CLARK v. MARYLAND INSTITUTE

And

W. ASHBIE HAWKINS

SOURCES

Edward S. Abrams
Race and the Law
Fall 2001

MEMORANDUM

DATE: December 6, 2001

TO: Professor Larry Gibson and Edward Papenfuse

FROM: Edward Abrams

RE: Binder of Sources

Attached please find my final paper on W. Ashbie Hawkins. In addition, I am submitting one (1) copy of my sources used in conjunction with my research over the semester (Clark v. Maryland and Ashbie Hawkins). I apologize for not turning in a duplicate copy of the sources as requested. Due to financial reason, I was unable to copy an entire duplicate set of the sources. I took out an emergency loan from financial aid to pay rent and bills for the last month of the semester and can not afford to make the duplicate set now. However, I would like to respectfully request the opportunity to turn in the duplicate set of sources in the new semester.

I appreciate your understanding.

Clark v. Maryland;
The beginning
of Baltimore City School Desegregation Cases

INTRODUCTION

The establishment of free public education in the state of Maryland began in 1864.[1] In that year, the Maryland State Legislature passed a constitutional amendment requiring the establishment of a "uniform system of free public schools."[2] The ability of education reformers in the mid-nineteenth century to create a system of free public schools did not happen without opposition. Anti-education reformers within the state legislature, who were mainly comprised of wealthy property and slave owners, resisted the concept of free schooling.[3] Anti-education reformers opposed such a system because it would threaten the status-quo and resented having to pay tax dollars for such a system.[4] The vast majority of academic and social interaction opportunities during this period were either segregated or excluded totally to people of African descent. Public and free education would also be segregated. Although the Maryland legislature has already unsuccessfully attempted to exclude blacks from receiving free public education, after the passage of the 14th Amendment to the United States Constitution it is clear that any such attempt would have been prohibited.

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[1] Susan Leviton and Matthew H. Joseph, *An Adequate Education for all Maryland's Children: Morally Right, Economically Necessary and Constitutionally Required*, 52 MD L. REV. 1137, 1154-59 (1993)
[2] *Id.*
[3] *Id.*
[4] *Id.*

On the heels of the 1896 Supreme Court ruling in *Plessy v. Ferguson*,[5] the entire country was engaged in a debate over race and the attendant rights that accompany citizenship. The *Plessy* decision set the precedent that "separate" facilities for blacks and whites were constitutional as long as they were "equal." This doctrine of "separate but equal" became the linchpin of racial desegregation cases all across the United States for the next 55 years covering a wide variety of social interactions, such as restaurants, theaters and restrooms. It was only natural that this debate would extend to the issue of mixed-race public education. By the time *Plessy* was decided, the concept of free public education offered by government was relatively new in Maryland (only dating back 35 years); the concept of integrated schools in Maryland even newer.[6] The road to integrating public schools would take an additional 58 years after *Plessy* and it would have its beginnings in the State of Maryland.[7] It is unclear, why Maryland would become the legal battleground for public school desegregation cases.[8] This paper will look at one of the earliest such cases, *Clark v. Maryland Institute.*[9]

Clark v. Maryland

On March 7, 1893 the Mayor of the Baltimore, Ferdinand Latrobe, and the Baltimore City Council enacted an ordinance (the "Ordinance") whereby the Mayor was authorized to enter into a contract with the Maryland Institute for the Promotion of Mechanic Arts (the "Maryland Institute") for the instruction of certain appointed

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[5] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[6] *See supra* n. 1.
[7] *Brown v. Board of Education*, 347 U.S. 483 (1954)
[8] *Clark v. Maryland Institute*, 41 A.126 (1898); *University v. Murray*, 169 Md. 478 (1936); *McCready v. Byrd*, 73 A.2d 8 (1950).
[9] *Clark v. Maryland Institute,* 41 A. 126 (1898)

students.[10] Under the Ordinance, the city of Baltimore would pay the Maryland Institute $9,000.00 annually. In return, the city would be allowed to appoint 33 students annually to a four-year scholarship at the school. The contract duration was for eight years and pledged $72,000 of the public treasury to this agreement.[11] Councilman from each Ward of the city would be allowed to appoint a student from their respective Wards to fill the scholarship. A contract was drafted and on March 9, 1893, the City Solicitor, W.S. Bryan, Jr., approved the legal sufficiency of the contract. Pursuant to the Ordinance, the Mayor and the Maryland Institute entered into a contract on March 10, 1893, just three days after the enactment of the Ordinance.[12]

The History of the Maryland Institute

The Maryland Institute for the Promotion of Mechanic Arts (commonly known as the "Maryland Institute", hereinafter the "school") was a prestigious institute of learning

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[10] *Clark*, 41 A. at 127; *See also* Order of Mandamus at page 4, para 10, *Clark v. Maryland* 41 A. 126 (1898). The language of the ordinance read:

> Each year, prior to Sept 1, there shall be appointed one pupil by each member of the First and Second Branches of the City Council. Each student would be eligible for in essence a four-year scholarship to the school. In addition, the School's President was required to make a report each September to the Mayor and the City Council of the names of students who had been appointed to the school and were currently enrolled. In the case of a vacancy, the school president was to notify the councilman from the ward of the vacancy and ask for the spot to be filled. If the vacancy was not filled by October by the councilman, then the Mayor would have the right to fill the vacany. The Mayor and the City could inspect the school's operation each year to see if it was operating well and if satisfied would pay the school $9,000. Ordinance was signed by the Mayor at 11:40am on March 7, 1893, by Ferdinand C. Labrobe, Mayor. Para 10 page 4

[11] Petition for Mandamus at 4, *Clark v. Maryland* 41 A. 126 (1898) [HEREINAFTER Petition for Mandamus]

[12] Petition for Mandamus at 4-5

located in the heart of the city.[13] The school was established as a private corporation on January 10, 1826.[14] In 1835, the school's building was destroyed by fire and the school did not reopen until approximately 1849.[15] The school's charter outlined the educational mission of the school to promote advancement in the arts and was valid for a period of thirty years. In 1878 the legislature reauthorized the school's charter by chapter 313 of the Acts of Assembly 1878.[16] Upon reopening in 1850, the Maryland Institute negotiated with the city to build a structure at Baltimore Street and Centre Market Space.[17] The design of the proposed building was to build above the existing market.[18] The new building plan would have to be approved by the City Council and the stall owners in the market. In addition, the school could not interfere with the operations of the market on the ground floor.[19] The city contributed $15,000 to fund the construction of the school if an equal amount could be raised by public subscription.[20] The final cost of the building was estimated at about $110,000, of which the city appropriated $20,000.[21] The site at

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[13] Appellant's Brief at page 2, *Clark v. Maryland Institute* 41 A. 126 (1898) [HEREINAFTER Appellant's Brief].
[14] *Norris v. Mayor*, 78 F. Supp. 451 (1948).
[15] *Norris*, 78 F. Supp. at 453. Noting Maryland Institute's incorporation date as February 13, 1850 (Acts of Assembly 1849, c. 114)
[16] Petition for Mandamus at para 2, page 1; The original charter of 1849 was valid for a period of 30 years. The record indicates that the charter was renewed by Act of 1878, chapter 313); The corporate charter read: "Objects of its incorporation are the encouragement and promotion of manufactures and the mechanic and useful arts by the establishment of school and popular lecturers upon the science connected with them, the promotion of schools of art and design, etc., etc., and by such other means for the promotion of the mechanic arts as experience may suggest." See also Norris v. Mayor at page 453 citing incorporation date and reenactment of charter in 1878.
[17] Appellant's Brief at 2. *See also Norris*, 78 F. Supp. at 453.
[18] *Norris*, 78 F. Supp. at 453
[19] *Id.*
[20] *Id.*
[21] *Id.*

Baltimore Street at the Market would be the home of the Maryland Institute for another 50 years.[22]

The school offered basic and advanced freehand, mechanical and architectural-drawing classes.[23] In addition, the school offered a full range of art classes including, painting in waters and oils, sculpting bust and landscape drawing and painting.[24] The school offered day and evening programs and enrolled upward of 500 students.[25] The day school met daily, while the night school held classes on Monday, Wednesday and Friday evenings.[26] Students who were able to complete the four-year course entitled to a certificate upon graduation that was authorized under the authority of the State of Maryland.[27] Alumni of the school also had the opportunity to compete for $500 scholarships distributed in sums of $50 and $100 increments.[28] In addition, graduates of the school were entitled to a free post-graduate education where students were able to

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[22] *Id.* at 453. Noting, once again, that the school was destroyed by the great fire of February 7-8, 1904. The fire destroyed a large portion of the surrounding blocks and the property was condemned. A realignment of the streets occurred by the Centre Market Commission and the new Centre Market was erected using public funds at a cost of about $190,000. Upon rebuilding, the Maryland Institute realized it needed additional space to operate the school. The Maryland State Legislature appropriated $175,000 for the purchase of a new parcel of property. In addition to the state appropriation, a grant in the amount of $263,000 by Andrew Carnegie and the donation of a parcel of property by Michael Jenkins resulted in the construction of the Maryland Institute's present day location on Mount Royal Avenue and Lanvale. The total cost of this building was approximately $500,000. *See Id.*

[23] Petition for Mandamus at 2.

[24] *Id.*

[25] Appellee's Brief at 3, Clark v. Maryland 41 A. 126 (1898) [Hereinafter Appellee's Brief]

[26] Petition for Mandamus at 2

[27] *Id.*

[28] *Id.*

practice and hone their skills.[29] The only requirement for admission into the post-graduate course was regular attendance.[30] The best sculpting students could also expect to study at the prestigious Rhinehart School of Sculpture (an affiliated school with the Maryland Institute).[31] The Rhinehart School, supposedly, offered the finest education an art student could receive in the United States at the time.[32] With all these advantages, it was clear that an education from the Maryland Institute was a valuable achievement and a coveted honor.

Although a private institution, the School received an annual appropriation from the State of Maryland for $3,000.[33] Coupled with the monies received from the city under the Scholarship Contract, the School was accepting in total $11,000 annually from the public treasury.[34] The School contended that the remainder, and vast majority, of it operating cost were raised exclusively by the tuition of paying students.[35] The Maryland Institute was also an overwhelmingly white student population.[36]

For 42 years from its inception, the School only enrolled white students.[37] In 1891, Harry Pratt, a student of African descent enrolled at the School.[38] This was the

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[29] *Id.*
[30] *Id.*
[31] *Id.* at 2.
[32] Petition for Mandamus at 2; it was admitted by the School that the education received at the Rhinehart School could only be obtained by traveling to foreign countries. Appeal from the Superior Court of Baltimore City at 9 [Respondent's Answer to Petition incorporated at page 9],
[33] Petition for Mandamus at 2.
[34] *Id.*.
[35] Respondent's Answer to Petition at 17, *Clark v. Maryland*, 41. A. 126 (1898) [HEREINAFTER Respondent's Answer to Petition].
[36] *Id.* Noting that appellant's argued that establishment of school was for whites, and with minor exceptions has been maintained for whites.
[37] *Id.*

first "colored pupil" the school ever enrolled, but would not be the last. William Mills, another colored student was also accepted into the school in the fall term for 1892. Again, in the fall term of 1895, both William H. Davis and Howard Gross, two students of African descent, were also appointed and accepted to the School [39]

In the fall of 1895, the discussion of integrated school was the hot political topic.[40] The school argued that the enrollment of 4 black students at the School caused a large controversy amongst the majority white students and their parents.[41] The school further alleged that there was a large contingent of white students and parents that supported the prohibition of any other black students from enrolling at the school.[42] The school under the alleged "political" and social "pressure" succumbed to the demands of the white students and parents by adopting a racially restrictive admission policy contained in its bylaws.[43] The school noted that it had been singled out in local newspapers in "great and unenviable notoriety" because of the enrollment of these black

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[38] Petition for Mandamus at page 5; the enrollment of Harry Pratt and William Mills took place before the enactment of the March 7, 1893 Ordiance and the Contract executed by the School and the City on March 10, 1893. The record indicates that these two students were appointed by Councilmen Harry S. Cummings and James Doyle. Harry S. Cummings was a leading black politician in 1891, he was also the first student of African descent to graduate from the University of Maryland Law School. *See* David Skillen Bogen, *The First Integration of the University of Maryland Law School.* It is unclear for the record the arrangement, the City and the School had before 1893 that allowed for the appointment of these two students.

[39] Petition for Mandamus at page 5; The record indicates that Harry Pratt graduated from the Maryland Institute with honorable mention. William Mills dropped out of the School. In the Fall of 1897, both Willam H. Davis and Hward Gross were still completing their studies at the Maryland Institute.

[40] See Respondent's Answer to Petition at 10.

[41] *Id.* See also *No Colored Art Students*, BALT. SUN, October 5, 1897(discussing that the school received the opinion of the City Solicitor opining to the lawful exclusion of black students.

[42] Respondent's Answer to Petition at 10.

students.[44] Citing declining enrollment numbers amongst white students the school decided to adopt the new bylaw that prohibited the admission of any students of African descent.[45] The bylaw drafted on November 11, 1895, by the School's board of managers read:

> "Whereas, the popular sentiment of all citizens of Maryland is opposed to mixed schools; and whereas, the appointment of colored pupils to this school, it is believed, has caused a large decrease in the number of white pupils attending the institute, thus lessening its power for good to the community: Resolved, that hereafter only reputable white pupils will be admitted to the schools. Resolved that the actuary be directed to issue a circular to the members of the newly-elected city council and other appointing powers, informing them of this action."

With the new bylaw in effect, black members of the newly elected city council would no longer be eligible to nominate black students from their respective Wards for these prestigious scholarships. Because the original Ordinance mentioned no exclusivity clause and the contract negotiated did not limit the appointments to only white pupils, many blacks took exception to the change. To the black city council members this appeared as a fundamental change in what the Ordinance of 1893 had authorized, what the Scholarship contract obligated the school to provide and the past practices and customs of the school in allowing appointed black students to enroll.

1968 Howard, Mitchell & Williams Campaign propaganda

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[43] *Id.*

[44] *Id.*

[45] Respondent's Answer to Petition at 10 (noting the School cited the popular objection of all people to mixed-race schooling. Noting that student enrollment was down in the fall term of 1895 from 643 the previous year to 521. In the winter of 1896 enrollment was down to 447 students. In the winter of 1897 student enrollment had dropped to 403 students).

The Appointment of John H. Clark, Jr.

On November 5, 1895, J. Marcus Cargill was elected to the First Branch of the City Council of the city of Baltimore from the Eleventh Ward, a predominantly black district within the city.[46] Councilman Cargill, was not just a politician, he was also a medical doctor with an office located within his district at 430 Biddle Street.[47] [Dr. Cargill's practice and his status as a black doctor would have meant his patients were predominantly, if not all, black citizens from his district.] As a newly elected Councilman, Dr. Cargill was entitled to nominate a student from his Ward under the existing Scholarship Contract between the city and the Maryland Institute. Councilman Cargill was fully aware that the school had adopted new bylaws prohibiting the appointment of black students.[48] On February 21, 1896, Councilman Cargill appointed Robert H. Clark, Jr. as the student from the Eleventh Ward that would attend the prestigious Maryland Institute for the fall term of 1896.[49] Clark's father, Robert H. Clark, Sr., was an attorney who resided at 1130 Druid Hill Avenue.[50] As a taxpayer of the Eleventh Ward, his son, Robert Jr. was eligble for the appointment. However, the school replied that it would not accept the appointment of Clark due to his race and instructed Councilman Cargill to select a "reputable white pupil" as his appointee.[51] Councilman Cargill decided not to make another appointment for the fall term of 1896

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[46] Petition for Mandamus at 6.
[47] *Id.*
[48] *Clark*, 41 A. at 127
[49] Petition for Mandamus at 6.
[50] *Id.*
[51] *Id.*

and left the seat from his ward vacant.[52] On October 1, 1986, Mayor Alcaeus Hooper selected Carrie E. Keyworth to fill the vacancy of the Eleventh Ward left open by Councilman Cargill.[53] In accordance with the provisions of the Scholarship Contract, if a City Council member left a vacancy from his Ward, the School was obligated to notify the Mayor and the Mayor could fill the vacant the spot with a student of his own choosing.[54]

In the fall of 1896, Councilman Cargill attempted again to appoint Robert H. Clark, Jr. to the School.[55] On Monday evening, October 4, 1896 at 7:30pm, Robert H. Clark Jr., accompanied by his father and another attorney[56] appeared in front of the doors of the Maryland Institute for the Promotion of Mechanic Arts. Once again, Clark was denied admission to the school due to his race.[57] This time Clark would attempt to resolve his dispute with the School using the rule of law. On October 16, 1897, Clark and his attorneys filed a Petition for Mandamus in the Superior Court of Baltimore City.[58]

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[52] *Id.*
[53] *Id.* at 7.
[54] *Id.*
[55] *Id.*
[56] *Id.* The School's Answer to the Petition states that the second man accompanying Robert Clark, Jr. was one of the attorneys in that filed the Petition for Mandamus. It is unclear weather this attorney was W. Ashbie Hawkins or John Phelps. Ironically, Hawkins had been expelled from the University of Maryland Law School under similar circumstances. Both Harry S. Cummings and Charles W. Johnson had graduated from the University of Maryland Law School in 1889. By the time Hawkins enrolled in 1890, opposition by white students at the University of Maryland was strong enough to have Hawkins barred from the law school. Hawkins finished his legal education at Howard University in the spring of 1891. Hawkins spent his career working to overturn desegregation laws in Maryland and this case was on of his earliest attempts.
[57] Petition for Mandamus at 7-8.
[58] *Id.*

The Lower Court Legal Proceeding

The Petition for Mandamus, filed by Clark, argued that his exclusion from the school was void and without effect based on four principle arguments. First, the refusal to admit him violated the Ordinance enacted by the City Council in 1893. Second, his exclusion violated the Scholarship contract that was entered into by the School and the City. Third, the revision of the bylaws was in direct contravention of the school's charter. Last, that his exclusion was a direct violation of the Fourteenth Amendment of the United States Constitution.[59]

Clarks' theory of the case was that the City Ordinance was enacted for the public benefit. The words and effect of the Ordinance were to make scholarships available to any student in Baltimore, irrespective of race. Because no racially exclusive terms were contemplated in the Ordinance regarding the term "pupil," the city council's intent was clear and no future modification could alter the Council's intent. The very use of any racially exclusive terms within the Ordinance would have made it void on its face under existing federal law.[60]

In his second argument, Clark argued that the Scholarship Contract negotiated between the School and the City also used racially neutral terms. Any attempt to modify the existing arrangement by the School was a breach of contract. He noted that the School had agreed to accept students appointed by the city council irrespective of race and was bound to honor the contract.[61] Augmenting this argument, Clark's attorneys noted that as agents of the city government, the Mayor and the City Council were

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[59] *See* Petition for Mandamus referring to Appellants arguments.
[60] *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

precluded from entering any racially discriminatory contract by the 14th Amendment of the United States Constitution.[62] The argument was an attempt to clarify and solidify any dispute over the ambiguous term "pupils" used in the Scholarship Contract. If Clark could show that the only meaning the city could have attributed to the term was a racially neutral meaning, it would have substantially proved that the contract was at least void because there was "no meeting of the minds."[63] Giving effect to the bylaw provisions would have been "unlawful, unconstitutional and utterly void."[64]

In his third argument, Clark attempted to show the court that the school's charter had not envisioned any racially exclusive admission policy and that the revised bylaw attempted to circumvent the established purpose of the School.[65] More importantly, the School had already admitted black students in the past and currently had two black students enrolled at the time Clark was seeking admission.[66] In so allowing the admission of these four students, Clark argued that the School acknowledged its open admission policy and was estopped from making any derivation to the contrary.[67]

Clark's final argument in the Petition urges the Court to take notice of the appropriations of the State and the City to the School. In total $11,000 of taxpayer money was being diverted to the School. Clark's petition argued that the acceptance of such public monies made the School a public or *quasi*-public institution funded by the

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[61] Petition for Mandamus at 7.
[62] U.S. CONST. amend XIV.
[63] Under the common law a contract is voidable if one can prove that the parties to the bargain did not have a fundamental understanding at contract formation over the terms of the contract.
[64] Petition for Mandamus at 7.
[65] *See Id.*
[66] *See supra* n. 38 and accompanying text.

government. As such, the School was bound by the same prohibitions of the 14th Amendment of the United States Constitution. Any attempt to exclude Clark on the basis or race was an abridgment of the privileges and immunities clause as citizens of the United States. Furthermore, such act of the School was a deprivation of Clark's rights without due process of law and denied him the equal protections of the law.[68]

Buttressing his arguments, Clark argued that the school was so unique in its qualities that a similar education could not be obtained anywhere else in Baltimore.[69] Specifically, he states "not only do the public schools fall immeasurably below the [Maryland Institute], in these particular branches, but there are few or none of the private schools offer the advantages that compare with the acknowledged superiority of the said school of art and design."[70] This argument was possibly in anticipation of the Court's response in the wake of *Plessy v. Ferguson*. Although, Clark does not cite to Plessy in his Petition, the argument offered attempts to eliminate any chance that he might be directed to another "separate but equal" art school.

On October 16, 1897, Judge Albert Ritchie issued an order to the School to show cause why the Writ of Mandamus should not be granted.[71] Additionally he ordered that a copy of the Petition for Mandamus be delivered to the School before October 20, 1897.[72]

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[67] See Petition for Mandamus at 7
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Order of the Superior Court of Baltimore, Clark v. Maryland, October 16, 1897
[72] *Id.*

The School's Response

On November 1, 1897, the School requested the trial to grant a three-day extension to file its answer.[73] Judge Ritchie granted the request and on November 3, 1897, the School filed its answer to the Petition for Mandamus.[74] The School admitted to most of the well-known facts relating to the controversy.[75] However, the School denied or made exception to some facts that would be central to the resolution of the case; namely the operations and funding of the School. By doing so, the school framed the argument in the context of a debate over public versus private mission of the School.

The School attempted to reframe the allegations relating to its relationship with the Rhinehart School by stating that the post-graduate training offered by Rhinehart was solely conducted by a Committee of the Rhinehart School. The School stated that it had no control over the program and that Committee of the Rhinehart School could abolish the program at whim.[76] The School attempted to show that the School was a private institution and could adopt racially exclusive regulations as any other private entity had the power to adopt.[77] The Institute stated that the adoption of the restrictive bylaw was done with the intent of saving the School from financial ruin and thus trying to preserve the School's beneficial public purpose.[78] It further stated that, to no avail, it had tried to reason with the white students and parents, thus trying to change popular sentiment about

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[73] Filed with Superior Court of Baltimore, November 1, 1897.
[74] Defendant's Answer to the Petition, filed November 3, 1897
[75] *See id* at page 1; School admits to plaintiff allegation in Paragraph 1, 2, 3,4, 5, 6 and 7. Such facts related generally to names, addresses, dates and the enactment to the Ordinance and the Scholarship Contract.
[76] *Id* at 2
[77] *Id.*
[78] Id

mixed race schooling.[79] Another fact the School was reluctant to concede was that the School was established with the vision of mixed-race schooling. It admitted that other colored students had been allowed to enroll at the School, but that this experiment was tolerated until it failed.[80]

As noted the School's legal arguments depended largely in part on convincing the trial court that it was not bound by the 14th Amendment because it was a private entity. As such, the school responded that (i) the Scholarship Contract between the School and the City was a private contract and that Clark had no standing to enforce any right under a breach of contract action; (ii) that the 14th Amendment only meant to constrain state action and did not apply to private citizens or institutions; and (iii) that the Writ of Mandamus was not the proper remedy under which Clark could seek relief.[81]

On November 29, 1897, Clark's attorneys filed an Agreement of Facts with the court, whereby they stipulated to a limited number of facts alleged in the defendant's response.[82] In addition, Clark's attorney filed a Demurrer to the School's answer.[83] The Demurrer was only one paragraph long and briefly stated that the School had not shown

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[79] *Clark*, 41 A. 126; Appellate Court noted that "[n]ot withstanding earnest and zealous efforts on the part of the board of managers and the faculty of teachers to reconcile the white pupils, their parents and guardians to the innovation, [enrollment of colored students] caused a great decrease in the number of pupils."

[80] Respondent's Answer to Petition at 10.

[81] Id at 17-18.

[82] Agreement of Facts filed with the Superior Court of Baltimore, November 29, 1897; stipulating that Plaintiff acknowledged (i) the appointments of Carrie Keyworth and Samuel C. Martin by the Mayor, (ii) that the Peabidy Institute donated all monetary prizes to the School; and (iii) that the School's catalogue would become part of the School Answer and matters of facts contained therein.

[83] Plaintiff's Demurrer, filed on November 29, 1897

in its answer why the Writ of Mandamus not be issued and that the points contained in the School's answer were insufficient at law.[84]

The Trial Court's Opinion

Judge Ritchie delivered his opinion on December 10, 1897.[85] In his opinion, Judge Ritchie stated that Clark resting his claims under the Ordinance and the Scholarship Contract.[86] The trial court noted that the City of Baltimore had established a "liberal and advanced system of public school for both races."[87] The court acknowledged that there was no school that offered a curriculum equivalent to the one offered by the defendant.[88] It further noted that Clark's exclusion was based totally on his race.[89] The acknowledgment of these facts were a small victory for the plaintiff in light of the recent decision in *Plessy v. Ferguson*.[90] If the rule of law dictated "separate but equal" then Judge Ritchie's statements suggest that there was no equal alternative open to Clark. However, the trial court did not see the case this way. In fact, vague references are made to the "doctrine of separate but equal," but no specific mention to *Plessy* is made in the trial court's opinion.[91] The trial court realized that if it expensed an inquiry into the School being a public institution, it would not have to answer the question of "separate but equal" and any constitutional arguments.

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[84] *Id.*
[85] Opinion of Superior Court of Baltimore, dated December 10, 1897
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] See supra n. 5 and accompanying text.
[91] *Id.*

Judge Ritchie's opinion is methodical in the way it lays out his evidence in analyzing the School's private nature. He begins by looking at the establishment of the School and its charter. He notes that the school was established in 1849 for the benefit of "white males and females."[92] It is unclear why Judge Ritchie thought the specific mention to "white females" was necessary. The reference to gender was never raised in either the Plaintiff's or Defendants trial documents. This reference may have been made to validate the acceptance of the Mayor's 1896 appointee, Carrie Keyworth, in lieu of, Robert Clark. In entering the Scholarship Contract, the School was like any other citizen or corporate entity having the legal capacity to do so. The court saw the evidence of declining enrollment as strong and credible reasons for the school to adopt changes in its admission policy. Noting the popular criticism surrounding mixed race schools, which the court stated that the Plaintiff acknowledged.[93] Once the Court had laid the proper framework for the School's private nature it expounded upon why the 14th Amendment was inapplicable in the case.

The signing of the Scholarship Contract did not make the School a public or even quasi-public institution either. The court saw this as a contract between a municipality and any independent contractor. Noting that if the City signed a contract with a street paving company, the signing of the contract did not make that company a public agent anymore than the Scholarship contract made the School a public agents. Additionally, the court noted the School could have entered into any contract with another party for the

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[92] *Id.*

[93] Id at page 20. The plaintiff's Demurrer to the Answer, filed with the Court on November 29, 1897, does not contain reference to conceding this point. If Plaintiff

education of 33 students and determining the School's status by the party it contracted with was an undesirable to in deciding what should trigger the substantive law's applicability.

The acceptance of public funds by the School did not change the School's status from private either. Relying on precedent in *St. Mary's School v. Brown*[94] where another court stated that the Maryland Institute was:

> "not a municipal agent, was subject to no municipal controls, occupied no municipal relation, was not subject to any of the ordinance or regulations adopted by the City under its authority from the State to establish a system of public schools, and that it was no part of the system established."[95]

In St. Mary's the appellate court dealt with the acceptance of public funds by a consortium of schools (the Maryland Institute for the Promotion of Mechanic Arts was one of these schools) located within the city of Baltimore.[96] The funds donated to these schools by the city were raised through the city's taxing authority.[97] In addition, the city was allowed to appoint trustees to some of the boards of these schools.[98] Since the opinion in *St. Mary's*, the court opined that no change in the school's governance had taken place and that it was still a private institution.

After showing that the School was essentially a private institution, the Court addressed Clarks' arguments relating to a violation of his *privileges and immunities* under the 14th Amendment by stating that it did not apply. The court noted that "no **State** can

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conceded that both races objected to mixed race schooling, it is absent from the written record.

[94] 45 MD 310

[95] *Id.*

[96] *Id.*

[97] *Id.*

abridge the privilege and immunities of citizens of the United States." (emphasis added). The trial court believed that free education is not a privilege and immunity incident to federal citizenship.[99] The bundle of rights that were protected by the privileges and immunities clause was never clearly delineated by the trial court. However, it emphatically believed that the concept of free education was not contained within that sphere of rights incident to citizenship. Because free education was a creature solely undertaken by State legislation, the right to it could not be protected or respected among the several states. If the federal government had take the opportunity to create a system of national education, then the Court believed that a Writ of Mandamus was the appropriate remedy to compel the admission of a citizen who had been denied admission by the use of racially exclusive policies.[100]

Because Clark's arguments failed to show a cause of action under the 14th Amendment, the court saw his claims him as a beneficiary of a contract trying to sue under which he had no remedy to enforce the breach of the contract. Furthermore, the Writ of Mandamus was not the appropriate remedy to enforce an action for breach of contract because the Writ "relates only to the enforcement of duties incumbent by law."[101] Because Clark did not have standing to sue under the contract the court did not have to decide and give effect to the word "pupil" in the Ordinance and Scholarship Contract. In dicta, the court mentioned that the use of the word "pupil" did, however,

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[98] *Id.*
[99] Opinion of Superior Court of Baltimore, dated December 10, 1897
[100] *Id. See also People v. Gallagher*, 93 N.Y. 435; *Ward v. Flood*, 48 Cal., 36; *State v. McCann*, 21 Ohio St., 210; *Lehews v. Brummell*, 103 Mo., 550
[101] Opinion of Superior Court of Baltimore, dated December 10, 1897

mean white student.[102] It reasoned that the parties drafted the language at a time when mixed race schooling was not contemplated; and that the Scholarship contract was no longer executory and that both parties had performed.[103] In addition, the City Solicitor had given an opinion stating that there had been no breach by the School and that in the event there had been a breach, the School had waived it right to enforce the contract once it accepted the bylaw modifications.[104]

Finding no colorable claims in Clark's favor, the Order of the court was entered on December 10, 1897 and Clark's Demurrer to the Answer was overruled. In addition, the Writ of Mandamus was dismissed.[105]

The Appellate Proceedings

Phelps and Hawkins immediately filed an appeal on Clark's behalf. The Petitioner's Order of Appeal was filed the same day as the trial court opinion.[106] Clark's formal arguments on appeal were filed with the Court of Appeals on February 15, 1898.[107] Surprisingly, the School filed its appellate brief four days earlier than Clark.[108] He argued on appeal that the trial court had erred in holding that the 1) 14th Amendment to the Constitution of the United States has no application to the case, nor the construction of the ordinance and 2) That the ordinance and contract in question constitute merely a private contract; that the petitioner had no rights in the case other than mere contract rights; that there is no public or legal duty imposed on the Respondent or

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] See Petitioner's Order of Appeal, dated December 10, 1897.
[107] See Petitioner's Appellate Record and Brief, submitted February 15, 1898.

any other than of a merely private contractual nature, and that this is merely a suit to enforce contract rights of a private character for which mandamus will not lie.

The Appellate Opinion

The Maryland Court of Appeals delivered it opinion in Clark v. Maryland Institute on June 28, 1898.[109] The case was argued before Chief Judge McSherry, and Judge Bryan, Fowler, Briscoe, Page, Boyd and Pearce.[110] The unanimous opinion of the court was drafted by Judge Bryan.[111] The opinion of the Court essentially recited verbatim the trial court's application of the law. The Court refused to find a violation of Clark's constitutional rights under the 14th Amendment because they felt the school was essentially private. It could not find any State action that came within the purview of the 14th Amendment. In a notable quote by the court, Judge Bryan wrote:

> "Let us suppose, for sake of illustration, that there was a school of great merit, conducted exclusively for the instruction of colored pupils in branches of learning not taught in the public schools, and that the legislature saw fit to appropriate money for the tuition of a number of colored pupils. It is not probable that such action would be assailed as forbidden by the fourteenth amendment, because of an unjust discrimination against the whites."

Judge Bryan and the Maryland Appellate Court, on the cusp of a new century could not have envisioned in 1898 the inescapable problem of the 20th century: "The Color Line."[112] Although this case was not a victory for Robert Clark, the case is an excellent study of the initial arguments used by blacks and black attorneys to bring about equality

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[108] See Respondent's Appellate Record and Brief, submitted February 11, 1898.
[109] 41 A. 126 (1898).
[110] *Id.*
[111] *Id.*

in education. Although, the Maryland Institute was not a public institution, the appropriation of public monies today under identical circumstances would bring the state within the purview of the fourteenth amendment. The desegregation of the public schools would come about in another 56 year in the case of *Brown v. Board of Education.*[113] However, one can see that much of what was articulated in Brown has its roots in *Clark v. Maryland.*

Application of *Clark v. Maryland*

Clark v. Maryland has never been expressly overruled by a Maryland Court. However, *Clark* has been cited to over 15 times. Relying mainly on the dicta in *Clark*, the case has been used primarily by other parties to establish the distinction between public and private entities, succinct issues relating to free public education and the use of government funding towards religious activities at school. While the facts in *Clark*, if presented today, would unquestionably be overruled, history has allowed it stand as good case law in Maryland. Most recently it was cited to in the case of *Clinton v. Board of Education of Howard County*[114] to establish that free schooling is open to all *if created by the state.* The Court of Appeals in *Clark* did acknowledge that the state would be obligated to provide schooling for all citizens, irrespective of race, if it creates a school system. However, this was purely *dicta* because the Court of Appeals concluded

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[112] W.E.B Dubois, *Souls of Black Folks*, (1903) (written work where Dubois coins the phrase "The Color Line" and indicates that it will be the problem of the 21st century).
[113] 347 U.S. 483 (1954)
[114] 556 A.2d 273 (1988)

that the Maryland Institute was not within the purview of the state-organized school system and not part of the holding in *Clark*.

Most interestingly, the federal district court in Maryland examined *Clark* positively in 1948 in the case of *Norris v. Mayor and City Council of Baltimore*.[115] In *Norris*, Charles Hamilton Houston, W.A.C. Hughes Jr., Fred E. Weisgal and Harry O. Levin brought suit on behalf of a black student denied admission to the Maryland Institute based upon the racially exclusive admission policy. Charles Hamilton Houston was the architect of the legal strategy designed at desegregating the school system. Unquestionably, the *Norris* case was yet another piece of the strategy that would culminate in the *Brown v. Board of Education* victory six years later. The state of Maryland would again be the battleground and ironically the Maryland Institute would be the subject matter of the dispute.

In *Norris*, an African-American student named Leon Norris sought admission to the Maryland Institute. The Maryland Institute denied him admission citing to its racially exclusive admission policy that had been in effect for fifty years.[116] Norris brought suit alleging that he had been denied a right solely on the grounds of race and color in direct violation of the 14th Amendment.[117] Arguing that no state shall deny its citizens the equal protection of the law, Norris brought suit against the Mayor and the City Council of Baltimore for its continued practice of appropriating public funds to the Maryland

[115] 78 F. Supp. 451 (1948)
[116] *Id.* at 453.

Institute. By the time Norris had filed suit in 1948, the City Council and Mayor had continuously expended public dollars (for fifty years) to the Maryland Institute in exchange for the appointment of white students only to the school. In addition, the Maryland legislature by this time was annually appropriating $16,500 to the school in exchange for the appointment of 29 students by the 29 members of the Maryland State Senate. The suit however did not name the State of Maryland as a party-defendant. Houston, along with W.A.C. Hughes, a protégé of W. Asbhie Hawkins (the attorney who argued against the Maryland Institute in the *Clark* case), most likely chose to file the case in federal court realizing the past failure of *Clark* to obtain relief in the state courts and their success in another case discussed *infra* in federal court.[118]

The trial court went into great discussion of the Maryland Institute's history and the development of the relationship between Baltimore City government and the Maryland Institute. The court noted that the complaint was modeled after the case of *Kerr v. Enoch Pratt Free Library of Baltimore City*.[119]

In *Kerr*, Houston and Hughes filed suit against the Enoch Pratt Free Library for its refusal to accept a young African-American woman into a training program for the training of librarians. Kerr had not been appointed to the training program, but simply applied and was rejected. The court made note that Kerr was amply qualified for the program. No other training programs for librarians existed within the state. In addition, the Mayor and the City Council appropriated

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[117] *Id.*

[118] See Kerr v. Enoch Pratt Library at n. __ and accompanying text.

money to this program. Over 200 African-Americans applied to the program and all were rejected. Houston and Hughes argued on behalf of Kerr that the Mayor and City Council be enjoined from making contributions to the library because they were *ultra vires* (in direct prohibition with the 14th Amendment) and that the appropriation constituted a government taking of property without due process of law.[120] The district court ruled against Kerr and appeal was taken to the Fourth Circuit. The Fourth Circuit ultimately concluded that Kerr had been denied a right to which she was entitled and reversed the trial court's opinion.

Houston and Hughes realized that this was a decisive victory that could be used to open the doors of the Maryland Institute to African-American students. Like Kerr, Norris had not been appointed to the Maryland Institute and claimed no specific right of admission. Norris only claimed that he desired to enroll and was refused admission based on his race. The Maryland Institute was accepting public tax dollars while simultaneously denying admission to black students and the federal courts appeared to be persuaded by this argument. *Norris* would not find similar favorable treatment in the federal courts.

The district court noted that *Norris* was not on point with *Kerr*. In its opinion the court went to great length to outline the public/private distiction between the entities. The Enoch Pratt Library was a creature of the city government from its inception. While the original funds used to establish the library were acquired by gift from Enoch Pratt, the conditions upon the gift placed

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[119] 149 F.2d 212, cert denied 326 U.S. 721
[120] 149 F.2d 212.

the responsibility of organizing and maintaining a public library. The court found the arrangement to be distinctly different from the Maryland Institute that had been organized as a private entity.[121] Based upon these conclusions, the court opined that the Maryland Institute, as a private corporation, could exclude Norris solely based upon race classification.

CONCLUSION

Again, the Maryland Institute would withstand a legal challenge to its racially exclusive admission policy. However, the span of litigation beginning with *Clark v. Maryland* and *Norris v. Mayor and City Council of Baltimore* were important and integral pieces of the strategy designed to desegregate both public and private schools. The victory achieved in *Brown v. Board of Education* would not have been realized had it not been for the systematic attack and dismantling of racially exclusive admission policies in all education institutions.

[121] *Norris*, 78 F. Supp. at 456.

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State &c ex rel Clark, Jr. by

his next friend,

vs.

Maryland Institute.

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Opinion.

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This was a petition for the writ of mandamus. The Maryland Institute for the promotion of the Mechanic Arts is a body politic and corporate created by Acts of Assembly of Maryland. It was originally incorporated by the Act of 1849 Chapter 114; and its charter was renewed by the Act of 1878 Chapter 313. The object of the incorporation was the encouragement and promotion of manufactures and the mechanic and useful arts by the establishment of schools of art and design and by other means adapted to that purpose. Robert H. Clark, Junior, a youth of African descent, claims the right to be admitted to these schools as a pupil; and by his father and next friend, he files a petition for a mandamus requiring the abovenamed corporation to admit him. The grounds of his demand are set forth in his petition. The Maryland Institute (as the corporation is popularly called) filed its answer; and on demurrer to the answer, the petition was dismissed, and appeal was taken to this Court.

There can be no contest about the facts in this case; because in addition to those admitted by the demurrer to the answer, there is an agreement of Counsel admitting such other facts as it was desired to lay before the Court. We proceed to consider the circumstances which, in our opinion, are important in the decision of the questions in the case. The municipality of Baltimore by an ordinance passed in March 1893 authorized the Mayor, Comptroller and

Register to contract with the Maryland Institute for the instruc-
of a number of pupils in its schools of Art and Design for the per-
iod of eight years from the first day of September next ensuing. By
the second section of the ordinance it was enacted that before the
first day of September in every year each member of the City Council
should appoint one pupil who should be entitled to instruction for
the period of four years in the schools of Art and Design, and that
in case of a vacancy occurring from any cause among the pupils the
President of the Institute should forthwith give notice to the mem-
ber of the Council representing the ward to which the pupil was cred-
ited, and that he should thereupon appoint another pupil to fill the
vacancy. The third section of the ordinance required the President
of the Institute to report annually in the month of September to the
Mayor and City Council the names of the pupils appointed and in at-
tendance at its schools, together with a list of the vacancies, if
there should be any. It also enacted that if no appointments should
be made before the first day of October by the members of the City
Council entitled to fill such vacancies, then the Mayor should ap-
point pupils to fill them. The fourth section of the ordinance enact-
ed that the Mayor, City Comptroller and City Register should annu-
ally, or as much oftener as they might deem it expedient, inspect
the said schools of the Institute, and "the condition and manner"
in which it was fulfilling its contract with the municipality, and
that thereupon the City Comptroller, if he was satisfied that the
Institute was faithfully complying with the contract, should pay to
its President annually in the month of September nine thousand dol-
lars for the education of the pupils. The Maryland Institute on the
tenth day of March 1893 entered into a written contract with the

Mayor, City Comptroller and City Register for the reception of thirty three pupils into its schools of Art and Design for each of the eight successive years beginning on the first day of September 1893, and following thereafter. It appears that a youth of African descent was received into the Institute as a pupil in 1891; another in 1892, and two others in 1895. So far as we are informed by the record, no other pupils of this description have ever been admitted into the schools of the Institute. The effect of the admission of these four pupils was very disastrous. There was an immovable and deep settled objection on the part of the white pupils to an association of this kind. Notwithstanding earnest and zealous efforts on the part of the board of managers and the faculty of teachers to reconcile the white pupils, their parents and guardians to the innovation, it caused a great decrease in the number of pupils; and the bringing of this suit made it still greater. On the eleventh of November 1895, the Board of Managers approved this resolution:

"Baltimore, November 11th, 1895.

"The following action of the Committee on Schools of Art and Design was reported by its chairman, Mr. John M. Carter, and on motion, it was unanimously adopted:

"Whereas, the popular sentiment of all the citizens of Maryland is opposed to mixed schools; and

"Whereas, the appointment of colored pupils to this school, it is believed, has caused a large decrease in the number of white pupils attending the institute, thus lessening its power for good to the community.

"Resolved, that hereafter only reputable white pupils will be admitted to the schools.

"Resolved, that the actuary be directed to issue a circular to the members of the newly elected City Council and other appointing powers, informing them of this action".

The Actuary of the Maryland Institute prepared a circular signed by its President, and the Chairman of the Committee on Schools of Art and Design setting forth the action of the Board and of the Committee, and attached to it a blank letter of appointment of pupils for the following year (1896). This blank letter was in the following form:

Baltimore, ----------189 .

To the Board of Managers of the Maryland Institute for the promotion of the Mechanic Arts:

I hereby appoint, subject to the rules of the institute, --------- (residence ----------) to the scholarship in your schools of art and design, under the contract between the Mayor and City Council of Baltimore and the Maryland Institute.

Member ---------- Branch of the

City Council -------- Ward -------

A copy of this circular and of the blank letter of appointment was sent to each member of the City Council, and to the school boards of the City of Baltimore and the counties. In February 1896, J. Marcus Cargill, a member of the City Council from the eleventh ward appointed Clark, Junior (the appellant) to a scholarship in the Institute, writing the appointment on the printed blank, which had been sent to him with the circular just mentioned. The Board refused to admit Clark as a pupil and requested Cargill to appoint a reputable white person; the refusal was, of course, because of his color. Cargill made no other appointment, and the Maryland Institute certified to the Mayor of Baltimore that a vacancy existed among the

pupils from the eleventh ward, and he in October 1896 appointed a white pupil who has ever since been a member of the school. In February 1897, the Mayor, Comptroller and Register made an inspection of the Maryland Institute, and made a very favorable report as to its condition and the manner in which it was fulfilling its contract in regard to the instruction of pupils sent there by the authority of the City. With full knowledge of the refusal of the Institute to admit any pupils except those who were white, the City Council in 1896 and 1897 directed the annual appropriation to be paid to the Institute according to the contract. And on the twentieth day of September 1897, the City Solicitor in reply to an inquiry from the Chairman of the Committee on Ways and Means of the City Council, gave his official opinion in writing that the Institute had not violated its contract by its refusal to admit a colored youth as a pupil in its schools. In September 1897 Cargill appointed Clark to the scholarship for that year which he was entitled to fill by virtue of his position as a member of the City Council; and the Institute again refused to admit Clark as a pupil.

The Maryland Institute is essentially a private corporation. It was not created for political purposes, nor endowed with political powers. It is not an instrument of the government for the administration of public duties. It has none of the faculties, functions or features of a public corporation as they are designated in the Regents case, 9 Gill & Johnson, and the many other cases which have followed that celebrated decision. The Act of 1878 which renewed its charter granted it the annual sum of three thousand dollars, but this grant did not make it an instrumentality of government, nor make any change in its corporate character. The Regents case, 9 Gill

and Johnson 398, shows that it could not have such an effect. The Maryland Institute holds its property in its own right, and has the power to manage its concerns according to its own discretion within the limitations of its charter. It is, of course, bound faithfully and diligently to pursue the objects and purposes of its incorporation; but it necessarily must have the choice of means which it may judge most appropriate to its ends. It was established for the benefit of white pupils, and has never admitted any other kind with the exception of the four instances already mentioned. When it found that the admission of these pupils had a very injurious effect on its interests, and seriously diminished its usefulness, it certainly had the right to refuse to continue such a disastrous departure from the scheme of administration on which it was organized. It would have been mere folly to persevere in the experiment under the existing circumstances. We suppose that it could hardly be maintained that the constituted authorities of the corporation did not have the right to conduct its affairs according to the plan and policy on which it was founded. We see no evidence of an intention to abandon this right when the contract was made with the municipality of Baltimore. It certainly does not appear on the face of the contract itself. And there is nothing in the surrounding circumstances from which it can be inferred that either of the contracting parties contemplated or desired such an abandonment. The City of Baltimore has shown in the most distinct manner that it knew that the Institute had the right to refuse colored pupils, and that this right was not impaired by the contract. The Mayor, City Comptroller and City Register, the officers appointed by the Ordinance to inspect the schools of the Institute and ascertain the manner in which it was fulfilling

the contract with the City, having full knowledge that colored pupils were denied admission made a most favorable report on the subject to the First Branch of the City Council. And the City Solicitor gave his official opinion to the Committee of Ways and Means that the Maryland Institute did not violate the contract by refusing to receive a colored youth because of his color. And, finally, after the resolution had been adopted that none but white pupils would be received and after this Appellant had been rejected on account of his color, the City Council well knowing these facts continued to make the annual appropriation of nine thousand dollars according to the terms of the contract. So it is evident that both the contracting parties meant the same thing when they made this contract, and that they have dealt with each other according to their mutual understanding of this meaning. We suppose that it would be a difficult matter to show that a person not a party to a contract has the right to intervene and establish a meaning contrary to the intention of the contracting parties, and upon this substituted meaning acquire and enforce rights in a Court of Justice. But unless this can be done the Appellant has no cause of action, of any description, under this contract.

It has been urged that the Appellant has been deprived of his rights under the Fourteenth Amendment of the Constitution of the United States. The portion of the Amendment which is supposed to sustain this position is in these words: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of

the laws." The gravamen of the offence of the Maryland Institute is that it has exerted the ordinary right of the proprietor of a private school to admit only such pupils as are considered desirable. It has been said by the Supreme Court of the United States that the right to follow any of the common occupations of life is inalienable. Allgeyer v Louisanna, 165 U.S.Repts. 589. And in the same case the Court evidently shows that it regards the prevention of a citizen from doing what is proper necessary and essential to the successful management of his business is a deprivation of his liberty, which cannot be done without due process of law. This is one of the wrongs which the Fourteenth Amendment was intended to prohibit. It would be a curiosity in jurisprudence, if the exercise in the ordinary and accustomed way of rights which the Fourteenth Amendment is so solicitous to protect should be obnoxious to its condemnation. No one can plausibly maintain that the Maryland Institute has done any wrong to the Appellant by simply attending to its own business in a quiet and unobtrusive manner. It has not deprived him of any privilege or immunity which he possessed; it has robbed him of no property; it has not excluded him from the benefit of any legal enactment made in his favor. It has merely let him alone. It would be difficult to prove that it had in this way acted in violation of the Fourteenth Amendment. We find, in fact, that the authorities all hold that the Fourteenth Amendment refers, as its terms ~~import~~ import, exclusively to State action, and not to anything which might be done by private individuals. In Virginia v Rives, 100 United States Reports 100, the Supreme Court said: "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individ-

uals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights." And in Ex parte Virginia page 346 of the same volume, the Court speaking of the same provisions said: "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." And this is the settled doctrine on this question.

It is contended in behalf of the Appellant that the Ordinance is to be regarded as the act of an agency established by the State, and that it is therefore subject to the Fourteenth Amendment. And that the exclusion of colored pupils consequently makes it invalid. No other objection to the ordinance is stated; and therefore we will confine our attention to this point, without expressing an opinion on any other question in this regard. It must be obvious, however, if the ordinance is unconstitutional, that the Appellant can have no rights under it, and that his prayer for mandamus must be denied. For the purpose of viewing the question in every aspect, we will ex gratia argumenti consider the ordinance as the Act of the State of Maryland. The Constitution of this State requires the General Assembly to establish and maintain a thorough and efficient system of

free Public Schools. This means that the schools must be open to all without expense. The right is given to the whole body of the people. It is justly held by the authorities that "to single out a certain portion of the people by the arbitrary standard of color, and say that these shall not have rights which are possessed by others, denies them the equal protection of the laws" Cooley on Torts page 287, where a large number of cases are cited. Such a course would be manifestly in violation of the Fourteenth Amendment, because it would deprive a class of persons of a right, which the Constitution of the State had declared that they should possess. Excellent public schools have been provided for the education of colored pupils in the City of Baltimore. But the Maryland Institute is not a part of the Public School system. This has been solemnly adjudged by this Court. St. Mary's School vs. Brown, 45 Maryland 310. The Appellant has no natural, statutory or constitutional right to be received there as a pupil, either gratuitously or for compensation. He has the same rights, which he has in respect to any other private institution; and none other or greater. Suppose that the State should form the same high opinion of the Maryland Institute which all men entertain, would it not be a competent and reasonable exercise of its discretion to determine that the public good would be promoted by extending its benefits to young persons who would not otherwise be able to obtain them? And could it not make an appropriation for paying the expense of the instruction of a certain number of pupils, and appoint a mode of selecting them? It has been the practice for a long series of years to make provisions of this kind in the case of other institutions, and the validity of these appropriations is not questioned. Of course the pupils selected must be eligible under the

rules of the institutions into which they seek admission. The selection of certain individuals is no injury to others who would not be eligible. These last mentioned would not be admitted into the institutions under any circumstances, and therefore are not concerned in the question of selection. Enlightened legislation is not enacted on the narrowminded principle that a benefit conferred on one object is necessarily something unjustly withheld from another. Let us suppose for the sake of illustration that there was a school of great merit conducted exclusively for the instruction of colored pupils in branches of learning not taught in the public schools, and that the Legislature saw fit to appropriate money for the tuition of a number of colored pupils. It is not probable that such action would be assailed as forbidden by the Fourteenth Amendment, because of an unjust discrimination against the whites. The Fourteenth Amendment was intended to prevent [illegible]. But it cannot be doubted that the Legislature has ample power to make appropriations to special objects, whenever in its judgment the public good would be thereby promoted. It has constantly exercised this power from the beginning of the State government. The Legislature may make donations without regard to class, creed, color or previous condition of servitude. The only condition limiting this exercise of this power is that it must in some way promote the public interest. The State has never surrendered this power to the General Government; and never can surrender it without stripping itself of the means of providing for the good order, happiness and general welfare of society. The benefits conferred in this way are matters of grace and favor which the State

bestows on its own citizens for worthy public reasons. They certainly cannot properly be described, in the language of the Fourteenth Amendment, as "privileges or immunities of citizens of the United States". If they were such, they could be demanded by any citizen of the United States, whether resident in Maryland or Oregon. And in that event, and only in that event, they would be comprehended within the scope of the Fourteenth Amendment. Slaughter House Cases, 16 Wallace. It is needless to say that the Legislature is not limited by the State Constitution in the particular mentioned. The forty-third Article of the Declaration of Rights seems to have been intended to impress upon it the necessity of exercising for the public good the vast powers which it possesses. It is in these words: "That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People."

In every view which we have been able to take of the questions presented by this appeal, we think that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

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C/b

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Filed February 11, 1898.

STATE OF MARYLAND *Ex Relatione,* ROBERT H. CLARK, JR. *By his Father and Next Friend,* ROBERT H. CLARK. *vs.* THE MARYLAND INSTITUTE *For the Promotion of the Mechanic Arts.*	IN THE Court of Appeals OF MARYLAND. JANUARY TERM, 1898. GENERAL DOCKET No. 44.

APPELLEE'S BRIEF.

The facts in this case are set out in the petition and answer, some errors of the petition being corrected by an agreement (Record, page 18) in advance filed of the demurrer to the answer.

The history of the case, thus conceded, is that the respondent, the appellee, on the 10th of March, 1893, entered into a contract with the Mayor and City Council of Baltimore for the education of pupils in its schools of art and design for a period of eight years, said pupils to be appointed annually by the members of the City

Council, each for a term of four years instruction. Contract and City Ordinance authorizing it. (Record, pages 3 and 4.)

Two colored pupils, Davis and Gross, were appointed by City Councilmen and admitted into the night school of the Institute, in the fall of 1895. This elicited much adverse criticism and so reduced the number of white pupils in the school, that the Board of Managers on the 11th November, 1895, adopted a regulation against the admission of other colored pupils and so notified the members of the City Council and other appointing powers. (Record, page 11.)

On the 21st February, 1896, Dr. J. Marcus Cargill, a member of the City Council, appointed the relator as a pupil in the school, *subject to the rules of the Institute*, of which he had notice. On the 11th March, following, the Board of Managers notified Dr. Cargill of the relator's rejection because of his color and invited the appointment of a white pupil in his stead. No other appointment was made by Dr. Cargill, and the vacancy having been reported to the Mayor of the City, as required by the ordinance and contract, the Mayor on the 10th October, 1896, appointed a white pupil to fill the vacancy who is still in the school.

In September, 1897, Dr. Cargill again appointed the relator as a pupil in the school *subject to the rules of the Institute*, and inasmuch as his disability because of color, was known both to the Board of Managers and Dr. Cargill, said appointment was rejected, and at the close of said month the vacancy was reported to the Mayor, who thereupon appointed another pupil, conforming to the rules of the Institute, who is still in the school.

The petition avers and the answer admits, that under a prior contract with the city, two colored pupils were appointed by a City Councilman and received into the night school of the Institute, and that one of these

remained in the school until graduated. But it is also averred in the answer and admitted by the demurrer, that the admission of these pupils, as also of these colored pupils now in the school, was but tentative and in no wise an admission on the part of the Institute of any contractural obligation. That notwithstanding the earnest efforts of the Board of Managers and Faculty of the school to reconcile the white pupils and their parents to the presence of the few colored pupils in the school, the number of white pupils has decreased from 643 to 403, that the usefulness of the said school has been greatly impaired, and that it is apprehended that the continued admission of colored pupils would break up the school altogether.

The demurrer also admits the averments of the answer, that the overwhelming public sentiment of the citizens of the State, both white and colored, is against the mingling of the races in the schools; that separate schools, both public and private, are maintained throughout the State. That the schools of the Institute were established and have been maintained for white pupils only, and that the contract and ordinance must be construed as applying to white pupils only. That in point of fact this is the construction placed upon it by the city authorities. That after the adoption of said rule of exclusion, and with full knowledge of the rejection of the relator, the Mayor, Comptroller and Register of the city inspected the schools of the Institute, and reported that the contract was being faithfully carried out. That with the same knowledge the City Council ratified the respondent's action in the premises by appropriating, both in the years 1896 and 1897, the annual appropriations of $9,000 each provided by the contract. And that the city's law officer, Mr. Elliott, in response to an enquiry from the chairman of the Committee of Ways and Means of the City Council, construed the contract as if it contained the word "white," and

held that the rejection of the relator because of his color was not a violation of the contract.

The schools of the Institute were established many years ago by private subscription, and the tuition fees of pay pupils, of whom there are many more now in the schools than those appointed under the contracts with city and State. The equipment and endowment of the schools represent an outlay of about $200.000, no part of which was contributed by the city or State, or by taxation, or by contribution from any but white persons.

It is contended on the part of the appellee, that the said by-law or rule of exclusion was valid, and not in violation of said contract or in contravention of the Constitution or Laws of the United States.

ARGUMENT.

I.

THE LEGAL RIGHT.

The petitioner claims by mandamus the right to be received as a pupil in the "Maryland Institute for the Promotion of the Mechanic Arts." As he claims to enforce this right through the remedy of mandamus, it becomes necessary first to state the character of the right which may be enforced through this extraordinary remedy. The whole matter is thus summed up by C. J. Alvey in the case of George's Creek C. & I. Co. vs. Co. Comm., 59 Md. 259: "Mandamus is a most valuable and essential remedy in the administration of justice, but it can only be resorted to to supply the want of some more appropriate ordinary remedy. Its office, as generally used, is to compel corporations, inferior tribunals or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature, is imperative, and to the performance of which the party applying for the writ has a *clear legal right.*

The process is extraordinary, and if the right be doubtful, or the duty discretionary or of a nature to require the exercise of judgment, or if there be any ordinary, adequate, legal remedy, to which the party applying, could have recourse, the writ will not be granted. The application for the writ being made to the sound judicial discretion of the Court, all the circumstances of the case must be considered in determining whether the writ should be granted or not; and it will not be allowed unless the Court is satisfied that it is necessary to secure the ends of justice or to subserve some just or useful purpose."

Nor will it ever be issued to compel the performance of a nugatory Act.

Hardcastle vs. Md. & Del. R. R. Co., 32 Md. 32.

2 Poe, Pldg. & Prac., sec. 709.

The right to be enforced by mandamus must be a legal right; it must be clear, definite and certain, and the circumstances must be such, that the Court can actually accomplish something by the writ.

The question now arises, where does this particular petitioner get the *clear, definite, legal right to be received as a pupil into this particular school?* Unless he can show this positive right, he has no case for a mandamus.

There are so many aspects under which these cases of racial discrimination arise, that it will tend to clarify the case and confine it within its own proper limits if we consider first of all, the circumstances upon which *this alleged right is not and cannot be founded.*

II.

CIRCUMSTANCES UPON WHICH THE RIGHT IS NOT FOUNDED.

A. *Not founded upon privilege clause of 14th amendment.*

The 14th amendment of the Constitution of the United States provides that, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Ever since the passage of this amendment, strenuous efforts have been made to show that under and by virtue of it *new rights* were conferred upon the citizen. It has, however, been uniformly held that this clause only has application to rights of citizens of the United States as such, and adds nothing to the rights of one citizen against another. As to privileges and immunities belonging to citizens of a State, these must rest for their security and protection where they have always rested—that is, with the State in which the citizen resides.

Short vs. State of Md., 80 Md. 401.
Civil Rights Cases, 109 U. S. 3.
U. S. vs. Cruikshank, 92 U. S. 543.
U. S. vs. Harris, 106 U. S. 629.
Virginia vs. Reeves, 100 U. S. 313.
Slaughter House Cases, 16 Wall. 74.

This construction of the 14th amendment has been uniformly applied to educational rights and advantages. The right of children to attend State schools and of parents to send them there, wherever such right exists, is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the State, and belonging to the State as such. The clause in the Constitution providing that no State shall abridge the privileges and immunities of citizens of the United States has no application.

Lehew vs. Brummell, 103 Mo. 546; 11 L. R. A. 829.
People vs. Gallagher, 93 N. Y. 447.
Corey vs. Carter, 48 Ind., 355.
State vs. McCann, 21 Ohio St. 198.
Ward vs. Flood, 48 Cal., 36; 50-1.

Hall vs. De Cuir, 95 U. S. 504–5.
Racial Discrimination, 30 Am. Law Reg., 86–8.

B. *Right not founded on any local civil rights legislation.*

There are many cases among the authorites where colored persons have been allowed certain rights by virtue of State legislation, somewhat similar to the Act of Congress, known as the civil rights bill, which was declared unconstitutional in the Civil Rights Cases, 109 U. S. 3.

Thus in certain States acts have been passed punishing those who refuse colored persons equal advantages in conveyances, hotels, theatres, barber shops, places of amusement, &c. Of this class of cases the following are examples, *all founded upon the local statutes*:

Joseph vs. Bidwell, 28 La. Ann. 382.
U. S. vs. Newcommer, 11 Phila. 519.
Bowlin vs. Lyon, 67 Iowa, 539.
People vs. King, 110 N. Y. 418.
Messenger vs. State, 41 N. W. Rep. 638. (Neb.)
Baylies vs. Curry, 30 Ill. App. 109.
Ferguson vs. Giles, 82 Mich. 364.

We mention these cases simply for the purpose of distinguishing them from the case at bar, and so that the Court may understand that if quoted by the petitioner, they are not authorities for this case, as we have in Maryland no local civil rights statute.

C. *Right not founded upon the general public school law.*

Most of the cases of racial discrimination arise from the attempt to exclude colored persons from the public schools; or, to prevent the mixing of the races in one public school.

As we have seen, the right of children to attend the public schools is a right created by the State. When

the State establishes a public school system by law, every child conforming to the regulations prescribed by the system has a right to attend. This right is founded upon the law of the State, and if he is denied admission, he can show a clear legal right, based upon the State law, which is therefore enforcable by mandamus. In establishing a *public school system* the State has no right to exclude colored persons from its benefits. This is inhibited by the other clause of the 14th amendment, to wit: "no State shall deny to any person within its jurisdiction the equal protection of the law."

Under this section it is not necessary that the races shall be educated together in one school. Mixed schools are not required by the Constitution. It has been quite uniformly held that colored persons may be excluded from white public schools whenever other public schools with equal advantages, are provided for colored persons.

Of this class of cases, the following are examples, all founded upon *general laws creating public schools*:

Lehew vs. Brummell, 103 Mo. 546.
People vs. Gallagher, 93 N. Y. 447.
Corey vs. Carter, 48 Ind. 355.
State vs. McCann, 21 Ohio St. 198.
Ward vs. Flood, 48 Cal. 36.
U. S. vs. Buntin, 10 Fed. Rep. 736. [Note.]

These authorities have no application to the case at bar, for in this case the petitioner does not and cannot found his right to enter the Maryland Institute on any State law; the Institute is not a *public school*, not a part *of the public school* system, and not a *public corporation*, as will be more fully shown hereafter. If the petitioner was founding his right on a general State law, then in the very nature of things, he would not have the exclusive right to enter the Institute, for the right would necessarily be open to all other colored boys of like qualifications. He contends that he has the right to enter the Institute to the exclusion of other colored

boys, and consequently must rely, if he has any right at all, not on a general State law, but on special circumstances peculiar to his individual case.

D. Right not a common law right.

Some of the many cases decided upon this question of race depend upon certain common law rights. Thus every one has the common law right to be conveyed by a common carrier, or to be lodged by an innkeeper. If a colored person is denied the right of carriage or lodging simply on account of his color, he may maintain an action for this denial of his rights, and if a State Court would not protect him in this action, then the State, through its judicial department, would be denying to one of its citizens, the equal protection of the laws.

Evidently the petitioner has no common law right to be educated at the Maryland Institute.

We have thus carefully gone over these various classes of cases, because they explain the exact attitude of the Courts upon racial discrimination, and so that the Court may see that none of them have any real bearing on the question now under discussion. By this process of exclusion also, we can now see in clear light the narrow limits of the present controversy. To come back now to the question with which we started—*"Where does this particular petitioner get the clear definite legal right to be received as a pupil into this particular school?"*

We may now answer negatively, he does not get the right, (1) from the privilege clause of the 14th amendment; (2) nor from any local civil rights statute; nor (3) from any general public school law; nor (4) from any provision of the common law.

Whatever right he has, if he has any, must be founded entirely and exclusively upon the contract between the City of Baltimore and the Maryland Institute. It is of

the utmost importance in this case to apprehend fully that there is no right at all in the petitioner, unless this contract gives it to him, for then the whole case resolves itself into a construction of the contract, and the rights and remedies of the petitioner under it.

III.

THE RIGHT UNDER THE CONTRACT.

On March 7th, 1893, the Mayor and City Council passed an ordinance empowering the Mayor, City Comptroller and City Register, to contract with the Maryland Institute for the education of pupils in its schools of Art and Design, for the period of eight years from the first of September, 1893.

By the terms of the ordinance there was to be appointed annually, before the first of September, one pupil by each member of the First and Second Branches of the City Council, entitled to instruction for a period of four years in said schools, and in case of a vacancy from any cause, the President of the Institute shall forthwith notify the member of the Council representing the ward to which such pupil was accredited, who shall thereupon fill the vacancy.

The president shall annually, in September, report to the Mayor and City Council the names of the pupils so appointed and in attendance upon its schools, together with a list of vacancies, should any exist, and should no appointment be made prior to the first of October by members of the City Council entitled to fill such vacancies, then the Mayor shall appoint pupils to fill said vacancies.

It was further provided that the Mayor, City Comptroller and City Register should annually, or as much oftener as they might deem it expedient, inspect said schools, and the condition and manner in which the terms of said contract are being fulfilled by the Insti-

tute, and thereupon, the Comptroller, upon being satisfied that the contract was being faithfully complied with, was to pay to the Institute annually, in the month of September, the sum of nine thousand dollars in full for the education of said pupils. (Record, pages 3-4.)

It was contended very earnestly in the Court below that the petitioner's right was not founded upon the contract with the city, but upon this ordinance; but this construction is obviously incorrect.

The ordinance does not profess to give any rights to any one to enter the Institute; it professes simply to *authorize* a contract under which, if entered into by the the Institute, certain appointees were to be received as pupils. If the Institute had declined to enter into the contract, manifestly no appointee of the City Council would have any rights as a pupil in these schools. Further than this, if the ordinance did profess to give appointees of the City Council the right to enter the Institute as pupils, it would be entirely ineffective. An ordinance *proprio vigore*, could confer no such rights. As well might the Mayor and City Council direct by ordinance that Mr. Carter and Mr. Gans should receive certain colored boys appointed by it, as law students in their offices. Such control over private individuals or corporations is not only not possessed by the municipal authorities, but is beyond the scope of the authority of any State agency, no matter how great or powerful. The right, therefore, if any, depends exclusively upon the contract.

A.

The Contract of March 10th, 1893.

In accordance with the authority granted by the ordinance of March 7, 1893, a contract was entered into between the city, acting by the Mayor, City Comptroller and City Register, on the one hand, and the Maryland

Institute on the other, in which it was agreed that "for and in consideration of the payment of the sum of nine thousand dollars annually, for a period of eight years from the first day of September, 1893, in the manner provided by said ordinance, the said Institute shall receive into its schools of Art and Design thirty-three pupils for the year beginning September 1, 1893, and thirty-three pupils for each of the years beginning September 1, 1894, 1895, 1896, 1897, 1898, 1899 and 1900, respectively, to be appointed in the manner provided in said ordinance, and shall cause the said pupils to be instructed in the various branches of art and design taught in said schools, in accordance with the terms and provisions of the aforesaid ordinance, a copy whereof is hereby annexed and made part of this contract." (Record, pages 4-5.)

The petitioner, a colored boy, was appointed as a pupil in the Institute before September 30th, 1897, by J. Marcus Cargill, member of the First Branch of the City Council from the Eleventh Ward. There are many other facts connected with the appointment and the action of the Institute, which will be referred to presently, but let us examine the question now simply upon this contract of March 10, 1893, and the appointment of petitioner in September, 1897.

The petitioner claims that this contract, properly construed, includes colored as well as white appointees; the Institute, on the contrary, contends that only white appointees are meant, and that the parties to the contract never had any intention of making the Maryland Institute a *mixed school.*

B.

Construction of Contract of March 10, 1893.

Of course, the whole effort of the Court in construing a contract is to reach the real intention of the parties, and in order to do this the surrounding circumstances

must be understood. These circumstances are well stated by Judge Ritchie in his very able opinion deciding the case in the Superior Court. Speaking of the Maryland Institute schools, he says: "From their establishment up to the year 1891, these schools had been exclusively for white pupils, male and female.

In that year one colored pupil was appointed and admitted and he completed the course. In 1892 another colored pupil was appointed and admitted but he left the Institute soon after. In 1895, since the date of the present contract, two more were appointed and admitted, and are now pursuing their studies. The answer however avers and the demurrer admits, that the overwhelming public sentiment, both white and colored, at the time these pupils were admitted, was against mixed schools; that these admissions were but tentative, with the hope that none others would be appointed and in no wise an acknowledgment of any contractual obligation, that notwithstanding the most earnest and zealous efforts of the managers and teachers to overcome the objections of the white pupils and their parents, the presence of those colored pupils was disastrous to the interests of the Institute, largely reduced the number of its pupils, and threatened to destroy the usefulness of these schools." (Opinion Record, pages 20-21. Answer Record, pages 9-10.)

In addition to these circumstances, admitted by the demurrer, the public history of the State, on the question of separate schools, is so well known as to be matter of judicial cognizance. The universal opposition to mixed schools, is not a light, trivial or ordinary matter, but is fundamental and has its origin and growth in the manifest difference in the races.

It is particularly strong in Maryland and in the Southern States, and no contract connected with education, could for a moment be construed without taking into account this universal usage of separate schools, and the

deep and abiding feeling, which has hitherto made mixed schools in this State an impossibility.

Since the Maryland Institute was founded for white pupils only, since it has always been maintained exclusively for white pupils, (with the exception of the few tentative cases mentioned), since the universal usage and custom precludes the mixing of the races in one school, it follows necessarily, that when the contract was made, it must be construed, in the light of these circumstances as applicable to white pupils only. This fact of the universal usage of separate schools for the separate races, is the basic fact which makes the intention of the parties to the contract demonstrable.

It is argued however, that the contract, as thus construed, would be illegal and therefore the construction is inadmissible. We will show presently that the contract construed in this way is not illegal, but just now, for the purpose of the argument, assume that it would be illegal, would that change the construction?

It is perfectly true that when a contract is open to two permissible constructions, one lawful and the other unlawful, the former is adopted, *ut res magis valeat quum pereat.* But this is a subsidary rule of construction for the purpose of arriving at the real intention of the parties. If, however, the Court can see the real intention of the parties, the Court must construe the contract according to that intention, even though thereby the contract becomes illegal. To do otherwise would be to make a new contract for the parties. And it is submitted that the dominant, overruling fact of universal custom and usage as to mixed schools, enables the Court to see that the real intention of the parties was that the Maryland Institute should not be made a mixed school.

C.

Facts Subsequent to Contract of March 10, 1893.

But this is made absolutely conclusive by the facts which followed the contract of March 10, 1893.

In October, 1895, an embittered political discussion as to mixed schools in Maryland grew out of the tentative reception of the few colored boys already mentioned, and, in consequence of the presence of these colored pupils, the pupils in the schools decreased from 643 in 1894-5 to 521 in 1895-6, and to 447 in the following winter, and the discussion produced such an adverse effect upon the schools, that it was a serious question with the Maryland Institute authorities whether the persistance in the demand for colored pupils would not, if yielded to by them, result in the complete destruction of the schools. (Record, page 10.)

On November 11, 1895, the Institute, because of the popular sentiment against mixed schools, and the damage which the reception of a few colored boys, even tentatively, was doing in schools, adopted a rule that—"hereafter only reputable white pupils will be admitted to the schools." (Record, page 11.)

A copy of this rule was sent to each member of the City Council, with a blank form of appointment, by which each appointment is made subject to the rules of the Institute. (Record, page 11.)

Now, with full knowledge of this rule adopted by the Institute, the Mayor and City Council in both 1896 and 1897, passed the appropriation of $9,000 in each year for the Institute.

On February 10, *1897*, the Mayor, Comptroller and Register, who by the very terms of the ordinance, were to inspect the schools, and the condition and manner in which the terms of the contract were being complied with, reported to the City Council favorably as to the manner in which the Institute was fulfilling its contract. (Record, page 13.)

This was after the adoption of the rule limiting appointees to white persons.

On September 20, 1897, the City Solicitor gave an opinion to a member of the special committee having the appropriation in charge, that the contract meant only white appointees. (Record, page 13.)

We have, therefore, the following facts:

1. The Institute refuses to receive any but white pupils.

2. This rule fully brought to the notice of the Mayor and City Council.

3. The legal effect of the rule passed on by the City Solicitor.

4. The annual appropriation of $9,000 for 1897, made with full knowledge of the rule, acquiesced in by the City Solicitor and the Mayor, City Comptroller and Register, who were specially designated by the ordinance to decide whether the Institute was complying with its contract.

Now, it must be borne in mind that the appointment of the petitioner, and his right under the contract to be admitted as a pupil, was in consideration of this very appropriation of 1897, for his appointment was for 1897.

So, whatever opinion may exist with reference to the construction of the contract of 1893, there can be no possible doubt as to what the parties to the contract meant in 1897. There can be no possible doubt but that the appropriation of 1897 was made in consideration of the Institute agreeing to receive *33 white* pupils for that year. The petitioner may argue that the contract was illegal, but he cannot possibly argue, on the facts, that the Institute agreed in 1897 *to take white and colored pupils* in consideration of the appropriation of 1897, when they expressly decline, before the appropriations of 1896 and 1897 are passed, to take colored pupils, to the full knowledge of the Councils which passed these appropriations.

Nor can the petitioner argue that the contract of March 10, 1893, as construed by him, extends through 1897, without the possibility of its being changed by subsequent Councils. The contract of March 10, 1893, was practically a divisible contract, annually renewable at the pleasure of the succeeding Council. In making this contract the City was not acting in its private capacity as a property holder, but in its public capacity as part of the local government. In reference to contracts of this class it is well settled that no Council can bind its successor by an irrevocable contract, but that each succeeding Council has the same jurisdiction and power with respect to the subject-matter as its predecessor. The corporation cannot abridge its own legislative powers.

Lake Roland R. R. Co. vs. M. & C. C. of Balto.
77 Md. 352, 370-6.

In 1897 the contract was brought about in this way: The Institution says it will receive only 33 white pupils for 1897. The Mayor and City Council, fortified by the opinion of the City Solicitor, and by the report of the Mayor, Comptroller and Register, say in reply—all right, we will give you $9,000 for 1897, in consideration of your ceiving 33 white pupils in 1897, to be instructed in accordance with the terms of the ordinance of 1893. This is undoubtedly the contract under which alone, the petitioner, who was an appointee for 1897, can have any rights. Now we present this dilemma. His rights, if any, depend solely upon the contract. The contract of 1897 includes only white appointees. If the contract is valid he is excluded by its terms. If it is void and illegal, he cuts from under his feet the only thing upon which he can found his right. In either case his petition must fail.

D

Acts of the parties under the contract.

But beyond all this the parties to the contract, to wit: the City, on the one side, and the Institute, on the other, have acted on the contract, so that it is no longer executory but executed, and there is no room for the petitioner's contention.

On February 21, 1896, Dr. Cargill, member of Council from 11th Ward, appointed the petitioner, Robert W. Clark, Jr., on blank forms, subject to rules of Institute. (Record, page 14.)

On March 11, 1896, the Institute wrote a letter to Cargill refusing Clark on account of his color and asking him to appoint another. In September, the Mayor and City Council, while Cargill was a member, appropriated $9000 to the Institute for 1896. (Record, pages 14-15.)

On October 1, 1896, the Institute certifies under the terms of the ordinance of 1893, the vacancy in the 11th Ward, caused by the refusal of Clark. (Record page 15.)

On October 10, 1896, the Mayor recognizing the vacancy, acts under the ordinance and appoints Miss Carrie E. Keyworth to fill the vacancy. (Record page 15.)

On September 14, 1897, Cargill was notified of vacancy in 11th Ward for 1897, and unless he filled it before September 30, the Mayor would be asked to fill the vacancy. (Record, page 16.)

On September 14, 1897, Cargill appoints Clark on blank form, subject to the rules of the Institute. (Record, page 16.)

On September 30, 1897, the Mayor was advised of the vacancy in 11th Ward. (Record, page 16.)

On October 1, 1897, the Mayor, under the ordinance of 1873, fills the vacancy by the appointment of Samuel C. Martin. (Record, page 17.)

On October 4, 1897, the petitioner presents himself and is refused admission. (Record, page 17.)

Thus it is perceived that the contract has been fully acted on by both parties to it. The place sought by the petitioner is not open, but has been filled, filled too in accordance with the very terms of the ordinance of 1893.

There can be no question, therefore, as to what the contract meant in the minds of the parties to it.

"In the construction of a contract, when the language used by the parties is indefinite or ambiguous, and of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence."

Topliff vs. Topliff, 122 U. S., 121.
Mitchell vs. Wedderburn, 68 Md., 139.

IV.

ALLEGED UNCONSTITUTIONALITY OF EXCLUSION OF COLORED PERSONS.

The petitioner claims that the rule adopted by the Maryland Institute that "only reputable white pupils will be admitted to the schools," (Record, page 11,) is in violation of the Fourteenth Amendment of the Constitution of the United States.

1. The language of the clause of the Fourteenth Amendment is: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

This provision has been uniformly construed to prohibit discrimination by the States. "Its prohibitions refer exclusively to State laws and State action. This State action may be manifested by any one of the departments of its government, or by any one of its officers or agents, or by a municipal corporation acting under legislative authority; but unless the act in question, be done in some way under the authority of the State, it is not within the prohibition of the amendment. The

amendment has no application whatever to the acts of private individuals or private corporations."

Opinion—Judge Richie, Record, page 22.
Civil Rights cases, 109 U. S. 11-17.
Virginia vs. Reeves, 100 U. S. 318.
U. S. vs. Harris, 106 U. S. 638.
U. S. vs. Cruikshank, 92 U. S. 554.

2. The Maryland Institute is a strictly private corporation. There is not a single power exercised by them in their corporate capacity, which they are not competent to exercise as individuals.

Regents vs. Williams, 8 G. & J 397.
Perry vs. House of Refuge, 63 Md. 22.

The precise status of this very corporation as a private corporation has been fixed by the Court of Appeals.

St. Mary's School vs. Brown, 45 Md. 310.

3. But it is argued that the contract with the city makes it a municipal agency, and the case of *St. Mary's School vs. Brown, 45 Md. 310*, is relied upon in support of this contention. In that case certain appropriations by the Mayor and City Council to the Maryland Institute and other corporations were declared to be invalid upon the ground that they were not created for the city by the Legislature of the State as instruments of municipal administration. (Page 329.) The Court, however, proceed to say (page 336): "We can perceive no good reason why the city may not arrange and contract for such care and training, * * * and we think the power to make such contracts may well be conceded to exist. Its exercise to be valid must be with the limitation that the subject matter of the contract be kept within the power and control of municipal authority, and complete accountability be provided for; and thus make the institutions contracted with, *pro hac vice*, municipal agencies."

The petitioner relies upon these last sentences to show that the Maryland Institute is, under its contract, a municipal agency, within the meaning of the prohibition of the fourteenth amendment.

But the fourteenth amendment aims only at State action. It is true that the State may operate through a great variety of public agents and officers, and that some of these officers may exercise a very small part of the sovereignty of the State. Yet in no sense can it be said that *the State* is acting, unless the person or corporation acting is, in some way, exercising a part of the State's sovereignty.

The petitioner fails to distinguish between an office, or agency of the State or city, and an employment, and yet the distinction is well settled by the authorities.

"A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public."

Mechem Public Off. section 1.

"A public office differs in material particulars from a public employment, for as was said by Chief Justice Marshall, although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a *contract*, express or implied, to perform a service without becoming an officer."

Mechem, section 2.
U. S. vs. Maurice, 2 Brock, U. S. C. C. 96.

"The term office implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. * * * An employment has none of those distinguishing features."

Opinion of Judges, 3 Greenlf. (Me.) 481.

"The most important characteristic which distinguishes an office from an employment or contract, is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of the government to be exercised by him for the benefit of the public. Unless the powers conferred are of this nature, the individual is not a public officer."

Mechem, section 4, cases in note 2.
U. S. vs. Hartwell, 6 Wall., 385.

"A public office is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by a contract it must be regarded as an employment and not a public office.'

Hall vs. Wisconsin, 103 U. S. 5.
Mechem, sec. 5.
Sawyer vs. Corse, 17 Gratton, 230.
Olmstead vs. The Mayor, 42 N. Y. Sup. Ct. 481.

The Maryland Institute is, therefore, not a part of the municipal government by virtue of this contract; its management is under the control of its own officers; their duties are not prescribed by law; its teachers are not appointed by the city or under its contract; it is not subject to any of the ordinances relating to the public schools; when the Institute acts, it does not act in the name of the State or city; it exercises no part, even the smallest, of the sovereign power of the State; its acts are not the acts of the city, and its voice is not the city's voice. "The relation between it and the city is simply that of a contracting party, and the contract is just such a one as the Institute might make with any citizen who wished to have instructed thirty-three pupils to be designated in a given manner. The fact that the contract was made with the city instead of with an individual cannot change the corporate status of the respondent, or make this any other than a private con-

tract. It creates no possible official, governmental or political relation between the city and the Institute, without which the respondent cannot be considered a municipal or State agency." (Opinion, Ritchie, Record, page 23.)

The meaning of the expression in 45 Md. 336, "*pro hac vice* municipal agencies"—is that contractors are doing under contract what the city could do through its own municipal agents.

The Institute is no more a municipal agent under this contract than a contractor to build a bridge for the City would be.

The act of discrimination being therefore the act of a private corporation, and not the act of the State or City, the 14th amendment has no application to the case.

4. Nor is the giving of the money to the corporation under such a contract illegal. If the giving of this money under such a contract, by the City, would be contrary to the constitution, then also would the appropriations constantly made by the Legislature, be contrary to the constitution, for the same reason. The Legislature has been appropriating money from time immemorial to institutions which are doing work for the public good, though most of them are for white persons only. Take the act of 1896, chapter 456 as an illustration. In it are found appropriations to Knapp's English and German Institute, The Hebrew Hospital and Asylum Association, The General German Aged People's Home; The Western Maryland College, St. John's College and many others, in which white persons are exclusively received. Are all these to be held void, simply because there are no colored institutions, doing precisely the same work, to which appropriations can also be made?

Is the hand of the State to be stayed until for every white institution, a similar colored institution is created? We submit that the whole argument of the petitioner proceeds upon this misconception. The

State may not *create* public Institutions for white people, and deny colored persons similar advantages, but outside of any general system of public Institutions created by the State, there is no constitutional provision, prohibiting the Legislature from aiding private enterprises doing beneficial public work, or which prohibits the city from having such work done under contract, by existing Institutions.

Chrisman vs. Brookhaven, 70 Miss. 481.

V.

PETITIONER'S REMEDY.

1. Even if our whole preceding contention is wrong, the petitioner would have no remedy as he is not a party to the contract.

There are cases where the person for whose benefit a contract is made, may sue on it, though not a party to it, but these cases are exceptions, and are chiefly where assets are placed in the hands of one for the benefit of a third party, from which an implied assumpsit arises, or when the contract is solely for the benefit of the party suing.

Nat. Bank vs. Grand Lodge, 98 U. S. 124.
Cragin vs. Lovell, 109 U. S. 194.
Keller vs. Ashford, 133 U. S. 621.
Jefferson vs. Ash, 25 C. R. A. 257. (Note.)
8 Harvard Law Rev. 93.
Brantly Contracts, 165.

But in this case the contract was made with the city; the city retained entire control over it; under its provisions city officers were to inspect the work from time to time, and determine whether the contract was being carried out. It is not one of those contracts upon which a third party not in privity may bring suit.

2. The right of the petitioner, if he has any, being a right under a contract with a private corporation, cannot be enforced by the action of mandamus.

High, sec. 25.
Rosenfeld vs. Einsten, 46 N. J. L. 481.
Opinion, Judge Ritchie, Record, page 24.

We respectfully submit that the judgment below should be affirmed.

JOHN M. CARTER,
EDGAR H. GANS,
For Appellee.

3

No 9

Filed February 15, 1898.

STATE OF MARYLAND
Ex Relations,
ROBERT H. CLARK, JR.
By his Father and Next Friend,
ROBERT H. CLARK.
vs.
THE MARYLAND INSTITUTE
For the Promotion of the Mechanic Arts.

IN THE

Court of Appeals

OF MARYLAND.

JANUARY TERM, 1898.

GENERAL DOCKET No. 44.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is a suit to compel by mandamus the admission of the Petitioner into the schools of the Respondent under the following facts:

The Respondent, the Maryland Institute, is a corporation incorporated under the laws of Maryland, Acts 1878, chapter 313, for the promotion of the mechanic arts, and for other educational purposes, among which is the maintenance of cer-

tain Schools of Art and Design in Baltimore City, where elementary and advanced instruction in the Practical and Fine Arts is offered to students.

The city of Baltimore confessedly offers no such instruction in the curriculum of its public schools.

While it is a corporation governed by its own officers, this Institute is endowed by the State of Maryland to the extent of $3,000 per annum, (see charter,) and formerly received an annual appropriation of a large amount from the city of Baltimore, and was assisted by the city in other material ways. This appropriation by the city was annulled by this Court in the case of *St. Mary's Industrial School vs. Brown, 45 Md. 310*, upon the general ground that it was a donation of public money for private purposes, from which the public received no benefit.

Acting on the suggestion of the learned Chief Judge Alvey, for the purpose of obviating the legal objections found in that case, and to give color to municipal aid for Respondent's schools, an ordinance was passed by the municipality of Baltimore, March 7, 1898. (Record, page 8.)

By its first section this ordinance authorized the Mayor, Comptroller and Register to contract with the Respondent for the education of pupils in its said schools for eight years, from September, 1893.

By the second section, as a foundation to sustain the annual appropriation to the Respondent, free instruction in the said schools of the Respondent is provided for certain of the public, in the following manner:

"Section 2. And be it further enacted and ordained, That as soon as may be convenient after the passage of this ordinance, and annually thereafter, before the first day of September, there shall be appointed one pupil by each member of the First and Second Branches of the City Council, who shall be entitled to instruction for the period of four years in said schools. And in case of a vacancy occurring from any cause among said pupils, the President of the Institute shall forth-

with notify the member of the Council representing the ward to which such pupil is credited, who shall thereupon appoint another pupil to fill such vacancy."

By the third section the President is required each September to report to the Mayor and City Council the names of the pupils so appointed, and any existing vacancies; and should the Councilmen not make the appointments to which they were entitled prior to the first of October, the Mayor should fill the vacancies by appointment.

By the fourth section the Mayor, Comptroller and Register are required annually, or oftener if they deem it expedient, to inspect said schools and the condition and manner in which the terms of said contract were being fulfilled, and the City Comptroller, upon being satisfied that it was faithfully complied with, should pay the Respondent $9,000 annually, in full, for the education of said pupils, and said amount so appropriated shall be used for no other purpose whatever.

Section 5 provided for the taking effect of the ordinance. (See Record, pages 3 and 4.)

The Respondent thereupon assented to the terms of said ordinance and became bound thereby by a contract duly entered into March 10, 1893, which, after reciting the ordinance, witnessed, that the Maryland Institute, in consideration of the payment of $9,000 annually *in the manner provided by said ordinance*, agreed to receive into its said Schools of Art and Design 33 pupils for the year beginning September 1, 1893, and 33 pupils for each of the years beginning September 1, 1894, to 1900, *to be appointed in the manner provided in said ordinance*, and should cause said pupils to be instructed in the various branches of art and design taught in said schools, *in accordance with the terms and provisions of the aforesaid ordinance*, which was annexed thereto and made a part thereof. (See Record, page 4.)

This ordinance and contract are the last of a series of similar instruments beginning April 14th, 1881.

Dr. J. Marcus Cargill, a member of the First Branch of the City Council, regularly appointed the Petitioner, Robert H. Clark, Jr., under the said ordinance, as pupil in said schools of Respondent in September, 1896, and again in September, 1897, (Record, pages 5 and 6,) but in both years, when the Petitioner duly presented himself for admission to the said schools, he was refused admission solely on the ground that he was a colored boy, and the Institute had resolved by its trustees not to admit any more colored persons. (Record, pages 5 to 7.) The appointments were treated as nullities, and Cargill making no others, the places were filled by appointments of the Mayor. (Record agreement, page 18.)

Before the said ordinance was passed there were two colored boys being educated as appointees, accepted without question, under a *previous* ordinance, similar to this one; and *after* the ordinance of March 7, 1893, the Respondent received two other colored boys appointed under *this* ordinance, one of whom is now in the school. (Record, page 5.)

The petition for mandamus to compel the Respondent to admit the Petitioner for education in its said schools according to said ordinance and contract, was filed October 16, 1897, and answer of Respondent, filed November 3, 1897. The case was heard in the Superior Court of Baltimore City upon demurrer to the answer November 29, 1897, and by order passed December 10, 1897, the demurrer was overruled and the petition dismissed, from which ruling this appeal lies. The opinion of Judge Ritchie, filed December 10, 1897, is printed in full in the Record, pages 19, etc. The merits of the whole case are fairly presented on the demurrer.

It is respectfully submitted that the learned Court below erred in holding:

1. That the Fourteenth Amendment to the Constitution of the United States has no application to the case, nor to the construction of the ordinance in question.

2. That the ordinance and contract in question constitute merely a private contract; that the petitioner has no rights in

the case other than mere contract rights; that there is no public or legal duty imposed on the Respondent or any other than of a merely private contractual nature, and that this is merely a suit to enforce contract rights of a private character for which mandamus will not lie.

ARGUMENT.

It is submitted on behalf of the Petitioner:

1. That the ordinance, construed with reference to the Fourteenth Amendment, gave him the same right to free education as it gave to white persons;

2. That the Respondent was legally bound by the ordinance to receive him if he was properly appointed, and no objection found against him other than his color; that in refusing him admittance on the ground of his color the Respondent was acting in violation of its legal duty under the ordinance and will be compelled to comply with it by writ of mandamus.

Construction of the Ordinance.

It is the ordinance which is the subject of construction since it alone determines the qualifications of appointees.

The words of the ordinance are: "There shall be appointed one pupil by each member of the First and Second Branches of the City Council, who shall be entitled to instruction for the period of four years in said schools."

By the contract the Institute agreed to receive into its said schools 33 pupils annually, "to be appointed in the manner provided in said ordinance."

There can be no doubt that the prohibition of the XIVth amendment applies to an ordinance of a municipality.

Yick Wo vs. Hopkins, 118 U. S., 356.

If the ordinance had in express terms excluded negroes from the benefits conferred, it would have been unconstitutional and void as prohibited by the XIVth amendment, either:

1. If the benefit conferred is public education as part of the system maintained by the city under legislative authority.

There is no education provided for by the city similar or substantially equal to that offered by this ordinance, (Record, pages 7, 20,) and the exclusion by a State agency of negroes from the education conferred thereby, or the maintenance of a system which gives the blacks inferior privileges, would be unconstitutional. For whenever a system of public schools is maintained by a State or under State authority it must be substantially equal in its benefits to both white and colored of the same class. This is admitted both by the Court below and by the appellee and supported by numerous cases.

Hall vs. DeCuir, 95 U. S., 504-506.
Claybrook vs. Owensboro, 16 Fed. Rep., 297.
United States vs. Buntin, 10 Fed. Rep., 730.
State vs. Duffy, 7 Nev., 342, 348.
State vs. McCann, 21 Ohio St., 198.
People vs. Gaston, 13 Abb. Pr., (N. S.), 160, 164.
Ward vs. Flood, 48 Cal., 36.
People vs. Gallagher, 93 N. Y., 438–451.
Corry vs. Carter, 48 Ind., 327.
Chase vs. Stephenson, 71 Ill., 383.

Or 2, Whatever may be the benefit conferred, it would be a discrimination by a State agency against the negro on the ground of color, and the XIVth Amendment prohibits all attempts directly or indirectly to single out the colored race as an object of discriminating laws.

Strauder vs. West Virginia, 100 U. S., 303.
Virginia vs. Rives, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Yick Wo vs. Hopkins, 118 U. S., 366.

Hence *the ordinance in question must be construed as not excluding negroes, but extending to them the same rights as to white persons of the same class without discrimination.*

An ordinance of a municipality is construed like an act of Legislature, and will always be construed to be in conformity with the Constitution whenever possible. Every intendment will be made in favor of its constitutionality.

Cooley Const. Lim., 6th Ed., 218, 238.
Matter of Yick Wo, 68 Cal., 294.
Southerland Stat. Constr., section 332.

The words "one pupil," without discrimination, are significant; where no discrimination is expressed none will be implied.

Clark vs. Board, 24 Iowa, 266, 271, 274.
Dallas vs. Fosdick, 40 How. Pr., 253.
People vs. Board, 151 Ill., 314.

The action of the Respondent in refusing Clark admission was clearly in violation of its duty under the ordinance thus construed in accordance with the Constitution.

The Respondent had no discretion in the refusal of appointees under the ordinance, since the validity of the ordinance and contract depends upon the Institute relinquishing all discretion in favor of the city; and such discretion had been expressly waived in the contract, by everything being referred to the ordinance.

St. Mary's Ind. School vs. Brown, 45 Md. 310.

Note.—While not necessary to establish the Petitioner's case, yet he contends that the constitutional inhibition in question applies also directly to the Institute itself as a State agency, and prohibits it from making the discrimination complained of. It was practically decided in *St. Mary's Industrial School vs. Brown*, 45 *Md.* 310, *etc.*, that while this Respondent was a private corporation, and as such not capable of receiving municipal aid, yet the appropriation might be validly made, provided the Institute were legally incorporated as part of the public school system. But whatever provision may be made must leave the institution no discretion, and the subject-matter, being a public trust, could not be delegated beyond the power and discretion of the municipality. The validity of the arrangement was held to depend upon that retention of municipal control, and that complete accountability be provided for, thus making the institutions contracted with, *pro hac vice municipal agencies.* (*Ibid, pages* 334-5-6.) The institution is thus embraced *quo ad hoc* as one of the governmental agencies of the city by taking upon itself the execution of a political function of government co-ordinately with the municipality.

The Institute is wholly responsible to the city, and both are responsible to the public, for the education of these pupils. The elements of agency are here. The State is behind them all, and is ultimately the party who is acting as principal.

The prohibitions of the amendment upon States extend to all agencies and instrumentalities employed in the administration of its government, whether superior or subordinate, legislative, executive or judicial.

Ex-parte Virginia, 100 U. S. 339.
Virginia vs. Rives, 100 U. S. 313.
Neal vs. Delaware, 103 U. S. 370.
Ah Kow vs. Nunan, 5 Sawy. 552.
Re Parrott, Fed. Rep. 481.

As to the alleged "construction of the contract by the parties," any change or construction thereof must have been made by *both* parties in order to be effective. But the city could not make any change or arrangement of any kind looking to the exclusion of negroes. Nor could its agents. The action of the city ministerial officers in unequally enforcing or aiding in a discriminating application of an ostensibly fair law, is unconstitutional.

Yick Wo, 118 U. S., 356, 373.
See M. & C. C. vs. Radecke, 49 Md. 217.

But no construction of the contract by the parties as to qualifications of appointees could in any manner alter the terms of the ordinance which established what those qualifications are.

The city cannot by contract bargain away its legislative discretion, nor can such contract control its legislative or governmental authority.

Gale vs. Kalamazoo, 23 Mich. 343.

The effect contended for can only be accomplished by a repeal, altering or re-enactment of the ordinance by the Mayor and City Council, which has confessedly never been done.

1 Dillon on Mun. Corp., section 314.

Looking to existing circumstances at the time the ordinance was passed: while the ordinary public schools of the city were on the "unmixed" plan, yet the schools of the Respondent *were confessedly mixed*, *i. e.*, white and colored educated together. (Rec., pages 5 and 9.) This must have been in the mind of the City Legislative, and this ordinance was passed with reference to *these* schools and not with reference to any unmixed schools.

The way in which the Respondents viewed this is immaterial, as they agreed to receive pupils "appointed in the manner provided by the ordinance."

Two colored youths were received *before* and two *after* the passage of this ordinance without objection or explanation. The demurrer *does not* admit the statement in the answer that this was no admission of any obligation on the part of the Resdondent. Demurrer only admits facts well pleaded.

Brooks vs. Widdicombe, 39 Md., 386, 400.

THE LEGAL AND PUBLIC DUTY OF THE RESPONDENT.

The respective rights and obligations of the Petitioner and Respondent are not contractual, but arise out of the ordinance, the ordinance being the instrument which fixed the rights, contingent on the assent of the Respondent; the "contract" being the assent of the Respondent to the terms of the ordinance and giving it effect.

The ordinance is not a contract. Municipal contracts are ordinarily made by the interposition of properly authorized agents. The authorizing a contract to be made *under the ordinance* plainly shows the intention of the legislative that the ordinance itself should not operate as a contract.

1 Dillon Mun. Corp., secs. 445, 450.

The *ordinance*, and not the contract, is embraced in the City Code as part of the city regulations concerning public schools.

Baltimore City Code, Art. 44, secs. 53 to 56, page 1398.

The first section of the ordinance is enabling, and under that section the contract was made. The remaining sections of the ordinance are not enabling, but mandatory, and are the valid expression of the legislative will of the city in the form of law.

They are enacted under the authority of the Legislature Acts 1872, chapter 377, giving the city power to establish a system of public schools, and the ordinance and appropriation can be sustained under no other law.

The fact that the ordinance without the contract would have conferred no rights, does not make the rights created "mere contract rights;" *a fortiori* not "mere private contractual rights." This Court has decided that "a valid ordinance may be passed to take effect upon the happening of a future contingent event, *even where that event involves the assent to its provisions by other parties.*"

State ex Rel. M. & C. C. vs. Kirkley, 29 Md. 85, 102.
M. & C. C. vs. Clunet, 23 Md. 468.

The virtue of this "contract" has been exaggerated. The Institute would have been as fully bound by simple assent, or indeed by merely acting under the ordinance, or receiving the appropriation.

The ordinance is on the one hand a municipal law giving free education under legislative authority to a certain defined class of the public; and on the other a grant of public money to a corporation upon conditions and duties subsequent to be performed by the corporation for the benefit of the public.

Indianapolis, Etc., R. Co. vs. State, 37 Ind. 489.

The City Council of Lawrenceburg passed an ordinance which by the first section made it lawful for the Respondent Railroad Company to lay tracks on certain streets of the city, and in the second section made it the duty of the company to keep crossings in repair, construct culverts, drains, etc. The railroad laid tracks according to the ordinance, and mandamus was brought by the city to compel the company to grade

certain streets. The company contended that the ordinance was nothing but a contract, and that hence mandamus did not lie. The Court held the ordinance not to be a contract, but simply a grant of a right of way upon certain conditions and duties subsequent to be performed by the company. That when the company accepted the grant it was its legal duty to grade the streets as required by the ordinance, and it would be enforced by mandamus.

Railroad Company vs. State, 37 Ind. 489.

The Legislature of Tennessee passed a law authorizing counties to subscribe to stock of projected railroads, and to pay for the stock by taxation. The taxpayer was entitled to a tax receipt, which the law provided should be good tender on the railroad in payment for freight or passage. The M. & O. R. R. received a large amount of money from Madison county, issuing stock in return. Wisdom held certain tax receipts and offered to pay them for a ticket to Mobile. The railroad refused. Wisdom brought mandamus to compel them to accept the receipts. The railroad contended *inter alia* that its relations with Wisdom were purely contractual, and that mandamus would not be, but the remedy was to sue for breach of contract. The Court held, however, that the acceptance of public funds raised by taxation imposed on the Respondent all the duties required of them by the act. It consented thereby to the terms on which the tax was collected and paid over, and the company was estopped from denying the statutory obligations imposed upon it.

Mobile & O. R. R. vs. Wisdom 5 Hiesk. (Tenn.,) 125, 155.

The contract, made in pursuance of Section 1 of the ordinance, was merely the assent of the Institute to the ordinance. It introduced nothing, but referred everything to the terms of the ordinance. It subjected the Institute to the authoritative part of the ordinance, and made it a valid law. While the city might not have compelled the Institute, *ea invita*, by an ordinance, to receive certain pupils, yet when the Institute

made the contract and accepted the city appropriation, it undertook the legal duty imposed by the ordinance and became bound thereby. The Institute is estopped from denying the legal obligation imposed upon it.

Mobile and O. R. R. Co. vs. Wisdom, 5 Heisk., 195.
Indianapolis, etc., R. vs. State, 37 Ind., 489.

"The Legislature of a State has, however, no constitutional authority to grant a public bounty except for the purpose of accomplishing some public good. It cannot dispose of the rights or funds of the people to assist a purely private enterprise. A grant of State aid to enable a private corporation to accomplish a purpose of public interest is, therefore, always subject to the implied condition that the company shall assume an obligation to the State to fulfill the purposes of the grant.

"The Legislature would have no power to grant the aid of the State on any other terms. It is immaterial whether the aid be in the form of a direct donation of funds or property by the State, or by a county or municipality, or in a form of a subscription for shares, or of a delegation of the power of eminent domain, or of an exemption from taxation, or of a monopoly. In each instance the acceptance of the grant of the public aid implies an assumption by the grantee of an obligation in favor of the public."

2 Morawetz on Priv. Corp., sec. 1114.

Here the Institute not only accepted the public money, but expressly agreed to be bound by the ordinance, agreeing that everything should be done in accordance with the terms of the ordinance.

Whatever may be the technical aspect of the Respondent's obligations, they are certainly not private in any sense, but are in the nature of public, political or governmental functions i. e. of public education, in compensation for public money raised by taxation for public schools. And the appropriation would be ultra vires in any other aspect.

Municipal corporations act in a double character:

1. Governmental or public, as a State agency.
2. Proprietary or private, as a distinct corporation.

I Dill. Mun. Corp., section 66.
Cooly Const. Lim., 284.
United States vs. B. and O. R. R., 17 Wall, 322.

This arrangement was effected by the city in its public character.

The education of the public youth is a public, political or governmental function primarily residing in the State for the benefit of the citizens, and delegated to municipalities, townships or trustees to be exercised by them as State agencies acting in a governmental capacity.

In Maryland it is established by the Constitution and includes the system in the city of Baltimore, over which the State Legislature has full control.

Md. Const., Art. VIII.
School Com'r's vs. M. & C. C. of Balto. 26 Md. 505.
1 Dillon Mun. Corp., sec. 23.
Merrill on Mandamus, sec. 115.
Com'r's. vs. Mighels, 7 Ohio St., 109, 119.
Trustees vs. Tatman, 13 Ill., 30.
Louisville vs. Wible, 84 Ky., 290, 294.
Hooper vs. New, 85 Md., 565, 574.

The education provided for in this ordinance is *public education.* It cannot be private. Nothing is better established than that it would be an unwarrantable diversion of public funds to apply them to private purposes as to a private school or for private education.

St. Mary's Ind. Sch. vs. Brown, supra.
Ellesburg vs. Seay, 83 Ala., 614.
Cooley on Taxation, 2d Ed., page 122.

Could the City Councilmen pass an ordinance similar to this and appropriate $9,000 annually expressly for the education of their own sons in the Respondent's schools?

Even this contract cannot be supported as an application of public funds, unless there is some *public benefit* derived from it, giving the public an interest in its performance.

M. & C. C. vs. Clunet, 23 Md. 468.
St. Mary's Ind. Sch. vs. Brown, 45 Md. 335.
Cushing vs. Inhabitants, 10 Metcalf, 508, 520.
Allen vs. Jay, 60 Maine, 124.
Opinion of Court, 58 Maine, 597.
Cooley Const. Lim. 207.
Cooley on Taxation, 2d Ed. pp. 113, 122, etc.
Morawetz Private Corp., sec. 1114, ut supra.

The *public education* provided is the only possible public benefit to be derived. It is made the express consideration for the payment. (See ordinance, sec. 4.) No incidental or consequential advantages to the public will support the payment.

Curtis vs. Whipple, 24 Wis. 350–354.

Mandamus lies to compel a corporation or an individual to perform a public duty, or one imposed by law; and the duty of the Respondent to admit the Petitioner in this case is a public duty and imposed by law.

It is unnecessary here to discuss whether the Respondent is a public or a private corporation, or even whether it is a municipal agency.

Mandamus lies against schools wholly outside the ordinary public school system and governed by their own trustees, to compel the admission of one entitled by law to be admitted.

State vs. White, 82 Ind. 278.
Foltz vs. Hoge, 54 Cal. 28.
Nourse vs. Merriam, 8 Cush. 11.

And against persons or corporations generally to enforce the performace of a legal or public duty.

Merrill on Mandamus, sections 25, 26, 27, 157, etc.
High Legal Rem., sec. 977.
Spelling Extr. Legal Rem., sec. 1521.

If there is a legal obligation and no remedy by action, mandamus is the proper remedy.

In Re Napier, 18 Q. B., 694.
People vs. Mayor, 10 Wend., 395.
High, Legal Rem., section 10.
Commonwealth vs. Select, etc., 34 Pa. St., 509.

Mandamus is the Petitioner's only possible remedy.

The Respondents contend that mandamus is not the proper remedy, but have not as yet suggested what other remedy is open to him. They put the law in the position of giving a legal right, but offering no remedy. Generally, when a certain duty is imposed by a law and no remedy is provided, mandamus is the remedy to resort to.

Tapping on Mandamus, 80.
M. & O. R. R. vs. Wisdom, 5 Heisk., 125.

The very origin and nature of the writ was to give a remedy where there was no adequate remedy by action and where in justice and good government there ought to be one.

Merrill on Mandamus, sec. 10, etc.
High on Leg. Rem., secs. 1, 5, 15.
An. ana Anns. on Corp., sec. 699.
3 Bl. Com., 110, 264.
1 Kent Com., 322.

If the right to the writ is shown under established rules of law, it must issue; there is no arbitrary discretion.

Brooks vs. Widdicombe, 39 Md., 387.

The policy of the law or public sentiment cannot affect the case.

Ward vs. Flood, 48 Cal., 36-52.
Westchester R. R. vs. Miles, 55 Pa., 209.
Mount Moriah Cem. vs. Com., 81 Pa. St., 235, 246.
Dallas vs. Fordick, 40 How. Pr., 249, 257.
People vs. Board, 18 Mich., 400, 414, 418.
Board vs. Timon, 26 Kansas, 1.
People vs. Board, 101 Ill., 308, 317.

The fact that the ordinance is made effective by agreement or contract, does not make it any the less an ordinance; and the fact that a contract intervenes in the chain of the Petitioner's legal right, is no bar to mandamus. Contracts have been frequently enforced by mandamus when their foundation is a legal obligation, as illustrated by the following cases:

Wren vs. City of Indianapolis, 96 Ind. 206, 219.
State vs. Crete, (Neb.,) 49 N. W. Rep. 272.
Leominster, Etc., vs. Railroad Co., 3 Kay & J. 654, 673.
2 Dillon Mun. Corp. sec. 828.
People vs. Haws, 34 Barb. 69.
Regina vs. Southampton, 1 Ellis B. & S. 5.
Adams vs. London & Blackwall Ry. Co., 6 Railway and Canal Cases, 271, 281.
Mount Moriah Cemetery vs. Com. 81 Pa. St. 235.

Several of the above cases were at the suit of private contractors.

The test is the *legal obligation.* Indeed, Lord Campbell says, "A legal obligation, which is the proper *substratum* of a mandamus, can arise only from common law, from statute, *or from contract.*"

Ex-parte Napier, 18 Q. B. 694.

The case of *Rosenfeld vs. Einstein, 46 N. J. L., 481,* and the cases cited by *High on Legal Remedies, section 25,* quoted by the Court below as authority for refusing the writ, are all cases between *two contractees* involving the enforcement of contracts of *purely private or personal nature,* involving no trust or legal obligation, but resting wholly upon contract. The courts very properly refuse to extend mandamus so as to take the place of specific performance of *purely private or personal contracts.*

But that principle, sound in those cases, has no relevancy in this case. Is this a case resting wholly upon a contract, of purely private or personal nature, between Clark and the Maryland Institute? Assuredly, Clark has *no contract what-*

ever. He would have no specific performance. The contract, as far as there is one, is between the city and the Respondent, and amounts, in effect, merely to the Respondent's assent to the terms of the ordinance. And who can seriously contend that it is a contract involving no trust or legal obligation on the part of the Respondent? The very fact that the contract deals with the exceedingly important and vital subject of public education, a governmental, and not a corporate duty, stamps it with a public character. The contract imposes a *legal* duty. And the fact that the Institute has actually undertaken the office of public instructor in the place of the city, in compensation for which it receives public money, raised by taxation to support the public schools, and by virtue of a city ordinance under legislative authority, reposes upon the Respondent a grave *public trust* for which it is responsible, not only to the municipality of Baltimore, but to the *public*, to whom the municipality itself is ultimately responsible.

St. Mary's Ind. School vs. Brown, supra.

It is not intended to throw doubts on the legality of this ordinance and contract. But it is most earnestly pressed upon the attention of the Court, that in this arrangement we have the utmost limit to which municipal aid to private institutions can be stretched. Should the element of public benefit be eliminated, and this arrangement construed to be of the character attributed to it by the Respondents and the learned Court below, a mere private contract involving no public duty or consequent public benefit, not only would its legality be open to most serious question, but a precedent would be established for appropriating public money for private purposes, which might be the entering wedge for future abuses in the taxing power of municipalities.

But no matter in what light the Constitution is held to apply, the cardinal fact remains that *money raised by taxation is being disbursed in a discriminating manner* with the connivance of and under the direct authority of the city of Baltimore. The Constitution brooks no indirect or sinister means of evading its

provisions. It regards the ultimate result, and brushes aside the means by which this is accomplished.

Claybrook vs. Owensboro, 16 Fed. Rep. 297. Yick Wo, 118 U. S. 356.

"It [the Fourteenth Amendment] ordains that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemptions from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

Strauder vs. West Virginia, 100 U. S. 300, 307.

It is sufficient to show that the Constitution of the United States is being violated, and that the City of Baltimore and the Respondent are united in denying to the Petitioner the *equal protection of the law.* The city cannot shift the responsibility on the Respondent, nor can it, in turn, evade performance of manifest duty by attempting to construe a law in the teeth of the constitutional prohibition. The equal protection of the law *is being denied,* and denied by agents of the State. The Respondent is attempting to evade a duty, which, but for the violation of the Constitution, it would confessedly have to perform. The Petitioner's constitutional rights under the law of the city have been denied him, the city laws violated, and its duty thereunder not performed by the Respondent.

The Petitioner has selected the appropriate and only possible remedy to enforce his rights; and the Courts will see to it that he shall not, through inability of the judicial power of the State, be denied what is guaranteed by the Constitution—THE EQUAL PROTECTION OF THE LAW.

It is, therefore, respectfully submitted that the order of the Superior Court of Baltimore City, overruling the demurrer and dismissing the petition, be reversed, with costs, and the writ issued as prayed.

JOHN PHELPS,
W. A. HAWKINS,
Attorneys for Petitioner.

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Appeal from the Superior Court of Baltimore City.

STATE OF MARYLAND EX RELATIONE ROBERT H. CLARK, JR., BY HIS FATHER AND NEXT FRIEND, ROBERT H. CLARK,	
vs.	In the Superior Court of Baltimore City.
THE MARYLAND INSTITUTE FOR THE PROMOTION OF THE MECHANIC ARTS	

Petition for Mandamus and Order of Court thereon.

(Filed October 16, 1897.)

To the Honorable, the Judge of said Court:

The petition of Robert H. Clark, Jr., by his father and next friend, Robert H. Clark, of the city of Baltimore, State of Maryland, respectfully represents:

I. That he is an infant of about sixteen years of age, a resident of the Eleventh ward of Baltimore city, and that his father, Robert H. Clark, is a resident of said ward and city, and a taxpayer therein.

II. That the defendant, the Maryland Institute for the Promotion of the Mechanic Arts (commonly known as the "Maryland Institute"), is a corporation duly incorporated by Acts of Assembly of Maryland of 1878, chapter 313, (renewing the old charter of Acts of 1849, chapter 114), and that among the objects of its incorporation are the encouragement and promotion of manufactures and the mechanic and useful arts by the establishment of school and popular lectures upon the sciences connected with them, the promotion of schools of art and design, etc., etc., and by such other means for the promotion of the mechanic arts as experience may suggest.

III. That it is further provided in said charter that the said defendant corporation shall make no by-laws which shall be repugnant to the Constitution and Laws of the United States or of the State of Maryland.

IV. That the said The Maryland Institute for the Promotion of the Mechanic Arts, is further authorized and empowered by its said charter to graduate students in its various schools and to grant diplomas to such as, after proper examination, may be found worthy of the distinction.

V. That the said defendant, the Maryland Institute for the Promotion of the Mechanic Arts, in the exercise of the powers vested in it by its said charter, has established and maintained, and does now maintain certain schools of art and design, situated on Baltimore street and Centre Market Space, in Baltimore city. The said schools of art and design being divided into a night school of art and design or industrial drawing; and a day school of art and design — art department.

VI. That the said night school meets on Monday, Wednesday and Friday evenings throughout the school year, and offers a complete graded course in the several departments of freehand, mechanical and architectual drawing in elementary and advanced classes, comprising instruction in final work and examinations requiring a high degree of perfection in all of the said departments, and entitling the student to a certificate upon graduation, under the authority of the State of Maryland, and also the opportunity to compete for certain honors and premiums known as the Peabody and Institue Premiums, said premiums consisting of money prizes of five hundred dollars ($500) distributed in sums of from fifty (50) to one hundred (100) dollars. And in addition to the said benefits the said students, upon graduation, are entitled as well to certain other special honors and prizes as to a free post graduate course affording an opportunity to students to prolong their studies and further perfect themselves, with no charge for tuition or prerequisite, other than application and regular attendance.

VII. That the regular course in the said day school is divided into four classes one for each of the four years, and includes complete theoretical and practical daily instruction in all branches of drawing; perspective, shading, painting in water color and oil; drawing, painting and modeling heads and figures from casts and from life; landscape drawing and painting; and sculpture. And students who have completed said regular course and passed satisfactorily required examinations, are entitled to graduate under the authority of the State of Maryland, and more over, that certain honors and valuable prizes are awarded to students who achieve certain grades of proficiency in their studies in said day school, and a student who has graduated as aforesaid, is entitled to join a post graduate class without charge for tuition in which the student may further perfect himself in such studies as he may select. And in addition thereto, students of said day school who have graduated as aforesaid (since 1894), and have attained a certain prescribed grade of proficiency and apply within a certain specified time, are entitled to be admitted, without cost or charge for tuition, to a certain other school connected with and operated by the said Maryland Institute, known as the Rinehart School of Sculpture, a course independent of the regular course of the said school of Art and Design, and for students of sculpture only, affording a practical opportunity for the study of the art of sculpture and advanced instructions therein not obtainable in any other school or academy

outside of the private studies of sculpture and art schools in foreign countries.

All of which advantages are entirely outside of and beyond the scope of the ordinary public schools for white or colored pupils, and can only be obtained by attendance in the said schools of art and design.

VIII. That the defendant, the Maryland Institute for the Promotion of Mechanic Arts, is, and has been endowed, largely supported and sustained by the State of Maryland under the terms of its said charter to the extent of three thousand dollars ($3,000) annually, which is devoted exclusively to the educational branches of the said institute, and particularly for the benefit and maintenance of the said schools of Art and Design, which said schools are further supported by the city of Baltimore by an annual appropriation of nine thousand dollars ($9,000) as hereinafter set forth.

IX. That the president of said institution is by the said charter required, and as your orator is informed, does, annually, in the month of September, make a detailed report of the operation of the said Schools of Art and Design to the Governor of the State of Maryland.

X. And your petitioner furthur complaining says, that on on the seventh day of March, 1893, the Mayor and City Council of Baltimore city passed the following ordinance (No. 26):

An ordinance to empower the Mayor, City Comptroller and City Register to contract with the Maryland Institute for the Promotion of the Mechanic Arts for the education of pupils in its Schools of Art and Design.

Section 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, that the Mayor, City Comptroller and City Register be, and they are hereby authorized and directed to contract with the Maryland Institute for the Promotion of the Mechanics Arts for the instruction of pupils in the said Institute of Art and Design for the period of eight years from the first day of September, 1893.

Section 2. And be it further enacted and ordained, that as soon as may be convenient after the passage of this ordinance, and annually thereafter, before the first of September, there shall be appointed one pupil by each member of the First and Second Branches of the City Council, who shall be entitled to instruction for the period of four years in said schools; and in case of a vacancy occurring from any cause among said pupils, the president of the institute shall forthwith notify the member of the Council representing the ward to which such pupil was creditited, who shall thereupon appoint another pupil to fill such vacancy.

Section 3. And be it further enacted and ordained, that the President of the Institute, shall, annually, in the month of September, report to the Mayor and City Council the names of the pupils so appointed and in attendance upon its schools,

together with a list of vacancies, should any exist; and should no appointments be made prior to the first of October by the members of the City Council entitled to fill such vacancies, then the Mayor shall appoint pupils to fill said vacancies.

Section 4. And be it further enacted and ordained, that the Mayor, City Comptroller and City Register, shall, annually, or as much oftener as they may deem it expedient, inspect said schools of said institute, and the condition and manner in which the terms of said contract are being fulfilled by the institute, and thereupon the City Comptroller, upon being satisfied that the said contract is being faithfully complied with, shall pay the president of the institute annually, in the month of September, the sum of nine thousand dollars in full for the education of said pupils, and the said amount so appropriated shall be used for no other purpose whatever.

Section 5. And be it further enacted and ordained, that this ordinance shall take effect from the date of its passage.

Signed, 11.40 A. M., March 7th, 1893, by Ferdinand C. Labrobe, Mayor.

Ordinance No. 26.

XI. That in pursuance of the power and authority vested in them by the said ordinance, the said Mayor, City Comptroller and City Register (then in office), did on the tenth day of March, 1893, enter into a written contract or agreement with the defendant, the said Maryland Institute, which said contract is as follows:

Whereas, by ordinance No. 26 of the Mayor and City Council of Baltimore, approved March 7th, 1893, the Mayor, City Comptroller and City Register are authorized and directed to contract with the Maryland Institute for the promotion of the Mechanic Arts for the instruction of pupils in the Institute's schools of Art and Design for the period of eight years from the first day of September, 1893,

Now, this agreement witnesseth, that in pursuance of said power and authority, the Mayor, City Comptroller and City Register, acting on behalf of the city of Baltimore, and the Maryland Institute for the promotion of the Mechanic Arts do hereby contract and agree, that for and in consideration of the payment of the sum of nine thousand dollars annually for the period of eight years from the first day of September, 1893, in the manner provided by said ordinance, the said Institute shall receive into its schools of Art and Design thirty-three pupils for the year beginning September 1st., 1893, and thirty-three pupils for each of the years beginning September 1st., 1894, 1895, 1896, 1897, 1898, 1899 and 1900, respectively, to be appointed in the manner provided in said ordinance, and shall cause the said pupils to be instructed in the various branches of art and design taught in the said schools, in accordance with the terms and provisions of the

aforesaid ordinance, a copy whereof is hereby annexed and made part of this contract.

FERDINAND C. LATROBE,
Mayor.
JAMES R. HORNER,
Comptroller.
JOHN A. ROBB,
Register.
JOSEPH M. CUSHING,
President of the Maryland Institute for the Promotion of the Mechanic Arts.

Executed in duplicate this 10th day of March, 1893.

The form and legal sufficiency of this contract is hereby approved. March 9th, 1893.

W. S. BRYAN, JR.,
City Solicitor.

XII. That subsequent to the execution of said contract, the defendant, the Maryland Institute, in violation of law, attempted to pass a by-law to the effect that no students would be received into its said schools of Art and Design unless said students were "white," intending thereby to exclude colored persons, or descendants of — African race, while admitting white persons, or descendants of the Caucasin race, said by-law being aimed more particularly at the admission of pupils appointed by city councilmen under provisions of the ordinance aforesaid.

Nevertheless, your petitioner alleges, what to him and the public is well known, that before the attempted passage of the said by-law and both after the said ordinance of March 7th, 1893, and contract of March 10th, 1893, and prior thereto under similar ordinances and contracts passed, executed and renewed from time to time, and in force continuously from April 14th, 1881, or before, until the said ordinance of March 7th, 1893, the defendant, the said Maryland Institute, had received into its said schools of Art and Design colored pupils appointed as aforesaid, by councilmen from the Eleventh ward in which the majority of voters are colored persons, and from other wards; some of which pupils have completed their course and some of whom are continuing in said schools, to wit: Harry T. Pratt (colored) was appointed in 1891 by Councilman Harry S. Cummings (colored), Eleventh ward, and has since graduated from the Institute with honorable mention; William Mills (colored) was appointed by Cummings, Eleventh ward in 1892; William H. Davis (colored) was appointed in 1895 by James Doyle, Councilman, Eleventh ward, and Howard Gross (colored) was appointed in 1895 by Councilman Samuel G. Davis, Eighteenth ward, the two latter pupils now completing their course at the said institute schools.

XIII. That on the 5th day of November, 1895, a certain J. Marcus Cargill was lawfully elected a member of the First

Branch of the City Council of Baltimore from the Eleventh ward, and was re-elected the 3d day of November, 1896, and has continued to occupy said office from said date up to the present time.

XIV. That during the month of September, 1896, the said City Councilman, J. Marcus Cargill, acting under the authority and power given by the said ordinance, did appoint your petitioner, Robert H. Clark, Jr., a youth of proper age, habits, morals and physical condition, and in all respects eligible as a pupil in said institute, entitled to free instruction in its said schools of art and design, in accordance with the terms of said ordinance and contract, and the defendant, the said Maryland Institute, was notified of the said appointment.

XV. But that when your petitioner, the said Robert H. Clark, Jr., presented himself at the said schools with proper credentials, and applied for admission therein, he was refused admission by the authorities of the said institute upon the ground that he was a colored boy, and it was against the rules of the said institute to admit colored boys into the said schools by reason of the attempted passage of said by-law. Whereupon, the said Cargill, though in no manner assenting to the unlawful and unauthorized action of the defendant, made no further appointment to fill the place of your petitioner in that year, and no appointment was made by the said Mayor to fill said scholarship for 1896, which was, and is still, vacant, though of right belonging to your petitioner, who is debarred therefrom by the unlawful act of the defendant as aforesaid.

XVI. That the Mayor, Comptroller and Register thereupon made an alleged inspection of said schools, as required by said ordinance, and reported that said contract was being faithfully carried out by said institute, although they well knew the contrary; and though they well knew that said institute had illegally and arbitrarily refused to admit your orator as by said ordinance and contract they were bound to do; and that the said Mayor, Comptroller and Register have combined and conspired with the said Maryland Institute against your petitioner to deprive him and other colored persons of their rights as citizens of the United States in violation of the Constitution of the United States.

XVII. That by a letter dated the 14th day of September, 1897, the said Cargill was informed by George L. McCahan, Esq., Actuary of the said institute, that the free scholarship for 1897 which said Cargill was entitled to fill was vacant, and notify him, that unless said vacancy was filled by September 30th, the Mayor would be called upon to make an appointment to fill said vacancy; also enclosing a circular letter of same date, signed by Joseph M. Cushing, President, George L. McCahan, Actuary and John M. Carter, Chairman Committee on Schools of Art and Design, requesting that the appointment be made and forwarded to the actuary, and among other suggestions, etc., as to selection of appointees, it was said that "according to the rules of the institution, only reputable white pupils who will conform to the regulations and discipline of the schools will be admitted."

Immediately upon receipt of said letter and circular letter, and before September 30th, 1897, the said Cargill notified the authorities of the institute that he had reappointed your petitioner, Robert H. Clark, Jr., for the said scholarship of 1897.

XVIII. That being desirous of entering the said schools of art and design, your petitioner presented himself on Monday evening, October 4th, 1897, at seven thirty o'clock, being the opening of the session for 1897, with proper credentials of his appointment, at the said institute on Baltimore street, and requested to be admitted as a pupil, but was refused admittance by the president of the institute, although he was of proper age, physical, mental and moral qualifications, willing to conform to the dicipline of said school, and demean himself in all respects as a proper and exemplary pupil.

Your petitioner being refused and denied admission expressly and distinctly upon the sole ground of his "color," and upon no other ground or pretext whatsoever, notwithstanding that the said by-laws, in so far as it attempted to prevent the appointment of colored pupils by city councilmen under said ordinance, was absolutely void and without effect, being not only a violation of the contract and ordinance aforesaid, and contrary to the charter of the institute, but also in direct contravention with the letter and spirit of the Constitution of the United States.

XIX. That the said Schools of Art and Design of the Maryland Institute are unique and unapproached in the city of Baltimore as well in the scope, extent and variety of the studies pursued, as in the excellence of the instruction, and the great advantages open to the student for the most advanced studies in the practical and fine arts. Not only do the public schools of this city (and especially the colored schools) fall immeasurably below the said institute schools in these particular branches, but few or none of the private art schools of the city offer advantages that compare with the acknowledged superiority of the said schools of art and design; and your petitioner verily believes, and therefore confidently alleges, that the exclusion of colored citizens from the rights of free education in the said schools of art and design, and the privileges enumerated in paragraphs vi and vii of this petition provided for by the public funds, and the arbitary admission of white pupils exclusivelyy, by an institution largely supported out of the public treasury, amounts practically and in effect to a total exclusion of such citizens from the equal advantages and rights of citizens on account of their color, abridges their privileges and immunities as citizens of the United States, deprives them of their property without due process of law and denies to them the equal protection of the laws, in violation of the Constitution of the United States.

XX. Your petitioner further alleges, that according to said ordinance and contract, the defendant agreed, and, becoming bound by the said ordinance, was by law compelled to receive appointees of city councilmen under said ordinance

without distinction as to color; and further, that even should the said contract have been made to refer to the admission of white pupils only, to the exclusion of colored pupils, such contract would be unlawful, unconstitutional and utterly void.

XXI. Your petitioner therefore prays that a writ of mandamus may be issued directed to the said The Maryland Institute for the Promotion of the Mechanic Arts, commanding it to admit your petitioner, Robert H. Clark, Jr., into its said schools of art and design for instruction therein for the period of four years, as required by said ordinance and contract.

And your petitioner will ever pray, etc.,

JOHN PHELPS,
W. ASHBIE HAWKINS,
Attorneys for Petitioner.

STATE OF MARYLAND,
Baltimore City, to wit:

I hereby certify that on this fifteenth day of October, in the year eighteen hundred and ninety-seven, before me, the subscriber, a Notary Public of the State of Maryland, in and for the city of Baltimore aforesaid, personally appeared Robert H. Clark, the father and next friend of Robert H. Clark, Junior, the petitioner in the foregoing petition, and made oath that the matters and facts therein stated are true, to the best of his knowledge and belief.

Witness my hand and seal of office.

(Notarial Seal.) GEO. W. HAULENBECK,
Notary Public.

Ordered this 16th day of October, 1897, on the aforegoing petition, that a rule be, and it is hereby, laid on the said The Maryland Institute for the Promotion of the Mechanic Arts, requiring it to show cause why the writ of mandamus should not issue as prayed, on or before the 1st day of November, 1897; provided that a copy of this order be served on the said defendant or its attorney, on or before the 20th day of October, 1897.

ALBERT RITCHIE,
Judge of the Superior Court of Baltimore city.

Sheriff's Return.

"Copy of the within petition for the mandamus and order of Court served on John M. Carter, attorney for respondents on the 18th day of October, 1897, in presence of Geo. W. Mecaslin.

"STEPHEN R. MASON,
"Sheriff."

"Also copy of the within order of Court served on Joseph M. Cushing, President of the Maryland Institute for the Promotion of the Mechanics arts, on the 19th day of October, 1897, in presence of George W. Mecaslin.

"STEPHEN MASON,
"Sheriff."

Petition and Order of Court Thereon.

(Filed November 1st, 1897.)

To the Honorable Albert Ritchie, Judge of said Court:

The petition of the defendant respectfully prays that it be allowed a delay of three days for the filing of its answer in this case, as the same is as yet incomplete.

JNO. M. CARTER,
Atty. for Defendant.

It is ordered this first day of November, 1897, that leave be granted as prayed.

ALBERT RITCHIE.

Respondent's Answer to Petition.

(Filed November 3d, 1897.)

To the Honorable Albert Ritchie, Judge of said Court:

The answer of the Maryland Institute for the Promotion of the Mechanic Arts to the petition for mandamus respectfully represents:

Respondent admits the averments contained in the first, second, third, fourth fifth, sixth and seventh parargraphs of the petition, except as to the latter part of the seventh paragraph, and in answer to the averments therein contained this respondent avers and says:

That the said Rinehart School for Sculpture is conducted wholly and entirely by the Committee on the Rinehart Fund of the Board of Trustees of the Peabody Institute; that the said school was established, and is maintained by the said committee entirely at the expense of said committee, save and except that this respondent provides a studio for the pupils with the necessary materials for work in its building: that while, by the present arrangement between said committee and this respondent, those who have been students in the day school of this respondent are admitted to the Rinehart School upon terms specified, yet it is within the power of said Committee on the Rinehart Fund of the Peabody Institute to change, alter, or entirely abrogate said arrangement, and abolish said school at its will and pleasure.

This respondent admit the averments contained in the eighth, ninth, tenth and eleventh paragraphs of said petition.

XII. Respondent admits that it adopted a regulation in November, 1895, against the admission of other than "white" pupils into its schools of art and design, but it denies that said regulation or by-law, as charged in said petition, was in violation of law. Respondent also admits the admission into its night school of the four pupils named in this paragraph of the petition, who are colored persons, under its contract with the Mayor and City Council of Baltimore, and that two of said pupils are now in said school.

And as to the admission of said four colored pupils and the reason and necessity for the adoption of said restriction against the admission of others, in the future, your respon-

dent avers and says: That upon the appointment of said Harry T. Pratt and William Mills as pupils, by city councilman Harry S. Cummings, your respondent in good faith instructed them in the various branches of study embraced in the curriculum of its night school, affording them all the facilities extended to white pupils, and in due course the said Harry T. Pratt was graduated with honorable mention as averred in said petition, but the said Mills at an early stage in his career of pupil withdrew from the school. That in October, 1895, your respondent admitted into its night school the said William H. Davis and Howard Gross, both colored, and has ever since and is still affording them the full benefit of a thorough course of training in said school as completely as is given to all other pupils therein.

But your respondent avers that in October, 1895, a State election was impending and a very exciting political campaign was in progress, and upon the announcement in the newspapers of the city that said two last named colored pupils had been appointed to the Maryland Institute night school, a very exciting and embittered discussion was precipitated both in the public newspapers and upon the rostrum upon the subject of mixed schools in Maryland—that is to say, the mingling of white and colored pupils in the same school—and the fact of these two colored pupils in the Maryland Institute was published in great and unenviable notoriety.

That owing to the well-known popular objection to mixed schools among the white people of the State of Maryland, your respondent found great difficulty in inducing the white pupils to continue to attend its night school. And notwithstanding the most earnest and zealous efforts on the part of the board of managers and the faculty of teachers to reconcile the objection of the white pupils and their parents and guardians to the presence of said colored pupils, the number of pupils in the night school decreased 643 in the Winter of 1894–'5, to 521 in the Winter of 1895–'6, and still further to 447 in the following Winter, and that the publication of the matter of the petitioner's application for mandamus is causing the number of pupils to decrease still more in the school year just begun, so that there are now but 403 pupils in said school.

That the effect of said agitation has been to greatly lessen the influence of said night school for the good work it has accomplished in the city of Baltimore and State of Maryland, in educating young men and boys for the various branches of mechanical industry, and for other pursuits in which a knowledge of drawing and designing is required, and it has become a serious question with your respondent whether the action of those colored people who are persisting in the demand for admission of pupils of their race into the school, would not, if yielded to by your respondent, result in its complete destruction.

Further answering, respondent avers that in November, 1895, after admitting the two colored pupils, Davis and Gross, then recently appointed into its night school, and after the State election was over your respondent's Committee on

Schools of Art and Design, upon a careful consideration of the subject, adopted, and the board of managers of the respondent approved, the following resolution:

"BALTIMORE, November 11th, 1895.

"The following action of the Committee on Schools of Art and Design was reported by its chairman, Mr. John M. Carter, and on motion, it was unanimously adopted:

"Whereas, the popular sentiment of all the citizens of Maryland is opposed to mixed schools; and

"Whereas, the appointment of colored pupils to this school, it is believed, has caused a large decrease in the number of white pupils attending the institute, thus lessening its power for good to the community.

"Resolved, that hereafter only reputable white pupils will be admitted to the schools.

"Resolved, that the actuary be directed to issue a circular to the members of the newly elected City Council, and other appointing powers, informing them of this action."

That thereupon, your respondent forwarded to each member of the City Council of Baltimore, and to the school boards of the said city and the various counties, a copy of the following circular and blank letter of appointment of pupil for the following year, 1896:

Maryland Institute
for the
Promotion of the Mechanic Arts,
Schools of Art and Design.

BALTIMORE, ————, 189—.

————————————, Esq.,

——Branch City Council, —— Ward ——

Dear Sir: In accordance with the contract between the Mayor and City Council and the Maryland Institute, each member of the City Council is entitled to appoint annually, one pupil to a four years' scholarship in the Institute Schools of Art and Design. These appointments should be made not later than the first of September next, so as to admit of the required report to the Mayor and City Council in that month; and also that pupils may be prepared to commence their studies on the opening of the schools. You are therefore requested to make an appointment within the time specified and forward the same to the actuary of the institute.

According to the rules of the institute, only reputable white pupils who will conform to the regulations and discipline of the school will be admitted.

In connection with the above, it is suggested on the part of the managers of the institute, that their strong desire is to have such students sent to them, as by age and talent will be able to comprehend the work to be performed, and by constant attendance and industry, secure to themselves all the benefits offered by these schools, to the end that they may not

only prove an honor to themselves, but also justify the efforts of the institute put forth in their behalf.

If appointed to the night school, the pupil must be fourteen years of age in the free-hand division, and fifteen years in the mechanical or architectural division.

Herewith please find appointment blank.

Very truly yours,

JOS. M. CUSHING,
President.

GEORGE L. MCCAHAN,
Actuary.

JNO. M. CARTER,
Chairman Committee on Schools of Art and Design.

BALTIMORE,———189 .

To the Board of Managers of the Maryland Institute for the promotion of the Mechanic Arts:

I hereby appoint, subject to the rules of the institute, ——— (residence ———) to the scholarship in your schools of art and design, under the contract between the Mayor and City Council of Baltimore and the Maryland Institute.

———

Member——— Branch of the
City Council———Ward——

And further answering the 12th paragraph of said petition, respondent avers that said ordinance and the contract made in pursuance thereof, were in view of the status of affairs then existing in our city and State. That no mixed schools then existed or were in contemplation. That on the contrary, separate schools, both public and private, for white and colored pupils were maintained in the city of Baltimore and throughout the State, and the sentiment of all citizens, both white and colored, was overwhelmingly in favor of maintaining said distinction.

That the said ordinance and contract must therefore be construed as applying to white pupils only, inasmuch as the schools of your respondent has been established and maintained only for white pupils.

That respondent never contemplated any other construction of said contract or ordinance and the experiment of receiving into the school the two colored pupils (one of whom remained such a brief period) appointed by Councilman Cummings was but tentative, with the hope that none others would be appointed, and in no wise an admission by this respondent of any contractural obligation.

And so with the admission of the two colored pupils now in the school, respondent received them before the hue and cry raised against their admission which has wrought such great damage to the school and promises to destroy its usefulness.

Further answering, respondent avers, that it was after the adoption of said rule of exclusion, and after and with full knowledge of the rejection of the petitioner that the Mayor,

Comptroller and register of the city reported that the said contract was being faithfully carried out by respondent, as will appear by their report to the City Council hereto appended.

And so with full knowledge of these facts the City Council, both in the years 1896 and 1897, approved and ratified the action of respondent by appropriating and directing to be paid to the respondent the annual appropriations of $9,000 each, provided by said contract.

And in further confirmation of the construction placed upon said contract by the city authorities; respondent appends hereto the opinion of Thomas Ireland Elliott, Esq., City Solicitor, given in response to an enquiry of the Chairman of the Committee on Ways and Means of the City Council who made the appropriation for the year 1897.

FEBRUARY 10, 1897.

To the President and Members
of the First Branch City Council.

Gentlemen: In reply to your communication of February 8, 1897, requesting me to submit to you a report of our inspection of the Maryland Institute, "as to the condition and manner in which said Institute is fulfilling its contract with the Mayor, City Comptroller and Register in the matter of instruction of the pupils sent there," we beg to report that we have visited the institution and are much pleased with the thoroughness and care with which nearly one thousand pupils are being instructed.

Very truly yours,

ALCAEUS HOOPER,
Mayor.

CHAS. D. FENHAGEN,
Comptroller.

WM. F. STONE,
Register.

SEPTEMBER 20th, 1897.

Frederick P. Ross, Esq.,

Member Special Committee, City Council of Baltimore,

Dear sir: I am in receipt of your letter addressing me the following inquiry:

"If a contract has been entered into between the Mayor and City Council of Baltimore and the Maryland Institute by which, for a period of eight years, the institute agrees to receive into its schools, for a full course of instruction, thirty-three students annually, for a consideration of $9,000 a year, one of said students to be named by each of the thirty-three members of the City Council. If subsequently during said period a rule is adopted by the Institute prohibiting colored students from entering its schools; and if, after the adoption of said rule, a member of the City Council appoints to a

scolarship under contract a colored youth who, because of his color, is denied admission, has the Institute violated the contract?"

In reply I would say that I do not think there has been any violation of contract.

I have taken occasion to examine the contract now existing between the Mayor and City Council and the Maryland Institute, and while I do not find that it anywhere contains the word "white," I am of the opinion that it is to be construed as if it did.

The general theory of unmixed schools supported in whole or in part by the city would seem to apply as well to schools of art as to those of the public school system, an application which, I am sure, neither race cares to modify.

The construction which I have given is apparently the one which the city has itself applied, since the same issue was raised in the year 1895, and, notwithstanding the refusal of the Maryland Institute to admit or accept colored students, appropriation was made to meet the contract.

It is a good principle of law that a cause of invalidating a contract once waived can not be again availed of. I remain,

Very truly yours,

THOS. IRELAND ELLIOTT
City Solicitor.

(Copy.)

XIII and XIV. Respondent admits the election of Dr. J. Marcus Cargill as a member of the City Council of Baltimore, on the 5th November, 1895, and again on the 3d November, 1896, as averred. Also, that on the 21st of February, and not during the month of September, 1896, as averred, the said Dr. Cargill, as such member of the City Council, did appoint the said Robert H. Clark, Jr., naming him in the letter of appointment as Robert H. Clark, to a scholarship in the school of your respondent; but your respondent avers that said appointment was written upon the printed blank form furnished said Cargill as aforesaid, and just above inserted in this answer, and was expressly made subject to the rules of this institute.

Respondent had then no knowledge of the qualifications of said Clark as alleged in said petition, but learning of his *dis*qualifications as to *color*, your respondent, through its president, adressed the following communication to said Dr. J. Marcus Cargill, declining to receive said Clark as a pupil in the school, and inviting Dr. Cargill to make another appointment of a pupil who should not be obnoxious to the rules of the institution:

"MARCH 11, 1896.

"Dr. J. Marcus Cargill, Member First Branch City Council, 11th Ward, 430 Biddle st., City.

"Dear sir: Your appointment of Robert H. Clark, 1130 Druid Hill avenue, to a scholarship in the Maryland Institute School of Art and Design, dated February 21, 1896, and on the blank form of the institute, was presented to the board of

managers of the institute, at its stated meeting of March 9, 1896, being its first meeting after the reception of said appointment.

"The board having been informed that the proposed pupil is not a white person, felt obliged, unanimously, to reject his nomination, as the rule of the schools subject to which he was appointed, allows only reputable white persons to be received as pupils.

"The board will be pleased to receive from you the nomination of any reputable white person as a pupil in the school.

"Enclosed please find a copy of the original notice sent to you November 20, 1895, and also a blank for a new appointment.

"Yours very truly,

(Signed). "Jos. M. Cushing.
"President."

"James Young,
"Secretary."

Respondent admits, that Dr. Cargill made no other appointment of a pupil in the year 1896, but it denies that "no appointment was made by the Mayor to fill said scholarship for 1896, which was and is still vacant." On the contrary respondent avers, that on the first day of October, 1896, respondent certified to his Honor, Mayor Alcaeus Hooper, the vacancy thus appearing from the Eleventh ward, as also all other vacancies existing among the pupils of the school credited to the various wards of the city under the ordinance and contract recited in the plaintiff's petition; and thereupon, his Honer, the Mayor, appointed other pupils to fill all of said vacancies: and that in this particular instance, his Honor did, on the 10th day of October, 1896, appoint Miss Carrie E. Keyworth, a pupil conforming in all respects to the rules and regulations of the institute, as a pupil in the night school of the institute representing the said Eleventh ward, and that said Carrie E. Keyworth has ever since been, and still is, a pupil in the said school by the Mayor's appointment as aforesaid.

XVI. Respondent avers, that the Mayor, Comptroller and Register of the city of Baltimore did, more than once during the year 1896, and also in the year 1897, thoroughly inspect the schools of this respondent as required by said ordinance, and professed themselves satisfied that said contract was being faithfully carried out by this respondent, as in truth and fact it was then, is now and ever has been since the date of said contract.

And your respondent denies that the said Mayor, Comptroller and Register have combined or conspired with this respondent against the said petitioner to deprive him and other colored persons of their rights as citizens of the United States, in violation of the Constitution of the United States. And respondent denies that the plaintiff has any rights in the premises as a citizen of the United States.

XVII. Respondent admits, that on or about the fourteenth day of September, 1897, the said Dr. Cargill was informed by George L. McCahan, actuary of the institute, that the scholarship for 1897, which said Cargill was entitled to fill, was vacant, and was notified that unless the vacancy was filled by September 30th, the Mayor would be called upon to make an appointment to fill said vacancy, and enclosing the circular letter of the same form and tenor as that hereinbefore attached and made part of this answer, signed by Jos. M. Cushing, president, George L. McCahan, actuary, and John M. Carter, chairman, requesting that the appointment be made and forwarded to the actuary. Respondent also admits that the said Cargill did immediately thereafter again appoint the said Robert H. Clark, Jr., to a scholarship in the institute school, *subject to the rules of the institute*, the said appointment being upon the same blank form supplied by the institute, as is hereinbefore appended to this answer.

Respondent admits, that on the evening of Monday, October 4th, 1897, at half-past seven o'clock, the said petitioner, with his father and one of the counsel appearing for him in this petition, presented themselves in the actuary's office and delivered to the president, in the presence of Mr. Carter, the chairman of the committee on schools, and the actuary of the institute, Mr. McCahan, the following letter from said Dr. Cargill:

BALTIMORE, October 2d, 1897.

Mr. George L. McCahan,
Librarian Maryland Institute for the Promotion
of the Mechanic Arts, Baltio., Md.

Dear sir: This will introduce to you the bearer, Robert H. Clark, Esq., and his son, Robert H. Clark, Jr. The latter is the youth who has been appointed by me to the city scholarship in the Maryland Institute from the Eleventh ward, by virtue of Ordinance No. 26, of March 7, 1893. Robert is a resident of the Eleventh ward, and his father is a citizen and taxpayer in the same ward. I know the young man to be in all respects eligible; of proper age for admission, of good character, moral habits, respectful, diligent and anxious to study and take advantage of his opportunities. He is of a tractable and kind disposition and will cheerfully and willingly submit to the discipline and authority of the institute.

He will present himself for admission at the institute on the opening night of the Fall session, Monday, October 4th, at 7.30 p. m. I therefore request that he be admitted as my appointee under the terms of the ordinance referred to.

Very respectfully,

(Signed), J. MARCUS CARGILL, M. D.,

430 W. Biddle St. 11th Ward City Councilman.

XVIII. Respondent admits that the said petitioner did so present himself on the evening of Monday, October 4th, 1897, and that he was refused admission to the schools by the pres-

ident of the institute. Further answering, respondent avers that not having received any notice whatsoever from the said Dr. J. Marcus Cargill on or before the thirtieth day of September, 1897, of an appointment by him of a pupil conforming to the rules and regulations of the school, this respondent did, on the evening of the same day, certify to his Honor, Mayor Alcaeus Hooper, the fact of said vacancy, as also of other vacancies existing under the ordinance and contract aforesaid. Thereupon, on the following day, the first of October, his Honor, the Mayor, did appoint Samuel C. Martin a pupil in the night school of the institute to fill the vacancy from the Eleventh ward caused by the failure of the said Dr. Cargill to appoint a pupil in the schools in accordance with the notification to him of the fourteenth of September, 1897, as aforesaid.

And your respondent avers that said rule or by-law was valid and not in violation of said contract or in contravention of the Constitution of the United States.

XIX. Respondent admits the excellence of its said schools and the extent and variety of their curriculum, but it avers that this was not due to the expenditures of public monies, which have been used only under the contracts with both city and State in the education of the pupils appointed under said contracts and the expenses of administration necessarily incident thereto. On the contrary, respondent avers that its schools were established many years ago solely and entirely by private subscription and by the tuition fees of a large number of pay pupils, of which class the number now in the schools greatly exceeds the number under the contracts with both city and State. That the equipment and endowment of said schools represent an outlay of nearly or quite $200,000, no part of which was contributed by city or State, or by taxation, or by contribution, so far as known, from any but white persons.

That as such private corporation, and especially as an institution of learning, it is competent for respondent to prescribe such reasonable rules and regulations, fix the qualifications and eligibility of pupils, enforce discipline, and do all things necessary and proper for the proper maintenance and management of its schools; and most of all, to prescribe restrictions and exclude such pupils, however meritorious otherwise, whose presence threatens to destroy the very existence of the school, as also the value and usefulness of its large and expensive equipment.

Respondent denies that the exclusion of colored citizens from its schools is an exclusion of such citizens from the equal advantages and rights of citizens on account of their color, or that it abridges the privileges and immunities as citizens of the United States, or that it deprives them of their property without the process of law, or that it denies to them the equal protection of the laws, or that it is in anywise in violation of the Constitution of the United States.

On the contray, Respondent avers that it is a private corporation and in no sense a State agency, and that such exclu-

sion cannot amount to a breach of the provisions and restrictions of the Constitution or laws United States, made and enacted for the benefit and protection of colored citizens, and directed to State action and not to the action of private corporations.

XX. Respondent denies that by said ordinance and contract, it agrees to receive pupils appointed by the members of the City Council without distinction as to color. And it denies that said contract is void, although it does refer to the admission of white pupils only. And respondent avers that if said contract be unlawful, unconstitutional and void, then the plaintiff is without remedy and can have no relief or claim under a void contract.

XXI. And further answering, respondent submits that the writ of mandamus is not the proper remedy for the plaintiff under any circumstances, as his application is simply an attempt to enforce an ordinary contract against a private corporation. Nor is the petitioner a party to said contract. On the contrary, that said contract is admittedly between this respondent and the Mayor and City Council of Baltimore, and that both of said parties have agreed that the same has been faithfully carried out and performed.

Respondents therefore prays that said petition be dismissed with costs to this respondent.

And as in duty,

JNO. M. CARTER,
EDGAR GANS.

STATE OF MARYLAND,

City of Baltimore, to wit:

I hereby certify that on this third day of November, 1897, before the subscriber, a Justice of the Peace of the State of Maryland, in and for Baltimore city, personally appeared Joseph M. Cushing, President of the Maryland Institute for the Promotion of the Mechanic Arts, and made oath in due form of law, that the matters and facts stated in the foregoing answer are true to the best of his knowledge and belief.

WM. B. HAMMOND, J. P.

Agreement of Counsel as to Facts.

(Filed November 29, 1897.)

It is hereby agreed this twenty-ninth day of November, in the year eighteen hundred and ninety-seven, between counsel, that the following shall be taken as matters of fact for the purposes of the demurrer to the answer:

That the said J. Marcus Cargill appointed the said Robert H. Clark, Jr., to the scholarship to the said Maryland Institute from the Eleventh ward, on the 21st day of February, eighteen hundred and ninety-six, as averred in the answer.

That Alcaeus Hooper, Mayor of Baltimore, appointed on the 10th day of October, 1896, Carrie E. Keyworth in the place of Robert H. Clark, Jr., refused; and that the said Alcaeus Hooper, Mayor, did appoint Samuel C. Martin on October 1st, 1897, in the place of the said Robert H. Clark, Jr., refused as aforesaid, as averred in the answer.

That Mr. Peabody's donation of the fund for prizes to pupils of the Maryland Institute was made in the year 1857.

It is also agreed that the catalogue of the said Maryland Institute for 1897-98, and the statements therein contained, shall be taken as part of said petition, and as matters of fact for the purposes of the said demurrer.

JOHN PHELPS,
W. ASHBIE HAWKINS,
Attorneys for Petitioner.

EDGAR H. GANS,
JNO. M. CARTER,
Attorneys for Respondent.

Petitioner's Demurrer to Answer.

(Filed November 29, 1897.)

To the Honorable, the Judge of said Court:

The petitioner, by way of reply to the answer of the Maryland Institute for the Promotion of the Mechanic Arts, heretofore exhibited and filed in this case, saith thereto, that the whole of said answer, and each and every paragraph thereof, is and are insufficient in law, and that respondent has shown no cause in law why the writ of mandamus should not be issued as prayed in said petition, and the petitioner demurs thereto.

JOHN PHELPS,
W. ASHBIE HAWKINS,
Attorneys for Petitioner.

Issue joined short on demurrer.

Order of Court.

(Filed December 10, 1897.)

Upon consideration of the petition for mandamus and answer thereto, under the demurrer filed by the petitioner to the answer.

It is this 10th day of December, 1897, adjudged and ordered, that the demurrer to the answer be over-ruled, and that the petition, showing no cause for mandamus, be and the same is hereby dismissed.

ALBERT RITCHIE.

Opinion of Court.

(Filed December 10th, 1897.)

(Inserted by Order of Petitioner's Attorney.)

The petitioner, Robert H. Clarke, Jr., a colored youth sixteen years of age, prays that a writ of mandamus may issue commanding the Maryland Institute for the Promotion of the Mechanic Arts, to admit him as a pupil into its schools of art and design. The petitioner rests his claim to be so admitted on an ordinance of the Mayor and City Council, of Baltimore, and the contract entered into between the city and said institute in pursuance thereof.

The case comes up for hearing on a demurrer to the answer.

The defendant was incorporated under the Act of 1849, ch. 114, and re-incorporated under 1878, ch. 313. The object of its incorporation is the encouragement and promotion of manufactures and the mechanic and useful arts, by the establishment of schools, by popular lectures, mechanical exhibitions and other means indicated in its charter.

In pursuance of its object, the respondent established schools of art and design, and while the city, under the authority of the State, has established for both races a most liberal and advanced system of public schools, it has no school in which the special studies of art and design are prosecuted as they are in the schools of respondent. From time to time since 1881, the city has passed ordinances and made contracts similar to the ordinance and contract now in question for the education of pupils in said schools.

The ordinance in question, No. 26, of 1893, authorizes the Mayor, Comptroller and Register to enter into a contract with the respondent "for the instruction of pupils" in its said schools of art and design for the period of eight years, and provides that "after the passage of this ordinance and annually thereafter * * * * there shall be appointed one pupil by each member of the First and Second Branches of the City Council, who shall be entitled to instruction for the period of four years in said schools." The ordinance further provides that in case of vacancies arising from the failure of members to make appointments, the same shall be filled by the Mayor; also that the Mayor, Comptroller and Register shall annually, or as often as they may deem it expedient, "inspect said schools, and the condition and manner in which the terms of said contract are being fulfilled," and, if said contract is being faithly complied with, the Comptroller is to pay the said institute annually the sum of nine thousand dollars.

A contract was duly entered into by the respondent in pursuance of this ordinance, whereby it agreed, in consideration of the annual payment of nine thousand dollars, to receive into its said schools of Art and Design thirty-three "pupils," for each of the eight years covered by the contract, to be appointed as provided in the ordinance, and the ordinance was in terms made part of the contract.

From their establishment up to the year 1891 these schools had been exclusively for white pupils, male and female. In that year one colored pupil was appointed and admitted, and he completed the course. In 1892 another colored pupil was appointed and admitted, but he left the Institute soon after. In 1895, since the date of the present contract, two more were appointed and admitted, and are now pursuing their studies.

The answer, however, avers, and the demurrer admits, that the overwhelming public sentiment, both white and colored, at the time these pupils were admitted, was against mixed schools; that their admission was but tentative, with the

hope that none others would be appointed, and in no wise as an acknowledgment of any contractual obligation; that notwithstanding the most earnest and zealous efforts of the managers and teachers to overcome the objections of the white pupils and their parents, the presence of these colored pupils was disastrous to the interests of the institute, largely reduced the number of its pupils, and threatened to destroy the usefulness of these schools.

The respondent, therefore, in November, 1895, adopted this by-law, viz: "Resolved, that hereafter only reputable white pupils will be admitted to the schools," and notice thereof was thereupon sent to each member of the City Council. In February, 1896, Dr. J. Marcus Cargill, a member of the City Council, appointed the petitioner as a pupil. The respondent declined to admit him on account of color, notified Dr. Cargill of the fact, and asked him to make another appointment. He having failed to do so, the vacancy was subsequently filled by the Mayor in October, 1896. In September last Dr. Cargill again appointed the petitioner as a pupil for 1897; the respondent again refused to admit him for the reason stated, and Dr. Cargill failing to make any other appointment, this vacancy was also filled by the Mayor.

The petitioner claims that by virtue of his recent appointment he has a clear legal right enforceable by mandamus to be admitted to the schools of respondent. He raises no question as to the validity of the contract. He insists that the word "pupils" embraced both white and colored, and alleges that his rejection under this discriminating by-law was a breach of contract, and also that the said by-law is void as being in violation of the Fourteenth Amendment of the Constitution of the United States, in that it abridges one of his privileges, or immunities as a citizen of the United States, and denies him the equal protection of the laws.

It is clear that the "immunity" clause of the amendment does not apply to this case. Under that amendment no State can abridge the privileges or immunities of citizens of the United States, but the right to free education is not a privilege or immunity incident to citizenship of the United States. Whenever it exists, it exists by virtue of the law of the State, and owes its existence altogether to the authority of the State. People vs. Gallagher, 93 N. Y., 435; Ward vs. Flood, 48 Cal., 36; State vs. McCann, 21 Ohio St., 210; Lehew vs. Brummell, 103 Mo., 550. This clause, therefore, does not require further consideration.

When, however, a uniform system of public schools has been adopted by the Constitution or laws of the State, no local board or any other State agency can discriminate on account of race, or impair the equal enjoyment of its privileges. Authorities supra, and cases cited by High, section 332. And a mandamus will be issued, under the "equal protection" clause of the 14th amendment, to enforce the right of any one who may be denied admission to the public schools on account of color.

The respondent, however, claims that under its charter it is a private corporation. If this claim be good, then this discriminating by-law is not within the 14th amendment, unless the operation of the contract in question is to make the respondent a part of the public school system of the city, and thereby a municipal agency, and thus, under the statute relating to public schools, also a State agency.

The prohibition of the amendment in this connection is, viz: "nor shall any *State* * * * deny to any person within its jurisdiction the equal protection of the laws." This amendment has been repeatedly construed by the Supreme Court, and it is well settled that its prohibitions refer exclusively to State laws and State action. This State action may be manifested by any one of the departments of its government, or by any of its officers or agents, or by a municipal corporation acting under legislative authority; but, unless the act in question be done in some way under the authority of the State, it is not within the prohibitions of the amendment. The amendment has no application whatever to the acts of private individuals or private corporations. Civil rights cases, 109 U. S., 11-17; Virginia vs. Rives, 100 U. S., 318; United States vs. Cruikshank, 92 U. S., 554; United States vs. Harris, 106 U. S., 638.

The Maryland Institute is neither a public nor *quasi* public corporation. There is not a single power exercised by its members in their corporate capacity which they are not competent to exercise as individuals, and it is a strictly private corporation. The Regents vs. Williams, 8 G. & J., 397; Perry vs. House of Refuge, 63 Md., 22.

The Fourteenth amendment, therefore, has nothing to do with this case, unless the status of the Maryland Institute as a corporation has been changed by the contract in question. The petitioner claims that this contract makes the respondent *pro hac vice* a municipal agency, and operates to make it part of the public school system.

The status of this corporation was defined by the Court of Appeals in St. Mary's School vs. Brown, 45 Md., 310, in which case was considered the validity of certain appropriations made to respondent and other institutions. It was there held that the Maryland Institute was not a municipal agent, was subject to no municipal control, occupid no municipal relation, was not subject to any of the ordinances or regulations adopted by the city under its authority from the State to establish a system of public schools, and that it was no part of the system established.

There has been no change since then in the conditions mentioned, unless it has been wrought by this contract, and this contract has wrought no change. The management of the institute is altogether in the hands of officers elected by its members; it is under no municipal control, is subject to none of the ordinances relating to public schools, and is no more a part of the public school system now than it was in 1876. The Mayor, Comptroller and Register are authorized to inspect these schools, and the manner in which the con-

tract is being complied with, but nothing more. The relation of the respondent to the city is simply that of a contracting party, and the contract is just such a one as the institute might make with any citizen who wished to have instructed thirty-three pupils to be designated in a given manner. The fact that this contract was made with the city, instead of with an individual, cannot change the corporate status of respondent, or make this any other than a private contract. It creates no possible official, governmental or political relation between the city and the institute, without which the respondent cannot be considered a municipal or State agency.

The city has ample power to contract with reference to municipal matters. It may contract for the erection of buildings, the construction of bridges, for paving the streets, and so forth, but the contractor does not become a part of the municipal government, or a municipal agency in any civil or political sense, by virtue of his contract.

Mechem on Public Officers, sec. 2–5.

There having been no change in the status of the respondent by reason of this contract, it being still simply a private corporation and no part of the public school system, it follows that the 14th Amendment has no application to the case, and the relation between the respondent and the city is a contractual one and nothing more. Whatever rights the petitioner has, therefore, must depend on the terms of the contract.

I cannot agree with the petitioner in the contention that he has rights under the ordinance, as separate and distinct from the contract. The ordinance did nothing but empower the officers named to make the contract, and had the institute declined to execute it, the ordinance of course would have amounted to nothing.

The position of the petitioner thus comes down to this: he claims to be a beneficiary under this contract, and as such, alleges that there has been a breach of it as against his rights, and asks the Court to enforce its performance by a writ of mandamus.

The respondent denies the alleged breach and avers, that in the light of the conditions existing at the time of the execution of the contract, the word "pupils" means white pupils. It further avers, that with full knowledge of all facts, the Mayor filled the vacancies created by the two rejections of the petitioner; that since his first rejection the city has twice made the annual appropriation under the contract; that in September last Mr. Elliott, the City Solicitor, gave an official opinion to the effect that there had not been any violation of the contract, and finally, that the city has always construed this contract in the same manner as has the respondent.

It is, however, altogether unnecessary in this proceeding, if not beyond the province of the Court, to construe the contract, because, whatever its true construction may be, the

petition must be dismissed. If it be construed to mean white pupils only, the respondent, being a private corporation and no part of the public school system, had a right to make a discriminatin, contract, and the petitioner would have no rights thereunder. If it be construed as embracing both white and colored pupils, then the action of respondent resolves itself simply into a refusal to perform its contract, and mandamus does not lie. Whenever it appears that the object of the petition is to enforce contract rights of a private character, the inquiry of the Court into the terms of the contract is at an end, and the construction of it, if in dispute, is for determination in some other proceeding.

It having been shown that the purpose of the suit is to enforce the performance of a private contract, the writ of mandamus cannot be issued. The remedy by mandamus "relates only to the enforcement of duties incumbent by law" on the respondent; it will not lie "for the enforcement of contract rights of a private or personal nature," and the Courts have "steadily refused to extend the jurisdiction into the domain of contract rights." High, sec. 25, and cases cited.

This restriction upon the remedy by mandamus applies, of course, to corporations as fully as to individuals. "It is well settled that private rights against corporations dependent wholly upon contract will not be enforced by mandamus. To warrant this writ against private companies, or their officers or agents, there must be some specific duty to the relator, expressly imposed by the terms of their charters, or necessarily arising from the nature of the privileges or obligations which the charters create." Rosenfeld vs. Einstein, 46 N. J., L. 481.

Such being the law, the city itself, even if there were a breach by the respondent, could not enforce the performance of this contract by mandamus, and so neither can the petitioner, even though he might be entitled to admission under the contract.

In accordance with the views expressed, I must over-rule the demurrer, and as the sufficiency of the petition also is brought under review by the mounting of the demurrer, and it shows no sufficient ground for granting the writ, I will also sign an order that it be dismissed.

ALBERT RICHIE.

Petitioner's Order for Appeal.

(Filed December 10th, 1897.)

MR. CLERK:—Please enter an appeal from the order of Court of December 10th, 1897, over-ruling the demurrer to the answer and dismissing the petition for mandamus.

JOHN PHELPS,
W. ASHBIE HAWKINS,
Attorneys for Petitioners.

Appellant's costs..... $34 75
Appellee's costs..... 8 90

STATE OF MARYLAND,

City of Baltimore, Sct:

I, ROBERT OGLE, Clerk of the Superior Court of Baltimore city, do hereby certify that the aforegoing *is* truly taken from the record and proceedings of the said Court in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the Superior Court of Baltimore city aforesaid, on the 6th day of January, eighteen hundred and ninety-eight.

(Seal's Place.)

ROBERT OGLE,

Clerk Superior Court of Baltimore city.

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is hoped that it will be put

ing a balance for next year of $58.70. The bathkeeper at Winans' Cove was paid $124.20, at Canton $125.70 and at Gwynn's falls, $125.

NO COLORED ART STUDENTS

Councilman Cargill's Scholarship Appointee Denied Admittance To The Maryland Institute.

The day classes at the Maryland Institute Schools of Art and Design reopened yesterday with an increase of twenty-five pupils over the number enrolled last year.

During the afternoon Robert H. Clark, Jr., colored, presented himself with his father and formally requested of the board of managers of the Institute admission to the art school. He had been appointed by Councilman Cargill, colored, of the eleventh ward, to fill the vacancy in the scholarships allowed the city because of an annual appropriation of $9,000 for the maintenance of the Institute. President Joseph M. Cushing told young Clark that he would not be received.

Last year Councilman Cargill appointed Clark, who was then refused admittance. City Solicitor Elliott later gave an opinion, in which he stated that the Institute managers could refuse admittance to the schools of colored pupils.

Councilman Cargill has determined to take the question into the courts and has retained Mr. George D. Penniman as counsel. He says that he will not name a white boy for the scholarship and, if defeated in the courts, will allow the scholarship to which his ward is entitled to remain unfilled until his successor is elected.

Mr. John B. Sisson has been elected a member of the board of managers of the Institute in place of Mr. William H. Perkins, deceased. Mr. Louis C. C. Krieger has been selected as instructor of the alumni classes.

It has been decided to open the night school on October 18. The bookkeeping class opens tonight.

The Baltimore University School of Law resumed its sessions last night at Brown Hall, 210 North Calvert street, with forty matriculates. Edgar Allan Poe has accepted the chair of corporations and constitutional law.

At a meeting of the executi
of the Maryland State Tempe
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in Baltimore during the wi
the climate in Klondike is
present his interests are bei
his partner, Mr. Edward P
of Jose, California.

Baltimore Sun 10/5/1897
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The First Integration of the University of Maryland School of Law

DAVID SKILLEN BOGEN

The 1935 court order requiring the University of Maryland School of Law to admit Donald Gaines Murray was the first success of the NAACP's campaign to end segregation in the public schools, but it was not the first time the law school had been integrated.[1] Nearly half a century earlier, in 1889, two black students had graduated from the school. Two other black students attended during the next academic year, but the law school then excluded them and all other blacks until Murray reopened the doors. The story of that first, brief integration of the university law school began with the struggle of blacks to be admitted to the bar and ended with the tragedy of virulent racial prejudice.

At the beginning of the nineteenth century each court in Maryland controlled the admission of lawyers to practice before it. None admitted blacks.[2] In 1832 a state statute setting some uniform standards for bar admission limited eligibility to free, white males. This racial restriction may have been prompted by Nat Turner's 1831 rebellion in neighboring Virginia, an event that led the 1831–1832 session of the assembly to enact other laws designed to control both the slave and the free black populations.[3] The codification of racial discrimination made it more difficult to eliminate in later years when white society was more willing to accept the existence of black lawyers.

The state prohibition against black attorneys did not end with ratification of the Fourteenth Amendment. In 1877 the Court of Appeals held that the amendment did not apply to admission to the bar. The following year an attempt to make black males eligible to practice law failed in the legislature. In 1884 the House of Delegates passed a measure striking the racial restriction, but it failed in the senate despite support for it expressed in newspaper editorials.[4] A Maryland court changed the law in 1885. Reasoning from an earlier decision of the United States Supreme Court, the Baltimore Supreme Bench held that excluding blacks from the practice of law was unconstitutional. On 10 October 1885 Everett Waring became the first black man admitted to legal practice in a state court in Maryland.[5]

Maryland blacks now had a reason to study law. "Reading" law in a lawyer's office was one way to qualify for practice, but few white lawyers would accept blacks. Only recently admitted to the Maryland bar themselves, black lawyers lacked the breadth of experience desirable in a mentor.[6] Law school offered a better alternative, and in 1887 two young black men applied to the University of Mary-

land. Harry Sythe Cummings, a Baltimore native and an 1886 graduate of Lincoln University, had spent a year reading law in the offices of a black attorney, Joseph Seldon Davis. Charles W. Johnson had just graduated from Lincoln.[7]

The law school had been founded in 1823 as a branch of the University of Maryland by David Hoffman, a celebrated innovator in legal education. The state took over the university in 1826, but, after disagreements with Hoffman, discontinued law school classes in 1833. When the law school reopened in 1870, the university was back in private hands. Until 1885 the racial prohibition on the practice of law made attendance by blacks unthinkable. Consisting of four full professors and four nonteaching attorneys, the Faculty of Law governed the law school. The Board of Instruction, which consisted of the four full professors and three assistant professors, did the teaching.[8]

George William Brown, a nonteaching faculty member, took a strong stand in favor of admitting Cummings and Johnson, and Severn Teackle Wallis, university provost, joined him. Although both men had been interned during the Civil War for fear that they would not support the North, they supported equality in the opportunity to practice law. Brown had been the chief judge of the Circuit Court of Baltimore City when in 1885 the suit for the admission of black attorneys to the bar was filed. Although he initially thought the issue had been settled by the prior Court of Appeals decision, he said, "It is a great injustice that no colored man can be admitted to the practice of the law. There is a large colored population in our State, and they ought to be allowed to enter any lawful occupation for which they may be fitted."[9] Wallis, the foremost Maryland lawyer of his time, was one leader of a reform movement to rid city and state politics of fraud and corruption. The movement sought to overthrow the machine Democrats by uniting independent Democrats and a Republican party heavily supported by blacks.[10]

Other nonteaching faculty members probably supported Brown and Wallis. George Dobbin and John H. B. Latrobe were the surviving members of the Faculty of Law from David Hoffman's era. When the law school had been revived, Dobbin had become the first dean. Latrobe had sought to preserve the Union although three of his sons had fought for the Confederacy. Another son, Ferdinand, was Baltimore mayor in 1885 and publicly favored the admission of blacks to the bar. The fourth nonteaching faculty member was Bernard Carter. A relative of Confederate General Robert E. Lee, Carter had sympathized with the South in the Civil War. During the suit to admit blacks to the bar, a reporter had asked Carter, then city solicitor, for his opinion. Carter replied that "he had not thought about the policy of the matter at all, but that personally he saw no objection whatever in admitting colored men to practice at the bar."[11]

The majority of the four teaching faculty members may have opposed the admission of black students. The dean of the law school, John Prentiss Poe, was later active in efforts to disenfranchise blacks. Two professors, Richard M. Venable and Thomas W. Hall, had been majors in the Confederate army.[12] Only Judge Charles E. Phelps had fought for the Union, and he was the only full professor on record in favor of black rights. In litigation over the admission of blacks to the bar, Phelps had characterized the racial barrier as a "relic of barbarism."[13]

With Wallis and Brown in the lead and Phelps, Carter, Latrobe, and Dobbins as likely supporters, the law school admitted Cummings and Johnson in 1887.

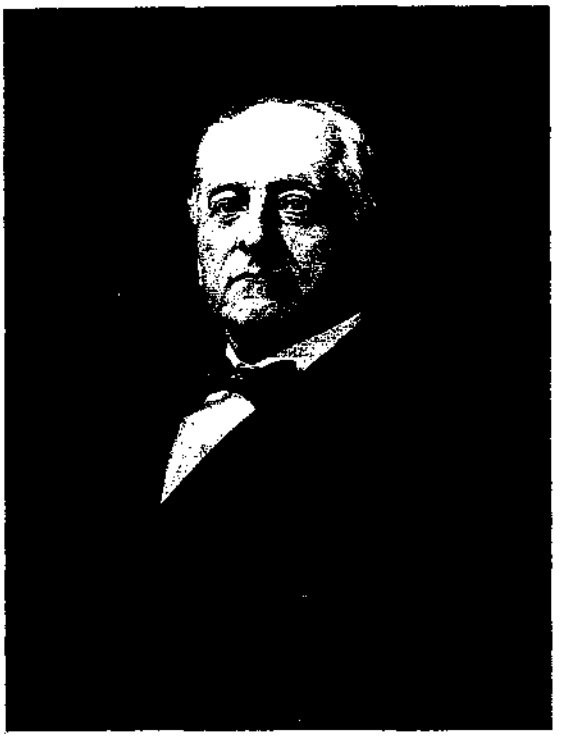

FIGURE 1. John Prentiss Poe, dean of the Maryland School of Law, 1870–1909. This portrait, oil on canvas, was a gift of the class of 1911. (University of Maryland School of Law. Photo: Rick Lippenholz.)

Some of the faculty disliked the change, but they accepted it. If Poe, Hall, and Venable had been determined to exclude blacks from the school, they might have succeeded. After all, Poe was the dean and Venable the most senior faculty member. Blacks in the classroom hardly threatened their status, for whites often taught Negro students in the segregated schools of Maryland. Indeed, the Baltimore City Council fought bitterly between 1885 and 1888 over whether to allow black teachers to teach in black schools. A strict party vote in 1887 rejected an effort to permit Negro teachers in black secondary schools, but in 1888, an ordinance allowing it was passed. The new ordinance met earlier objections by providing that white and black teachers would never be employed in the same school.[14]

Progress in race relations was mixed during this era: Baltimore was partially integrated and partially segregated. Many restaurants excluded blacks, and theaters restricted their seating. Even so, at least one white church had a Negro member, and some blacks performed in largely white troupes of entertainers. Court decisions had compelled the integration of municipal transit in 1871, and it remained integrated in 1887.[15] In this context the faculty may have been satisfied that more students at a proprietary school meant more fees. The faculty seems to have felt that sitting for an hour or two listening to a lecture in a classroom more closely resembled riding in a train than eating or playgoing.

Cummings and Johnson completed the three-year course in only two years, graduating in the spring of 1889. Johnson finished third and Cummings tenth in a class of thirty-three. White students at first had grumbled about their black classmates but eventually accepted them. At a class meeting before graduation Charles Johnson reportedly thanked whites for their kindness; he and Cummings, he said,

"had been treated with the utmost respect and made to feel that they were gentlemen associating with gentlemen." A leading contemporary student of race relations noted that "the graduating students themselves, by the good judgment and tact of the two colored ones, and the kindly feeling of a majority of the white ones, in return, prevented any color discrimination in seating the guests at the graduation exercises."[16]

Cummings and Johnson enjoyed success that appeared to bode well both for race relations and the law school. The black community feted the pair at a testimonial dinner at the Madison Street Presbyterian Church. Joseph Seldon Davis presided, Everett Waring delivered a speech, and the new graduates received law books. Afterward Cummings and Johnson plunged into work. Judge Phelps asked one of them to assist him in preparing his book on equity jurisprudence. But there were more pressing concerns: In November 1889 Cummings and Johnson successfully represented a black man accused of assaulting a white girl in Baltimore County. That fall two more black students enrolled at the law school—John L. Dozier, another product of Lincoln, and William Ashbie Hawkins, who had graduated from Centenary Bible Institute (later Morgan College).[17]

Yet the racial climate was turning cold. One reason was the political struggle between regular Democrats and the reform coalition. Reformers had succeeded in blocking the machine Democrats' legislative program. In response Senator Arthur Pue Gorman, state Democratic boss, in the fall of 1889 launched a campaign to weaken the racially mixed, independent-Democrat/Republican coalition by invoking the specter of black rule. Gorman said, "We have determined that this government was made by white men and shall be ruled by white men as long as the republic lasts."[18] Dean Poe was growing closer to Senator Gorman. Poe had always been a Democrat and since 1885 had openly pledged his support to Gorman's cause.[19] In view of the racial tone of the 1889 campaign, Dozier and Hawkins must have found life at the law school particularly difficult.

Discontent with integration at the University of Maryland now flared into open attack. The medical school faculty voted to deny admission to blacks. White students from the law, medical, and dental schools petitioned the faculty against the admission of black students to the law school. During the winter of 1889–1890 nearly all of ninety-nine enrolled law students signed a petition protesting black admissions. The petitioners kept up pressure to dismiss Hawkins and Dozier through the academic year.[20] In the summer of 1890 the issue went to the university regents, a group composed of the faculties of law, medicine, and dentistry, who held several meetings on it.

Meantime, fueling the controversy, Harry Sythe Cummings conducted a strong campaign for a city council seat in Baltimore's Eleventh Ward. It was probably apparent early in the year that his chances of success were high, and he did indeed win the seat in the November election.[21] The faculty's public statements did not mention this rise of a black lawyer to modest political power, but it may have affected the attitudes of the white students who demanded that blacks be excluded from the law school. The opening of Baltimore University Law School in the fall of 1890 gave segregationists new leverage.[22] Students unhappy at attending school with blacks could now go elsewhere. Too, old age and death weakened the regents'

FIGURE 2. Harry Sythe Cummings, 1889 graduate of the Maryland School of Law. Undated photo. (Courtesy of his daughter, Louise Dorcas.)

ability to resist student pressure. Dobbin and Latrobe were in their eighties, and George William Brown had died.

With the voice of the strongest supporter of integration stilled, the university surrendered to student agitation and the fear of revenue losses. In September 1890, reported Dean Poe, the regents "finally resolved that it would be unwise to endanger the school or jeopardize its interests in any way by any longer allowing colored students to attend the school in the face of such manifest opposition." Claiming that the presence of Hawkins and Dozier had caused a number of students to leave the school and others to refuse to enter, the regents cited the prospect of continued enrollment losses as the chief consideration in their decision to expel the two black students. In fact, the size of the school had changed only slightly between 1887 and 1890; there were 101 students enrolled when Cummings and Johnson matriculated and 99 when Hawkins and Dozier enrolled.[23] If expulsion of the 2 black students did not result in a significant increase in student numbers, segregation may have prevented more white students from leaving to attend the new rival.

In any case, Poe also attempted to justify exclusion of black students "in view of their exceedingly low record." The Baltimore *Herald* responded by reporting the words of a prominent jurist connected with the school. "We treat a colored student as we do a white one," he said, "and if he has no aptitude for the law we simply tell him we cannot take his money, as he will receive, of course, no equivalent for it." Hawkins himself wrote a protesting letter to the same paper. "The mere statement itself is enough to provoke an incredulous smile on the face of every man in Baltimore," he declared of the suggestion that his expulsion was based on record

and not on race. "It is bad enough to have the University of Maryland take our money, start us on our course, and then suddenly stop us for no other reason than that the white students do not desire to mingle with us, but to have one of the officers misrepresent us in this way is provoking in the extreme." Hawkins noted that although he had done poorly in Property, he had met the university requirements for retention and done so at a level higher than some white students who were continuing. Even Dean Poe had called his record a fine one. "The real and the only question underlying this difficulty is my race and not my intellectual fitness for the study of law," Hawkins wrote. "If it were not for my color there would be no trouble. . . . I do not care for my exclusion from the university. I can find some other place to pursue my studies, but the faculty does me an injustice and shows the weakness of its own cause when it charges that my exclusion is for any other cause than my color."[24]

Hawkins and Dozier faced difficulties in finding another place to pursue their studies. They sought to persuade Hawkins's alma mater, Morgan College, to open a law school. Facing financial problems, Morgan set up a committee to see if one could be established "without additional expense to the College." Judge Hugh Lennox Bond, one of the original trustees of Morgan, threw cold water on Hawkins and Dozier's hopes for obtaining a legal education in Maryland. He wrote Morgan College President F. J. Wagner, "I do not think a law school at Morgan College would be a success. Volunteer lecturers of any ability on law could not be obtained; and, as I understand you, the college will have to rely wholly upon the efforts of unpaid teachers."[25]

Judge Bond's letter exemplified "liberal" thought. A staunch Republican federal judge after the Civil War, he had ruled in favor of the integration of city transit. But Judge Bond was skeptical of professional education for blacks. "I do not think, as yet, the colored youth of our state have the education or the habit of close mental application to fit them for the study of law," he wrote. Bond thought he was being practical in urging manual labor instead of law: "There are a few who have been educated in more liberal states who have good positions at the bar, but the colored people do not support them, and they can hardly be called successful practitioners."[26]

Publication of Judge Bond's letter sparked more controversy than had the closing of the Maryland Law School to blacks. Letters from black lawyers poured in to attack his comments. Everett J. Waring contended that the black community did indeed support black lawyers, and he noted the outstanding record of Cummings and Johnson at the law school. Waring also pointed out that it was easier for a black to train for the professions than to get into trade school or a trade association to apprentice. Another recently admitted black lawyer, Robert A. McGuinn, agreed with Bond that blacks did not support their legal representatives as they ought, but he contended that five years was not a sufficient time to test whether attitudes would change. Of Judge Bond's advice to learn a trade, McGuinn wrote, "It is like telling a man to learn to swim on dry land." Harry Cummings also criticized the judge. He noted that black lawyers had been at least as successful in their first five years of practice as their white counterparts.[27]

Although Judge Bond saw vocational training as the first priority for black education, he did not support the University of Maryland's policy. He contended

FIGURE 3. This circa-1900 photograph of Harry Sythe Cummings (front row center) and W. Ashbie Hawkins (second row center), among other black lawyers and ministers working for civil rights, was taken in front of the home of Reverend Harvey Johnson (last row center). Others in the group include attorneys David Dickson (front row right) and Warner T. McGuinn (fourth row, second from right), and the Reverend William Alexander (second row left). (Suzanne Ellery Greene, *Baltimore: An Illustrated History* [Woodland Hills, Calif.: Windsor Publications, 1980], p. 167.)

that racial exclusion violated the university charter and argued against a law school at Morgan on the grounds that it would reduce the pressure on Maryland to conform to its obligations. Bond did "not propose to supplement by charity that which belongs to every citizen by right." (Since the charter made no reference to race, and the courts were not likely to find a commitment to race-neutral practices in its general language,[28] no one attempted to sue the university on Bond's theory.)

Bond ended his letter by suggesting the publication of the names of the faculty and students who voted against the black students. This advice was spitting into the wind. No strong constituency for racial integration existed in the white community. Indeed, race prejudice was becoming a political asset in the state. Only a few months later, William Cabell Bruce published a pamphlet called "The Negro Problem" which launched a political career that ended in the United States Senate.[29]

The excluded black students finished their legal education at Howard University Law School and became members of the Baltimore bar. In what must have been sweet revenge, W. Ashbie Hawkins subsequently led a successful court fight to overturn a series of residential segregation laws in Baltimore City.[30] The rising tide

of anti-black feeling, however, left private institutions strictly segregated. The faint hope that the law school's integration had raised in 1887 lay dashed. The law school did not come under state control until 1920, by which time the whites-only admissions policy had grown firmly entrenched. Only a courageous and unprecedented lawsuit could end it.

NOTES

1. The decision of Judge Eugene O'Dunne of the Baltimore Supreme Bench ordering the law school to admit Murray was affirmed by the Maryland Court of Appeals in *University* v. *Murray,* 169 Md. 478 (1936). See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Alfred A. Knopf, 1976), pp. 186–94.

2. See note, "*Attorney General* v. *Waldron*—The Maryland Judiciary's Expansive Power to Regulate the Bar Under the Separation of Powers Article; Intermediate Scrutiny Under Maryland's New Equal Protection 'Clause,' " *Maryland Law Review,* 41 (1982): 410. See also Anton-Hermann Chroust, *The Rise of the Legal Profession in America* (2 vols.; Norman: University of Oklahoma Press, 1965), 1:239–62. No black was admitted to practice law in any state until 1844, when Macon Allen was admitted to practice in Maine (see Walter J. Leonard, *Black Lawyers* [Boston: Senna & Shih, 1977], p. 49).

3. *Laws of Maryland, 1831,* chap. 268, sec. 2; Jeffrey R. Brackett, *The Negro in Maryland* (Baltimore: Johns Hopkins Press, 1889), pp. 236–38. Colonization of blacks in Africa under the auspices of the Maryland Colonization Society became state policy (*Laws of Maryland, 1831,* chaps. 281, 314). The Maryland General Assembly strengthened restrictions on the immigration of free blacks and the importation of slaves, restricted black ownership of firearms, limited religious meetings, and in general reenacted or extended a host of restrictions on blacks (ibid., chap. 323).

4. *In the Matter of Charles Taylor,* 48 Md. 28 (1877), reasoned that the practice of law was not a "privilege or immunity of citizens of the United States" on the basis of the Slaughterhouse Cases, 83 U.S. [16 Wall.] 36 (1873) and *Bradwell* v. *Illinois,* 83 U.S. [16 Wall.] 130 (1873). Taylor did not rely on the equal protection clause in his argument, and the court did not mention it. See also Margaret Law Callcott, *The Negro in Maryland Politics, 1870–1912* (Baltimore: Johns Hopkins Press, 1969), p. 63; Jeffrey R. Brackett, *Notes on the Progress of the Colored People of Maryland Since the War* (Baltimore: John Murphy & Co., 1890), pp. 72–76; and, for editorial support of the change, Baltimore *Sun,* 7 February and 12 March 1884.

5. *In the Matter of Charles S. Wilson,* Baltimore Supreme Bench, 19 March 1885. The slip opinion was reprinted in the *Sun,* 20 March 1885. See David Bogen, "The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Attorneys," *Maryland Law Review,* 44 (1986): 939–1046. On 10 October 1885 Everett J. Waring was admitted to practice before the Baltimore Supreme Bench on motion of Assistant States Attorney Edgar H. Gans. See A. Briscoe Koger, *The Negro Lawyer in Maryland* (Baltimore: A. B. Koger, 1948), p. 5; Baltimore City Superior Court Test Book, no. 3, 1880–1895, p. 205.

6. Waring graduated from Howard in 1885. Joseph Seldon Davis, another recent Howard Law School graduate, was admitted to practice on 1 March 1886 (Baltimore City Superior Court Test Book, no. 3, 1880–1895, p. 205).

7. *Sun,* 6 June 1904; *The Law School of the University of Maryland Catalogue* (Baltimore: Isaac Friedenwald, 1888), p. 6.

8. See George H. Callcott, *A History of the University of Maryland* (Baltimore: Maryland Historical Society, 1966), pp. 34–38, 47–54, 68–69.

9. *Sun,* 9 February 1885. "When an effort was made at one time . . . to refuse colored law students the privileges of the institution, he [Brown], together with his colleague, S. Teackle Wallis, took a very pronounced stand against any such narrow policy of exclusion" (Conway Sams, *Bench and Bar of Maryland: A History, 1634 to 1901* [Chicago: Lewis Publishing Co., 1901], p. 499).

10. William Cabell Bruce, *Recollections* (Baltimore: King Bros., 1936), pp. 134–54.

11. *Sun,* 10 February 1885. Eugene Fauntleroy Cordell, *University of Maryland, 1807–1907: Its History, Influence, Equipment and Characteristics, with Biographical Sketches and Portraits of its Founders, Benefactors, Regents, Faculty and Alumni* (2 vols.; New York: Lewis Publishing Co., 1907), 1:348–49. Dobbin graduated from the law school in 1830, when David Hoffman was its only teacher, and was elected a judge of the Supreme Bench in Baltimore in 1867. When in 1879 he passed the age limit of seventy, the General Assembly passed a special act to permit him to remain on the bench. He served as dean of the law school in its first year of revival, before yielding place to Poe (ibid., 2:7–8). Latrobe opposed slavery but doubted the feasibility of racial coexistence. His great passion was the project to colonize blacks in Africa. He drafted the constitution and ordinances for the government of Maryland in Liberia, served for many years as the president of the Maryland Colonization Society, and in 1853 became the president of the American Colonization Society. See John E. Semmes, *John H. B. Latrobe and His Times, 1803–1891* (Baltimore: Norman, Remington Co., 1917). On Carter, see Bruce, *Recollections,* pp. 158–64; W. Calvin Chestnut, *A Federal Judge Sums Up* (Baltimore: n.p., 1947), pp. 59–60; and Cordell, *University of Maryland,* 1:116–17.

12. Although Poe dropped racial classifications respecting bastardy and admission to the bar from Maryland laws when in 1888 he codified them at the assembly's request, in 1905 he wrote an unsuccessful constitutional amendment that would have prevented blacks from voting (Callcott, *Negro in Politics,* pp. 115–25). Born in Virginia, Venable served in the Army of Northern Virginia, rising to the rank of major of artillery and engineers. After the war he taught at Washington and Lee in the department of mathematics, receiving his LL.B. from that institution in 1868. He moved to Baltimore in 1869 and the following year became a professor in the law school, where he served for thirty–two years. Venable was also the senior partner of Venable, Baetjer & Howard and was active in numerous civic endeavors, particularly the development of the city's parks (Cordell, *University of Maryland,* 1:363–64). During the Civil War Hall wrote newspaper articles criticizing the Lincoln administration, for which he was imprisoned for one year. After his release (no legal grounds for detention were shown), he joined the Confederate army and eventually rose to the rank of major. When the test oath was removed in 1867, Hall returned to Maryland, dividing his time between journalism and the law. For twelve years (1870–1882) he was a member of the editorial staff of the *Sun.* He also served as city solicitor from 1878 to 1883. Hall taught international and constitutional law (Cordell, *University of Maryland,* 2:12–14).

13. *Sun,* 10 February 1885. Phelps, a brigadier general who had been seriously wounded in battle, opposed Reconstruction in Congress and voted against the Fifteenth Amendment (*Proceedings of the Memorial Meeting of the Bench and Bar of Baltimore City in Memory of Charles Edward Phelps, Late Judge of the Supreme Bench of Baltimore City. January 11, 1909*).

14. Brackett, *Notes,* pp. 77, 90.

15. See ibid., p. 60, where Brackett wrote: "Some little complaint has been made by respectable colored men against the discrimination berween white and colored citizens in the city park, in that lessees of the restaurant will serve the latter only at a stand without the restaurants. In such matters as these, however, the complaint of the colored people usually runs against a high wall, of strong and widely spread public sentiment against any change." See also, ibid., pp. 62–64, and Meredith Janvier, *Baltimore in the Eighties and Nineties* (Baltimore: H. G. Roebuck & Son, 1933), pp. 249, 276.

16. *New York Times,* 10 June 1889; Brackett, *Notes,* p. 77. See also *Sun,* 1 June 1889.

17. *Sun,* 7 June 1889; *New York Times,* 10 June 1889; Brackett, *Notes,* p. 77. Phelps acknowledged the help of neither Cummings nor Johnson; perhaps legal duties prevented the black student from being of assistance after Phelps selected him. For the 1889 black admittees, see *The Law School of the University of Maryland Catalogue* (Baltimore: Isaac Friedenwald, 1890), p. 6.

18. *Sun,* 22 October 1889. See also Callcott, *Negro in Politics,* p. 55; William George Paul, "The Shadow of Equality: The Negro in Baltimore, 1864–1911" (Ph.D. diss., University of Wisconsin, 1972), p. 183; *Sun,* 14, 17, 26, 29, and 30 October and 4 November 1889.

19. John R. Lambert, *Arthur Pue Gorman* (Baton Rouge: Louisiana State University Press, 1953), p. 127.

20. "The [Medical School] Dean then presented the application of two negro students for admission to the University. After general discussion it was: —Moved: —(Chew) That the Dean be instructed to say in answer to the applications, that the Faculty deem it inexpedient to admit colored students to the medical class. Carried." Minutes of the Faculty of Physic, 8 October 1889. These minutes are in manuscript, preserved in the archives at the Health Sciences Library of the University of Maryland at Baltimore. See also *Baltimore American,* 15 September 1890, and *New York Times,* 15 September 1890.

21. Suzanne Ellery Greene, "Black Republicans on the Baltimore City Council, 1890–1931," *Maryland Historical Magazine,* 74 (1979): 205.

22. Baltimore *Morning Herald,* 9 August 1890.

23. *Baltimore American,* 15 September 1890. See also *New York Times,* 15 September 1890; *Maryland Law School Catalogue, 1888;* and *Maryland Law School Catalogue, 1890.*

24. *Baltimore American,* 15 September 1890; Baltimore *Sunday Herald,* 14 September 1890; Baltimore *Morning Herald,* 15 September 1890. See also *Baltimore American,* 17 September 1890.

25. Edward N. Wilson, *The History of Morgan State College* (New York: Vantage Press, 1975), pp. 57–58; *Baltimore American,* 16 December 1890.

26. *Baltimore American,* 16 December 1890. On integrating streetcars, see *Field* v. *Baltimore City Passenger Railway,* 9 F. Cas. 11 (D.C. Md. 1871) (no. 4763). Judges Giles and Bond sat jointly. See also *Baltimore American and Commercial Advertiser,* 13 November 1871. As a Radical Republican, Bond had been the only state judge likely to issue writs of habeas corpus to protect freedmen from servitude under illegal indentures (Barbara Jeanne Fields, *Slavery and Freedom on the Middle Ground: Maryland during the Nineteenth Century* [New Haven: Yale University Press, 1985], p. 151; Richard Paul Fuke, "Hugh Lennox Bond and Radical Republican Ideology," *Journal of Southern History,* 45 [1979]: 569–86).

27. *Baltimore American,* 17 December 1890.

28. Ibid., 16 December 1890. In *Clark* v. *Maryland Institute,* 87 Md. 643 (1898), the Maryland Court of Appeals held that the institute was not bound by its contract with the city to admit black students nominated by city council members.

29. *Baltimore American,* 16 December 1890; William Cabell Bruce, *The Negro Problem* (Baltimore: Murphy, 1891).

30. Garrett Power, "Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913," *Maryland Law Review,* 42 (1983): 289–328. See also W. Ashbie Hawkins, "A Year of Segregation in Baltimore," *Crisis,* 3 (1911): 17; *State* v. *Gurry,* 3 Balt. City Ct. 262 (1913), aff'd 121 Md. 534 (1913); and *Jackson* v. *State,* 132 Md. 311 (1918). The *Jackson* decision was held in the Maryland Court of Appeals until after the decision of the United States Supreme Court in *Buchanan* v. *Warley,* 245 U.S. 60 (1917), a case in which Hawkins filed an *amicus* brief.

7

o hundred letters of con- been sent to Dr. and Mrs. of prominence in the Pres- her churches in the United s the Doctor has become ac- his long career as a minister t a member of the General Presbyterian Church. Car- ent a happily worded letter in, as did also Bishop Wil- cticut, senior bishop of the copal Church, and Rev. Dr. y of Episcopal commit- nity.

... od from Rev. Dr. Rev. ... Houston Eccleston, ell and Rev. Dr. Julius E. the Protestant Episcopal n Rev. Thomas S. Lee, of St. hone Church, Washington, of the Baltimore Cathedral. from Presbyterians. prominent Presbyterians in e country who sent letters o were: Rev. Dr. John Hall, e Church, New York; Rev. ler, of Brooklyn; Rev. Geo. niversity Place Church, New essman John A. Bingham, of en W. Thurman, of Colum- Armstrong, New York; Rev. president of Auburn Theo- y; ex-Congressman William ork; Judge Cyrus Pershing, Dean J. O. Murray, Revs. rves, William M. Pax- arfield and William H. eton Theological Seminary; odd, of Princeton College; rkes, of Danville Theologi- evs. M. B. Riddle and T. H. ozauy Seminary; Rev. Fran- nion Seminary, New York; o, secretary of the Presby- publication, Philadelphia; ige, secretary of the Pres- af. education, Philadel- F. Ellinwood, secretary rian board of foreign mis- ; Rev. James Allison, editor rian Banner, Pittsburg; W. f the Interior, Chicago; Rev. editor of the Herald and onati; Rev. T. S. Hamlin, of the Covenant, Washington; underland, B. F. Bittenger er, Washington; Rev. R. R. Church, New York city; Sample, Westminster York city; Rev. J. S. m Church, New York ries L. Thompson, Madison New York city; Revs. T. an ... on Phraner, New s ... Agnew, George D. ston, ... Lowrie, R. M. Pat- E. Schenck, Philadelphia; Cer and Rev. S. J. Niccolls, J. P. E. Kumler, Pittsburg. of Anniversaries.

dding was the third notable ich Dr. Smith has celebrated s. The first was his silver storate of Central Presbyte- hich occurred in March, 1887. as the golden anniversary of the ministry, which was ob-

and Useful Life.

native of Mercer, Pa., and a fferson College, at Canons- was licensed to preach by the rie in 1841 and did missionary in the oil regions. he pastor of the Presbyterian native town, and remained d to the Second Presbyterian more in 1849. He remained church for eleven years, re- o accept a chair in the Dan- logical Seminary. The break- ivil war interfered with this Smith came back to Balti- pastor of the Central Presby- where he continued until en he gave up the active church and was elected its

ently been elected a commis- Presbytery of Baltimore to- embly of his church, and, in rving on many committees, erator of the assembly which t Omaha, Neb.

Mrs. Smith.

as born at Canonsburg, Pa., est daughter of Dr. Jonathan physician and surgeon, of ylvania, whose father, a Bap- came to this country from ade her husband's acquaint- ras a student at Canonsburg d to ... August 20, 1845. ... andchildren. ree ... Dr. Joseph T. Smith, of Ba...more; Rev. J. Ritchie of the First Presbyterian ekill, N.Y., and William Let- of this city. The couple also ildren, one of them being h the third.

e of the Callers.

rian ministers of Baltimore ent at the reception included: . C. Maloy, Rev. and Mrs. Thomas and Mrs. Jere Witherspoon, Rev.

ben, of Washington, D. C., and Miss Mary W. Scott, of Warrenton, Va. All the maids were gowned alike in Nile green silk mull, trimmed with ribbon of the same color and with narrow white lace. They carried shower bouquets of Bride roses tied with Nile green ribbons.

The groom's best man was his brother Mr. Archie Stuart, of Scotland. The ushers were Messrs. Grosvenor Ransom, H. Noble Tabb, Arthur Brogden, N. Rozer Williams, Dorsey Macgubbin Williams and W. S. G. Williams.

While the wedding party was entering and leaving the church the march from "Lohengrin" and Mendelssohn's wedding march were played by Miss Charlotte S. Crook. Before and during the ceremony she played an overture to "Zampa," variations of the song "Call Me Thine Own," "Narcissus," Intermezzo from "Cavalleria Rusticana," selection from "The Rose Maiden" and Handel's "Largo."

After the ceremony a reception was held at the bride's home, 915 McCulloh street, for only the members of the bridal party.

The couple left later for a wedding journey North and West. They will return to Baltimore next month, and on December 7 will sail for their future home, near Edinburg, Scotland.

OBITUARY.

Thomas P. Doughty.

Mr. Thomas P. Doughty died early yesterday morning at the Johns Hopkins Hospital from chronic rheumatism.

He was sixty years old and was born in North Hampton, Va. At the age of twenty-four he enlisted in the nineteenth Virginia infantry and served throughout the civil war.

In 1866 he came to this city, and until 1873 was in the wholesale grocery business. From 1873 to 1878 he was a member of the firm of Richard T. Waters & Son, wholesale lumber merchants, and subsequently he was in the firm of Samuel E. Egerton & Co. Owing to rheumatic troubles Mr. Doughty retired from active business ten years ago, and for the past five years has lived at the Johns Hopkins Hospital.

His first wife was a Miss Dunton, of North Hampton, who died in 1866. In 1868 he married a daughter of Mr. Richard T. Waters, who survives him. Two children also survive him. They are Mrs. William D. Turner, of Isle of Wight county, Va., and Mr. Howard W. Doughty, of this city.

Capt. Charles E. Stevenson.

Information has been received in Baltimore that Capt. Charles E. Stevenson died last Friday at Salem, N. C., after a lingering illness, of Bright's disease.

He was a traveling salesman for Daniel Miller & Co. until 1873, and had traveled for Hurst, Purnell & Co. and John E. Hurst & Co. since that time. Captain Stevenson was born in Indiana about fifty-four years ago. He was raised in Kentucky, and at the outbreak of the civil war enlisted in the Confederate army from Russell county, in Southwest Virginia. At first he was a private, but he afterward organized a company and served throughout the war with distinction.

The Captain married Miss Sallie Kramer, of Salem, N. C. He resided in Baltimore until his health became poor, when he removed to Salem.

Jacob Feilheimer.

Mr. Jacob Feilheimer died last evening at his home, 665 West Fayette street. He had been suffering for six weeks with kidney disease. Mr. Feilheimer was born in Germany fifty-seven years ago, and came to this country when a boy. For thirty-five years he had been engaged in business in Baltimore, at the time of his death having a millinery store on Lexington street. Mr. Feilheimer was a charter member of the Order of B'nai B'rith. He leaves a widow and the following children: Jerome, Simon, Herbert and Miss Hettie Feilheimer. His mother lives in Washington.

Lewis Moore, Sr.

Mr. Lewis Moore, Sr., of Philadelphia, and formerly of Baltimore, died yesterday at the home of his sister-in-law, Mrs. E. F. Fairbank, 1127 Argyle avenue, whom he was visiting. He had been to his former home in Fredericksburg, Va., and was on his way to Philadelphia. Mr. Fairbank was seventy-six years old, and was for a number of years in the shoe business in Baltimore. He left this city soon after the war and went to Philadelphia, where he went into the same business. A son, Lewis Moore, of Philadelphia, survives him. His body will be sent to Fredericksburg for burial.

Mrs. Elizabeth L. Cox.

Mrs. Elizabeth L. Cox, sixty-four years old, died at her home, 1735 North Broadway, last night. She was a daughter of the late Nathaniel and Elizabeth Kirby and the wife of Mr. John Cox, who for many years was city printer. Three sons and two daughters survive her. Her sons are Harry C., James and Charles L. Cox, of the firm of John Cox's Sons. One of her daughters is the wife of Mr. Charles H. Evans, United States marshal, and the other is Mrs. James C. Davis, of this city.

from Ella Harrison, W. Annie O'Neill, Ida E. Haffke, physical instructor, and Harry F. Pratt, drawing teacher in colored schools.

Samuel Newton and Edith Lacy were appointed to vacant scholarships in the Maryland Institute.

It was announced by President Morris that the idea of sending a school exhibit to the Atlanta Exposition had been abandoned, as information had been received that all the space for educational exhibits at the exposition had been given out.

MARYLAND INSTITUTE.

Art Classes of the Day School Resume —Some Improvements.

The art classes of the Maryland Institute day school reopened yesterday for the term of 1895-96.

During the summer vacation the teachers' rooms have been newly painted to correspond with the board-room, on the opposite side of the corridor. Pictures have been rehung and many new ones added. All these rooms are now open to the public. They contain an attractive and interesting exhibit of students' work in drawing, painting, sculpture and designs, together with a large collection of autotypes, photographs and oil paintings. In the board-rooms are two fine paintings lent by Mr. Cantley, of this city, one representing St. Luke writing the gospel, said to be by Rubens, the other a fine old landscape of the eighteenth century, "Crossing the Ford at Daybreak."

By a rearrangement of the library all the art and technical books have been put in the annex connecting it with the principal's room. New showcases are in the art library for the display of vases, tiles, bronzes, bric-a-brac and fine draperies and textiles contributed by the Decorative Art Society, of this city.

It has long been the desire of the board of managers to establish in connection with the art schools a museum of works of art. The beginning has now been made, and although as yet unpretentious, it is hoped that new acquisitions will be made in the near future to make the Maryland Institute one of the most attractive places for strangers, as well as residents of Baltimore, to visit.

PEABODY INSTITUTE.

Conservatory and Art Gallery Reopened —Miss Kennedy Wins a Scholarship.

The Peabody Institute reopened its conservatory of music and its art gallery yesterday.

In the conservatory new students were enrolled and the classes were organized. The number of students is expected to be about the same as last year, which had the largest record of attendance in any year since the conservatory was founded twenty-five years ago.

The musical faculty awarded the scholarship in vocal music, founded by the late Charles J. M. Eaton, to Miss Lydie Kennedy, of 320 East Lafayette avenue. It is for three years. There were six candidates for the scholarship, but the award to Miss Kennedy was made unanimously. Signor Minetti was the chief examiner.

The committee of the Institute trustees in charge of the lectures has decided to arrange no regular course running through the winter, as has been the custom for many years past. The change was made because the course has not been profitable for several years. Should any distinguished European specialists visit this country in the winter the committee will make an effort to secure them for lectures at the Peabody.

The library has been open since September 1. It has recently received several large invoices of rare and costly books, purchased at auction in England.

Training School of Elocution.

The Baltimore Training School of Elocution, Literature and Physical Culture, 2413 St. Paul st., reopened yesterday. The scholarship offered to a high school or city college graduate was awarded by examination to Miss Bertie Hall. Two new features are added this year—French under a native teacher, and fencing under Miss Esther Porter. On Friday night an opening reception will be held in the school parlors. The course of Monday lectures will be resumed in November, and the usual students' recitals be given during the year.

Woman's Medical College.

The fall session of the Woman's Medical College, corner of McCulloh and Hoffman streets, was opened yesterday. Addresses were made by Dr. Charles O'Donovan and other members of the faculty. Nearly fifty students were present. At night a reception was held at the college.

School of Law.

The Baltimore University School of Law opened last night at 210 North Calvert street with thirty-five students. The opening lecture was by Mr. William F. Campbell, dean of the faculty. Addresses were made by Mr. Howard Bryant and Mr. James J. Ringgold.

Baltimore and Ohio Y. M. C. A.

The night school of the Baltimore and Ohio Young Men's Christian Association was reopened last night with a reception and entertainment.

Beloved," will soon be completed by Miss Katharine Pearson Woods. This work has occupied nearly five years.

Mrs. George Whitelock is preparing a "Blue Book of Holland," which will be illustrated with blue prints from photographs taken in that country.

Mrs. Elizabeth Brown Davis is engaged in preparing for the Navy Department at Washington a portion of the American Ephemeris and Nautical Almanac for 1900. The time embraced is from 1891 to 1899 inclusive. The almanac comprises seven volumes. Mrs. Davis has also in preparation a Child's Astronomy.

A portrait of Mrs. Mary Spear Tiernan, one of the founders of the club, was presented by Rev. William Sharp through Mrs. Charles E. Phelps.

CHRISTIAN ENDEAVORERS.

Plans for the Annual State Convention to Be Held at Hagerstown.

Contrary to the established precedent of holding their conventions in Baltimore, the Christian Endeavorers of Maryland will this year meet in Hagerstown, October 29—31 being the dates on which it will be held.

The meetings will be held in the Opera House, and overflow meetings in the adjacent churches. Among the distinguished speakers will be Rev. Drs. Behrends, McCrory and Puddefoot.

The railroad companies are lending their aid to make the convention a success by reducing the rates to 2 cents a mile each way. This rate will apply not only from Baltimore to Hagerstown, via either the Western Maryland or the Baltimore and Ohio Railroad, but also to Baltimore from points on the various lines centering there. Delegates residing along the lines of the Baltimore, Chesapeake and Atlantic Railway will be favored with tickets to Baltimore and return at one fare for the round trip. Tickets to Baltimore and from Baltimore to Hagerstown can be purchased only on card orders, which can be had by applying to the secretary of each local society.

The great day of the convention will be Thursday, the 31st, when it is proposed to run a special excursion from Baltimore via Western Maryland Railroad. The train will leave Hillen Station about 8 A. M., arriving in Hagerstown about 11 A. M., and returning leave Hagerstown about 9 P. M. The cost of the tickets will be $1 25 for adults and 65 cents for children.

ROUGH-AND-TUMBLE FIGHT.

Row on "the Space" in which a Dozen Men Took Part.

A lively scrimmage which took place yesterday afternoon on Centre Market space resulted in three men going to jail and one to the City Hospital.

The trouble began between two men who quarrelled in front of a saloon near the corner of Centre Market space and Lombard street. They came to blows, and the cry of some one that a fight was in progress caused a general outpouring from the saloons in the vicinity. Friends of both contestants were for a time spectators of the affray, but soon no less than a dozen men were engaged in a catch-as-catch-can fight.

Patrolman George Smith appeared on the scene and as many of the fighters as could get away made their escape, but the patrolman succeeded in cornering four of the men. The prisoners gave their names as John Dunn, Thomas Connor, Hugh Kelly and John Caulfield. They were arraigned before Justice Murray, charged with disturbing the peace, and each was fined $5. They were unable to pay and were sent to jail in default.

While the trial was in progress Turnkey Manning discovered that John Dunn was bleeding from a stab wound in the side near the heart. Dunn said that Caulfield had stabbed him. Caulfield declared that he did not stab Dunn and also denied that he was engaged in the fight. Patrolman Smith testified that Caulfield not only was in the fight, but that he struck Dunn while waiting at the box for the patrol wagon. Connor and Kelly both said they saw Caulfield have a knife in his hand, but did not see him use it. Dunn was sent to the hospital for treatment.

EFFICIENT POLICEMEN.

Captain Auld, Lieutenant League and Patrolman Edwards Reappointed.

The police commissioners yesterday reappointed Capt. Benjamin F. Auld, Lieut. Geo. League and Patrolman David Edwards, all of the eastern district.

Captain Auld was born in Baltimore in 1828, was appointed a sergeant of police in 1860 and soon after was called to do some important detective-work, which he did to the satisfaction of the department. Continued good work won him his promotion, and in 1871 he was made a lieutenant, which position he held twelve years and five months, when he was appointed captain.

Lieutenant League was born in 1843 and was appointed a patrolman in 1870. He was made a sergeant in 1876 and was commissioned a lieutenant in 1883. His record has been an honorable one and many important arrests stand on the records to his credit.

was opened yesterday. Religious were conducted at First Luthera corner of Fremont avenue and street, by Rev. Dr. G. U. Wenner, of president of the deaconess boa General Synod of the Evangelical Church. The home will start deaconesses, of whom Miss ... Shaffer will act as head sister.

Died from Their Injuri

Hynson Eoy, aged twenty-five y yesterday from injuries which he Monday by being run over by a c he was driving at the corner o avenue and Pratt street. His taken to his home, corner of Gilm Henry streets.

Thomas Johnson, colored, ... years, died yesterday at the City injuries received Monday while u wagon at the wharf of the old B steamers.

Baptist Orphanage.

The trustees of the Baptist have turned over the management board of ladies. The ladies ha Mrs. John M. Keeler president; M Levering, Sr., Mrs. J. Davidson an Field, vice-presidents; Mrs. Sau corresponding secretary; Mrs. (rer, secretary, and Mrs. Foster Several improvements will be orphanage.

The Wharton Meetin

The union meetings conducted auspices of Rev. Dr. H. M. Whart tinue all this week. Last eveni H. K. Walker preached at Brow Church. Tonight Dr. H. W. Bat preach at Eutaw Place Bapt Thursday Dr. M. D. Babcock is Central Presbyterian Church. F. Latane is to preach at First Co Church.

A Coming Bazar.

The ladies interested in the ba to be held at Music Hall Novem 23 for the benefit of the Baptist C this city and the Whosoever Far Va., have elected Rev. Dr. H. ... president; Mrs. James Pollard dent; Miss Nellie Martin, sec Mr. A. S. Cross, treasurer. Dr. engaged the entire building for

A Daily Polish Newsp

Mr. George W. Wezaot, who h has published Polonia as a w newspaper, will begin next Satu it as a daily afternoon paper. ... editor-in-chief, and will have as him Mr. Joseph Bernolak, who h nected with the weekly from th of its existence. The publicatio 603 South Bond street.

Liquor License Reve

City Register Robb received terday from State Treasurer $6,704 77, being three-fourths of of the clerk of the Court of Co for liquor licenses for the q August 31. The total receipts from that source amount to $40 crease of $1,906 07 over 1894.

Straw Ride Partie

A lively straw ride party left of Mr. Samuel J. Diggs, 1717 Ea street yesterday. Those in the p the Buffalo Hill Wild West sh rode around the streets for an h turning to the house from which

A straw ride around the city v to friends of Mr. George Reumi stead.

Delegates to Purity Co

The president of the Baltim Endeavor Union has appointed delegates to the National Purity be held here October 14, 15 an A. Abbott, Rev. Geo. L. Curtis Swenzel, Miss Sallie Pr...mar G. Bell, Miss Lulu Wicks and Anschutz.

Food or Murder

Edward Evans was sent to the rection yesterday for two mont Schenkol. Wm. E. Honaberger Lee street, said Evans went to stated that he would kill eve house if he did not get somethi Honaberger called Patrolman ... rested Evans.

A Big Pile of Mo

The quarterly count of fund treasury, which was made yeste a total of $9,250,000. Of this a was in gold, $5,818,534 in standa lars and $1,702,200 in currency.

Died from Lockja

Harry Johnning, aged seven 1013 North Calhoun street, die from lockjaw. His fatal illne sult of an injury to one of his eleading a bicycle.

"Luck and Pluck

Dr. J. J. Lafferty, of Richm lecture on "Luck and Pluck" of the Epworth League Thursd St. Paul's Methodist Episcopal C

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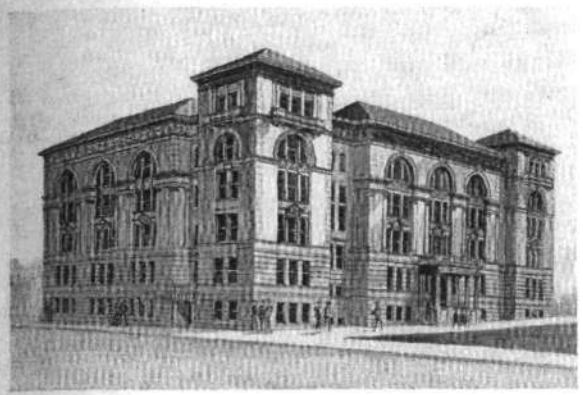


New Baltimore City College, Howard Street.
Baldwin & Pennington, Architects. Henry S. Rippel, Builder.

Other views presented herewith show the ASSEMBLY HALL of this institution, with the sewing class engaged therein, and the new PHYSICAL LABORATORY, with class also at work (pages 17 and 18).

SOME FAMOUS SCHOOLS: Most notable among the higher institutions of learning at Baltimore is the JOHNS HOPKINS UNIVERSITY, originated in 1867 and founded in 1874, with an endowment of $3,500,000, furnished by JOHNS HOPKINS, a Quaker merchant and banker of the city. DANIEL C. GILMAN has been its president since December, 1874, and to him, more than to any one else, it owes its form of organization, practical working, and success.

During the twenty-one years since it was founded, Johns Hopkins has acquired a name ranking it with Harvard, Yale, and the other great higher educational institutions of the country. It has now enrolled, its medical department not included, 600 students; it has a staff of seventy professors, several of them men of world-wide reputation, and has attached as lecturers some of the most eminent men in every department of learning.

The scheme of instruction at the Johns Hopkins is the university course proper, viz.: advanced and special instruction, and its facilities, therefore, mechanical and practical, are as comprehensive as money affords. Its laboratories, libraries, and bureaus of aids to research, and conveniences for study generally are of the most complete and convenient sort.

The principal buildings of this university are shown in an engraving of this matter. These buildings are: 1. The Central or Administration building, containing the president's office and class rooms for classical and oriental studies; 2. The Library building, containing 70,000 volumes; 3. The Chemical Laboratory, large enough for 150 workers; 4. The Biological Laboratory; 5. The Physical Laboratory; 6. The "Gym"; 7. Levering Hall, a Y. M. C. A. building, presented by EUG. LEVERING, merchant, and president of the Board of Trade; 8. McCoy Hall, bequest of the late Jno. W. McCoy, containing the museums, botanical, zoological, mineral, etc., autograph, and literary, and numismatic collections, etc.; 9, 10, 11, 12. The president's residence and other smaller buildings. These are situated in a group at Monument, Howard, and Eutaw Streets, in the heart of the city. The Medical College and Johns Hopkins Hospital form an entirely distinct institution, located in another part of the town.

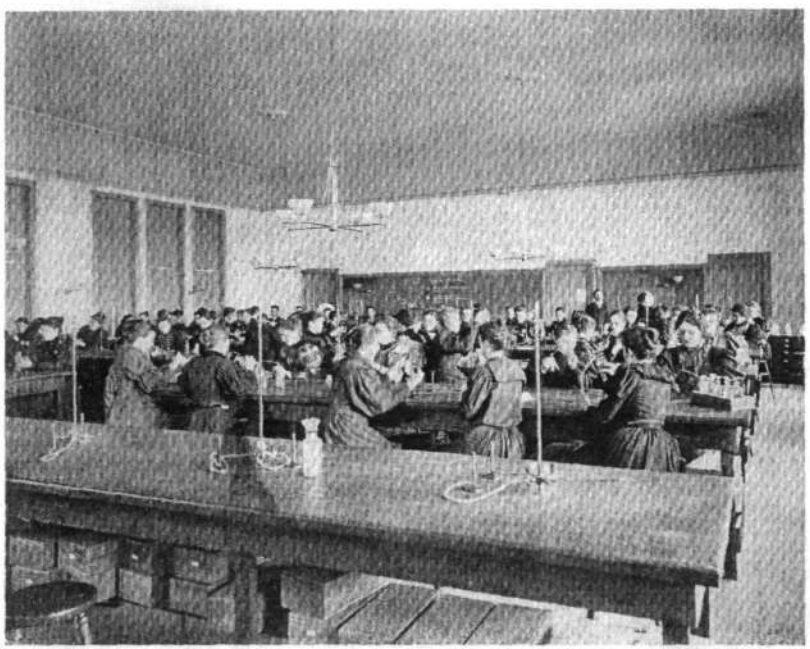
the State, is situated in Baltimore, at Lafayette and Carrollton Avennes. It occupies there the stately structure shown in the engraving on page 16 of this matter, a building French Renaissance in its architecture, erected in 1874 at a cost of $100,000, and enlarged in 1894 at an additional expense of $40,000.

This school was founded in 1864 and reorganized in 1868. It is free to certain appointees apportioned among the various Maryland counties and to this city; all others pay. There are 234 free scholarships, two for each representative in the General Assembly of the State. A limited number of students are admitted who pay fifty dollars a year tuition. Of the latter class there are at present 130, making a total of 364 in attendance in the Normal Department. There are, besides, forty-nine students in the Academic Department, who pay from forty to fifty dollars a year tuition.

Maryland Institute School of Art, Baltimore Street.

The wing recently added provides a new laboratory, gymnasium, study hall, and *Slojd* room. The school is handsomely and completely equipped now for instruction in the sciences and in educational manual training for the young men, and cookery for the young ladies. It has a staff of thirteen competent instructors, headed by PROF. E. B. PRETTYMAN, who has been its principal since 1890.

His experience, both in pedagogy and the practical concerns of life, fits him especially well for this position. He is a native of Delaware and a graduate of Dickinson College, Pennsylvania.



Laboratory Class, Maryland State Normal School.

1

Baltimore, by Engelhardt, 1895

Bust of Sydney Lanier, Johns Hopkins University.

representation of Renaissance reproductions, antique casts and terra-cottas, ceramics, marbles, and bronzes. The lecture season provides Baltimore with a course of thirty lectures by the most eminent exponents of the knowledge and culture of the day in literature, art, theology, archeology, and science generally.

The conservatory of music has a director and nine experienced professors, and affords instruction to advanced pupils only. Concerts and recitals by the faculty, assisted by trained performers and the most proficient of the pupils, are given during the winter. The examinations are critical, and the school has a great reputation. It is second to none, indeed, in the country in this regard.

JOHNS HOPKINS, Founder of Johns Hopkins University and Hospital.

Mr. Peabody's aim in the establishment of this institution was to furnish a helping hand to youth of talent and ambition, and generally to improve the public taste with respect to letters and the arts. To DR. P. R. UHLER as provost, along with certain committees, this purpose is entrusted. A body of fifteen trustees has general management of this institution.

The MARYLAND INSTITUTE SCHOOL OF ART AND DESIGN was organized in 1825, and reorganized in 1847. It occupies the upper part of the Marsh Market, shown in the engraving on page 17, a structure which cost, in 1851, $105,000. Its quarters are especially suited for it. There are wide, open spaces all round it, so that it has the amplest light and ventilation. The attendance at this institution during the past year was nearly 1,000, many of them hailing from other States. Nearly 20,000 have received instruction in the school since its organization; and many of its graduates have risen to eminence as artists, engineers, manufacturers, architects and builders, and teachers, both here and elsewhere.

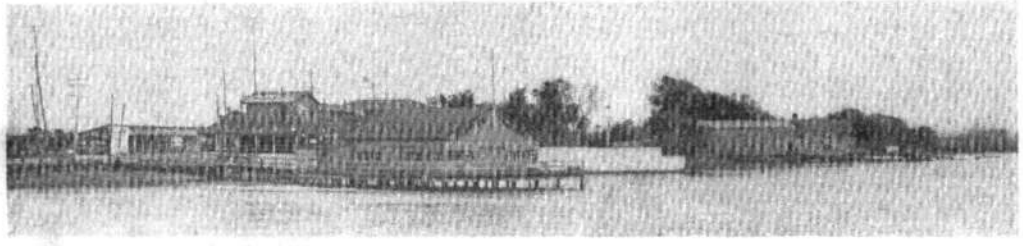
The schools comprise a DAY-SCHOOL devoted to the fine arts, in which are taught free-hand drawing, designing, painting in water colors and in oil, modeling, and studies from life; and a NIGHT-SCHOOL, devoted to industrial drawing, in which are taught free-hand, mechanical, and architectural drawing. In the day-school students enter as "special" in any branch and for such period as they desire, a prerequisite, however, for the higher branches being a sufficient knowledge of drawing; or as "regulars," which comprehends a systematic training in all branches, extending through a course of four years. In the night-school students enter one branch only, as they may elect, the full course also covering a period of four years. Those students who successfully pass through a full course in either day or night school receive the diploma of the institute.

The faculty, headed by PROF. OTTO FUCHS, principal formerly of the Boston Evening Drawing School, Cooper Institute, New York, United States Naval Academy, and director of the State Normal Art School of Massachusetts, is equal to that of any similar institution in the country.

The late WILLIAM T. WALTERS, of the Walters Art Gallery.

ENOCH PRATT, Founder of the Enoch Pratt Free Library.

The outfit devoted to the interests of these schools represents an outlay of over $175,000. It embraces, besides numerous specimens and art accessories, a library of 20,000 volumes, largely relating to the arts and sciences. The equipment of the art and industrial classes — constantly being enlarged — includes a splendid collection of all the most important casts of antique figures and heads, specimens of designs in wrought iron, stained glass, terra-cotta, complete models of stationary and marine engines, steam pumps, and other machinery, structural details of buildings, etc., so that the most perfect facilities are provided for studying objectively in every department.



Ferry Bar Pavilion and Free Baths.

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District Court, D. Maryland.

NORRIS
v.
MAYOR AND CITY COUNCIL OF BALTIMORE et al.

Civil Action No. 3484.

June 18, 1948.

Action by Leon A. Norris against the Mayor and City Council of Baltimore and Maryland Institute for the promotion of the mechanic arts, for a declaratory judgment, and for other relief.

Complaint dismissed.

West Headnotes

[1] Federal Courts ⇐ 411
170Bk411 Most Cited Cases
(Formerly 106k365(3))

Determination of whether corporation is acting as a state agency so as to be subject to constitutional restraints upon the state itself, or merely in a private capacity, requires that facts be independently appraised by federal court in order to secure uniform application of 14th Amendment, and hence state decisions, though persuasive, are not controlling. U.S.C.A. Const.Amend. 14.

[2] Federal Courts ⇐ 411
170Bk411 Most Cited Cases
(Formerly 106k365(3))

Federal court making judicial appraisal of effect of facts, in determining whether corporation is acting as state agency so as to be subject to constitutional restraints imposed upon state, is not bound by narrow and technical rules of local law but must consider question from larger viewpoint of fundamental constitutional rights. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law ⇐ 213(4)
92k213(4) Most Cited Cases
(Formerly 92k209)

[3] Constitutional Law ⇐ 254(4)
92k254(4) Most Cited Cases
Of.
(Formerly 92k251)

The due process and equal protection provision of 14th amendment inhibits only such action as may fairly be said to be that of the states, and erects no shield against merely private conduct, however discriminatory or wrongful. U.S.C.A.Const. Amend. 14.

[4] Constitutional Law ⇐ 213(4)

92k213(4) Most Cited Cases
(Formerly 92k213)

The conduct of a private corporation is private rather than public conduct and is not subject to restraints of 14th Amendment, and distinction between "private corporation" and "public corporation" is whether corporation is subject to control by public authority, state or municipal. U.S.C.A.Const. Amend. 14.

[5] Constitutional Law ⇐ 213(1)
92k213(1) Most Cited Cases
(Formerly 92k213)

The managers, trustees, or directors of a corporation must not only be appointed by public authority but also subject to its control, in order to make the corporation a "public corporation" subject to restraints of 14th Amendment. U.S.C.A.Const. Amend. 14.

[6] Constitutional Law ⇐ 213(1)
92k213(1) Most Cited Cases
(Formerly 92k213)

Action of private corporation of an educational nature does not become state action within scope of 14th Amendment merely because state or city advances moneys to corporation in substantial amount which thereby becomes mingled with other general funds of corporation. U.S.C.A.Const. Amend. 14.

[7] Constitutional Law ⇐ 213(1)
92k213(1) Most Cited Cases
(Formerly 92k213)

The Maryland Institute for the Promotion of the Mechanic Arts is a "private corporation," not a "public corporation," in view of fact that its officers are not appointed by and it is not subject to control of public authority, notwithstanding receipt of public funds in consideration of free scholarships, and favored treatment as lessee of public property, and hence refusal of institute to admit Negro as student was not "state action" inhibited by 14th Amendment. Laws Md.1825, c. 4; Laws Md.1849, c. 114; Laws Md.1904, cc. 87, 228; Laws Md.1878, c. 313; U.S.C.A.Const. Amend. 14.

[8] Federal Courts ⇐ 333
170Bk333 Most Cited Cases
(Formerly 106k326)

Jurisdiction of federal District Court was properly invoked, without averment or proof of amount in controversy, for relief from alleged deprivation by state action of a personal right of equal protection of the laws. 28 U.S.C.A. § 1343; U.S.C.A. Const.Amend. 14.

[9] Federal Courts ⇐ 331.1
170Bk331.1 Most Cited Cases
(Formerly 170Bk331, 106k326)

Prayer in the alternative for injunction against appropriations of public money to educational institution was essentially a taxpayer's suit of which federal District Court did not have jurisdiction without a showing that amount in controversy exceeded $3,000, and basis for assumption of jurisdiction was not furnished either by charge that appropriations were ultra vires or that taxpayer was denied due process. 28 U.S.C.A. §§ 1331, 1332, 1341- 1343, 1345, 1354, 1359; U.S.C.A. Const.Amend. 14.

[10] Federal Courts ⇐ 21
170Bk21 Most Cited Cases
(Formerly 106k264(2))

Where complaint prayed that institute be enjoined from excluding plaintiff as a student because of race or color and prayed in the alternative that city be enjoined from appropriating public money to the institute and court did not have jurisdiction of second cause of action because of want of allegation or proof of jurisdictional amount, the court's assumption of jurisdiction of the first cause of action and decision of question therein raised on the merits did not give the court jurisdiction to decide question raised by second cause of action. 28 U.S.C.A. §§ 1331, 1332, 13341-1343, 1345, 1354, 1359.

[11] Federal Courts ⇐ 6
170Bk6 Most Cited Cases
(Formerly 106k262.8(1))

Generally, taxpayer's suit against local taxing body should be litigated in state rather than in federal courts, and all questions of state law should be authoritatively decided by state courts before federal constitutional question is presented for final determination by Supreme Court.

[12] Federal Courts ⇐ 6
170Bk6 Most Cited Cases
(Formerly 106k262.4(1))

Federal courts are reluctant to interfere by injunction with state policy unless there is undoubted jurisdiction, and substantial justice can be accomplished only by use of injunction.

***452** Charles H. Houston, of Washington, D.C., and Fred E. Weisgal, Harry O. Levin, and W. A. C. Hughes, Jr., all of Baltimore, Md., for plaintiff.

R. E. Lee Marshall, of Baltimore, Md., for defendant Maryland Institute.

Allan A. Davis, Asst. City Sol., of Baltimore, Md., for Mayor and City Council.

CHESTNUT, District Judge.

The plaintiff in this case, Leon A. Norris, a young negro resident of Baltimore City and citizen of the State of Maryland, made application on September 11, 1946, to the Maryland Institute for the Promotion of the Mechanic Arts, a Maryland corporation, for admission as a student for instruction in art and teacher training in art. The institute declined his application on the ground that for fifty years past it had maintained a consistent policy and practice of admitting only white persons as students. Thereafter the plaintiff filed this suit alleging that he had been denied a right solely on the ground of race and color contrary to the constitutional protection of the 14th Amendment of the Federal Constitution which provides, among other things, that 'no State shall * * * deny to any person within its jurisdiction the equal protection of the laws'. The complaint prays for the following relief:

(a) A declaratory judgment that the plaintiff is entitled to be received as a student at the Maryland Institute on the same terms as other citizens and residents of Baltimore City without regard to race or color;

(b) that the Institute be enjoined from excluding him from such instruction solely because of race or color;

(c) in the alternative, if the plaintiff is not entitled to the above relief, then that the other defendant, the Mayor and City Council of Baltimore, a municipal corporation, be enjoined from appropriating any public money or allocating any public property or resources to the Art Institute if ***453** it is a private corporation not under the restraints of the Federal Constitution;

(d) for damages in the amount of $20,000.

In due course the defendants have answered denying that the plaintiff is entitled to any of the relief asked against either of the defendants; extended testimony has been taken particularly with regard to the history, management and activities of the Maryland Institute, and the case has been orally argued and briefs submitted by counsel for the respective parties. It will be noted at the outset that the jurisdiction of the court with respect to the declaratory judgment prayed for raises a question of federal constitutional law as to which this court clearly has jurisdiction; but the relief by way of injunction asked in the alternative against Baltimore City is in nature essentially a taxpayer's suit of which this court would have no jurisdiction in the absence of allegation or proof that the amount in controversy exceeds $3,000, which does not exist. From the evidence in the case I find the following facts.

History of the Maryland Institute

The Maryland Institute was incorporated as a private corporation January 10, 1826 [FN1] by citizens of Maryland, and functioned until 1835 when the school plant was destroyed by fire. [FN2] The activities of the school were resumed in 1847 and steps were taken resulting in the incorporation of the Institute as a private corporation (for a period of 30

years) on February 13, 1850. (Acts of Assembly 1849, c. 114). The charter of the corporation was extended by Chapter 313 of the Acts of Assembly 1878, and by this Act an annual grant of $3,000 was to be paid by the State to the president of the Institute, without condition other than an annual report of activities to the Governor of the State. The principal corporate purpose and power was to promote the mechanic arts and maintain schools of art and design.

FN1. Laws of Maryland 1825, c. 4.

FN2. Maryland Institute Reports 1897-98, Library of Bureau of Legislative Reference, City Hall, Baltimore, Maryland.

Negotiations between the Institute and the City of Baltimore concerning the site of the school resulted in an ordinance dated June 6, 1850 (Ordinance No. 43 of June 6, 1850) which granted permission to the Managers of the Institute to erect a building for the Institute's use over the Market House at Centre Market (similar to Fanucil Hall in Boston) provided the plans for the building were approved by a Committee from the City Council, that the stall owners in the Market assent and that there be no interference with the use of the ground floor as a market. The City agreed to contribute $15,000 to the erection of a building on the condition that an equal amount be raised by public subscription. It was also provided that the hall to be constructed should be available rent free for any public meetings called by the Mayor. The actual cost of the building erected pursuant to this authorization was about $110,000, of which amount the City contributed approximately $20,000. [FN3]

FN3. For subsequent Resolutions dealing with specific problems arising under this Ordinance, see Res. #43 of April 4, 1851 (providing for the payment of the agreed $15,000), and Res. #139 of June 23, 1851 (arrangement of market stalls, etc.)

The building erected by the Institute was occupied as the home of the School until the structure was destroyed in the great fire of February 7-8, 1904, which swept over this and surrounding blocks. The City of Baltimore, acting pursuant to Chapter 87 of the Laws of Maryland 1904, condemned the land in the Centre Market area, acting through the Burnt District Commission. A realignment of streets was made in the area and a special 'Centre Market Commission' appointed by the then Mayor erected, using public funds, the present Market Place structure at a cost of about $190,000. [FN4]

FN4. For a complete report of the actions and discussions of the Centre Market Commission, see Minutes of the Commission, Library of Legislative Reference, City Hall, Baltimore, Md.

By the Ordinance of the Mayor and City Council of Baltimore dated February 27, 1907 [FN5] the Mayor was authorized to execute *454 a lease of the two upper stories of this new Market Place Building to the Institute for a period of 14 years commencing May 1, 1907, at the annual rent of $500, the lessee agreeing to make necessary repairs, and the City agreeing to furnish heat. Pursuant to a later Ordinance [FN6] a renewal of this lease was executed on May 11, 1921, for a period of 14 years. Since the expiration of this lease no further lease has been executed but the parties have apparently continued the relation of landlord and tenant on the same terms, being now a holdover yearly tenancy. Some years ago, the use of the ground floor for a market was discontinued and thereupon Baltimore City made some changes in the first floor to adapt it for further use by the Maryland Institute, at a cost of $25,000, but without increasing the rental of $500 a year. However, for some years past the Maryland Institute has been charged with and paid the cost of heating the building at about $2,000 or more per year.

FN5. Ordinance #233 of Mayor & City Council of Baltimore, Feb. 27, 1907.

FN6. Ordinance #604 of Mayor & City Council of Baltimore, June 4, 1921.

Throughout the years from 1881 to the present the City of Baltimore has maintained a contract relationship with the Maryland

Institute for the education of pupils in the schools of the Institute. These contracts have been much alike. By Ordinance No. 42 dated April 14, 1881, the City of Baltimore authorized the Mayor, City Comptroller and City Register to contract with the Maryland Institute for the instruction of a number of pupils in the School of Art and Design for a period of three years from September 1, 1881. Initially three pupils were to be appointed from each ward, and in the succeeding years one pupil was to be appointed by each member of the City Council. When a vacancy occurred the President of the Institute was to notify the member of the City Council entitled to fill the vacancy and the Councilman was then to appoint another pupil. Section 3 of the Ordinance required the President of the Institute in September of each year to report the names of the pupils so appointed and the vacancies existing, if any, and gave the Mayor the right to appoint should any member of the City Council entitled to fill a vacancy fail to do so for a period of two months. Section 4 of the Ordinance provided that the Mayor, City Comptroller and City Register should annually inspect the school and the manner in which the contract was being fulfilled, and if after such inspection the Comptroller was satisfied that the terms of the contract were being complied with he should pay the Institute $3,000 in September of each year for the education of the pupils.

A further contract in similar form, but providing for a payment of $9,000 was authorized on March 7, 1893. [FN7] This authorization was for a period of eight years from September 1, 1892 (sic). This Ordinance of March 1893 was discussed at length in the case of Clark v. Maryland Institute for the Promotion of Mechanic Arts, 87 Md. 643, 41 A. 126. The same arrangement was continued for a still further period of eight years from January 1, 1901. [FN8]

FN7. Ordinance #26 of Mayor & City Council of Baltimore, March 7, 1893.

FN8. Ordinance #74 of Mayor & City Council of Baltimore, Oct. 15, 1900.

By another Ordinance approved May 18, 1908 [FN9] the City authorized the extension of this contract relationship for a period of twelve years from January 1, 1909, on the same basis but at the annual figure of $12,000. This renewal, which normally would have terminated on January 1, 1921, appears never to have been formally extended but the arrangement has continued down to date, the amount of money appropriated annually varying in the later years, averaging about $25,000 a year in the recent years.

FN9. Ordinance #115 of Mayor & City Council of Baltimore, May 18, 1908.

Subsequent to the fire in 1904 the Maryland Institute felt in need of larger facilities to meet its increasing enrollment. There had been a total of $101,500 in insurance outstanding on the old Market Place Building, and from this insurance about $85,000 was realized as a result of the inability of some of the insurance companies *455 to pay the loss in full. [FN10] The Legislature by Chapter 228 of the Laws of Maryland 1904, provided $175,000 to be used for the purchase of a lot and erection of a building for the Maryland Institute. With these available funds, plus a grant by Mr. Andrew Carnegie of $263,000 (apparently obtained by the personal solicitation of Mr. John M. Carter, then president of the Maryland Institute [FN11] and the donation by Mr. Michael Jenkins of a lot at the corner of Mt. Royal Avenue and Lanvale, the new Maryland Institute Building was erected. The total cost of this new building was approximately $500,000

FN10. See Maryland Institute Reports, 1904-5, supra.

FN11. See Maryland Historical Society Magazine, March 1948, p. 45, in article by Latrobe Weston.

On the first question with respect to the prayer for declaratory judgment, it is apparent that the crucial issue is whether the Maryland Institute is a corporation exercising governmental functions, or only a private corporation not subject to public control, and responsible for its own policies and

management. If a private corporation only, its action its action in declining the application of the plaintiff does not constitute 'State action'. Summarizing from the above history the interrelations of the Maryland Institute and the City of Baltimore and the State of Maryland, I find that these relations consist only of the following:

1. The City for more than sixty years has made some annual payment to the Institute beginning with about $3,000 a year and presently amounting to about $25,000 a year under a contractual arrangement whereby each member of the City Council has the authority to appoint one student each year to the Institute free of tuition charges.

2. The City rents to the Maryland Institute a large building owned by the City in the commercial district of Baltimore for the annual rental of $500; a real estate agent expressed the opinion that, if the City decided to rent the building for commercial purposes, the annual rental probably would be between $11,000 and $12,000.

3. The only interrelations of the State of Maryland and the Maryland Institute are (1) the State by Act of the Legislature incorporated the Maryland Institute as a private corporation. Under the laws of incorporation the management of the corporation is entrusted to its members now consisting of 150 in number who annually elect the officers and twenty-one managers. The corporation has no outstanding stock, and it is generally called a non-profit corporation for certain educational purposes. (2) The State makes annual contributions to the Institute varying in amount and now about $16,500. For this contribution each of the 29 members of the Maryland Senate have the right to appoint to the Institute one student free of tuition charge. Currently the number of City and State students combined is about 100. The total enrollment of all students of all different classes at the Institute, including Mt. Royal Avenue Fine Arts Building and the Market Place Mechanical Arts Building, is about 2,000.

4. Neither the City nor the State exercise any control whatever in the management of the affairs of the Institute subject only to the possible qualification that the City has the right annually to examine the course of instruction given at the Institute subject only to the possible qualification that the City has the right annually to examine the course of instruction given at the Institute to see that the terms of the contract for the appointment of students is being performed, and the Institute makes an annual report to the Governor of the State.

The tuition rates charged by the Institute are comparatively small, ranging from $190 a year for day classes in the Fine Arts Building on Mt. Royal Avenue, to about $25 per year for students at Market Place where only night classes are conducted three evenings a week. The tuition rates have been kept low in order to give the benefit of instruction to a larger number of students, with the result that the operating profit is kept very small.

The balance sheet of assets and liabilities of the Institute for 1947 shows net outright owned assets to the value of nearly $1,000,000,consisting of land and building (heavily depreciated), an endowment fund invested in stocks and securities of about $152,544.09, and an art collection accumulated over many years valued at $500,000.

***456** The gross income of the Institute for the fiscal year 1947 was $184302.71. Included in this amount was $26,000 received from the City of Baltimore for student appointments and $16,500 from the State of Maryland. The tuition fees at Mt. Royal Avenue Building amounted to $107564.21, and from Market Place $18,770. The annual operating expenses aggregated $164,129.82 for that particular year leaving a net income of $20,172.89. The Market Place School had an operating deficit. The same net income for 1946 was only $13,759.48.

No officials of either the City or the State are members of the Institute nor on its Board of Directors, nor among its officers. Neither the

City nor State has ever appoint-d any, and have no authority to do so. Mr. Young, the present President of the Institute, was for some years Collector of Taxes of Baltimore City; but that was purely coincidental as he succeeded both his father and grandfather and grandfather as an officer of the Institute. Neither the City nor the State now has nor has ever had any control over the appointment of the Director of the Institute (presently Mr. Hans Scheuler, the well-known Baltimore sculptor), or its teaching staff or other employees. The Institute maintains something in the nature of a pension fund for its employees but they are not included in either the City or State pension fund. Neither the City nor the State in any way exercise any control over or participation in the formulation of the annual budget of the Institute.

By the charter of Baltimore City under legislative authority public education is wholly conducted by a Board of School Commissioners (Md.Code 1939, Art. 77 Sec. 182 et seq.; Baltimore City Charter). Ss. 91-93. The Maryland Institute is not in any way a part of the Public School System, nor in any way subject to the authority of the School Board. In the public schools of Baltimore City, both elementary and high schools, there are general courses given in drawing and other subjects of art. To some extent the Maryland Institute furnishes parallel courses in mechanical and artistic drawing but differs in that it also offers to advanced art students instructions tending to qualify them for teaching art in the public schools and elsewhere. But successful graduation from the Institute in such a course does not automatically qualify the graduate to appointment as a teacher in the City schools, but only qualifies him to take, along with other applicants, an examination for that purpose. The custom of segregation of the races, colored and white, has long prevailed in Baltimore City Schools where there are separate schools for colored pupils and for the white pupils.

The plaintiff in this case did not apply for admission to the Market Place School of the Institute, but for the Fine Arts Course and Teachers' Training Course conducted exclusively at the Mt. Royal Avenue Building. The plaintiff is a taxpayer in Baltimore but the amount of taxes paid by him does not appear in the pleadings or evidence. The plaintiff has not proven that he has sustained any pecuniary damage by refusal of the Institute to accept him as a student. He has not sought or received an appointment to a scholarship at the Institute.

Opinion

The plaintiff's complaint is obviously patterned on the case of Kerr v. Enoch Pratt Free Library of Baltimore City, 4 Cir., 149 F.2d 212, certiorari denied 326 U.S. 721, 66 S.Ct. 26, 90 L.Ed. 427. In that case the Court of Appeals for this Circuit held, reversing this court, that the relations of the State of Maryland and Baltimore City to the Enoch Pratt Free Library, although originally incorporated by the State for management by a named Board of Trustees to be self-perpetuating, had resulted in making the Library an instrument of public education and therefore the refusal of the Board of Trustees to admit a young colored woman, otherwise qualified, to its instruction class for prospective librarians, solely on account of her race and color, constituted 'State action' within the 14th Amendment,. As that case constitutes the law of this Circuit, the question is immediately presented whether on its facts, or within its principle, it governs this case. If so, its rule must be followed here. Therefore the legal and factual situations of the Pratt Library must be closely compared with those of the Maryland Institute. The facts in the Pratt case are carefully ***457** reviewed in the opinion of the court. It was at once conceded by counsel for the plaintiff in this case that the facts of the two cases are very different. The question is whether the nature and extent of the difference requires a difference in result. For convenience, the facts of the two cases with respect to the relations of the State and City to the respective corporations, may be compared in parallel columns as follows:

	Enoch Pratt Library	Maryland Institute
Value of plant owned and used by	None	$500,000 (cost)
Value of plant owned by City but used by	Over $4,000,000	Lessee for $500 per year of one City building which, for commercial purposes, would rent for $12,000 a year
Annual gross income from property or activities of	$6,000 to $8,000	$184,000
Annual sums paid by City and State	Over $800,000$42,500 (under contract for scholarships)	
Proportion of public funds received to total budget	99%	About 23% (under contract)
Public status of employees	Included in municipal employees retirement system	None
Control of disbursements by City	Made through City Bureau of Control and Accounts on vouchers submitted by Trustees	None
Salary checks for employees	Issued by City Payroll Officer	None
Salary of employees	Conform to City salary schedule	None
Control of budget	Submitted to municipal budget authorities	None

The total effect of the State and City relations to the Pratt Library were summarized in the opinion of the Circuit Court of Appeals (page 215 of 149 F.2d). Just before doing so the opinion noted that the District Court in deciding the case there had applied 'the rule, enunciated in state and federal courts, that to make a corporation a public one its managers must not only be appointed by public authority, but subject to its control. See 18 C.J.S., Corporations, § 18, et seq.; Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 671, 4 L.Ed. 629.' The opinion then cites a number of Maryland cases (two dealing with the Maryland Institute, Clark v. Maryland Institute for the Promotion of Mechanic Arts, 87 Md. 643, 41 A. 126, and St. Mary's Industrial School for Boys v. Brown, 45 Md.

310), which applied this general rule to the facts of the particular cases and held the Maryland corporations there involved to be private *458 corporations. It was then said 'These decisions are persuasive but in none of them was the corporation under examination completely owned and supported from its inception by the state as was the library corporation in the pending case.' (Italics supplied)

Therefore as I read the opinion in the Pratt case, the decision is placed not upon disapproval in principle of the rule announced in the Maryland cases, but on the ground that the facts in the Pratt case distinguished it from the cited Maryland cases, particularly Clark v. Maryland Institute for the Promotion of Mechanic Arts, and St. Mary's Industrial School for Boys v. Brown, supra, because the Court of Appeals concluded from the facts that the Pratt Library was 'completely owned and supported from its inception by the state.' No such factual conclusion seems possible with regard to the Maryland Institute.

[1][2] As the factual situation in the instant case is not comparable to that in the Pratt case, it remains to be considered whether the case of the Maryland Institute is within the principle of constitutional law with regard to what constitutes State action decided in the Pratt case. As I read it, the opinion in that case does not establish any new principle of federal law but only applies previously established principles to the facts of the particular case. The opinion does point out very clearly that to determine whether the corporation is acting as a State agency or merely in a private capacity, the facts must be independently appraised by the federal court in order to have a uniform application of the 14th Amendment, and that therefore State decisions, although persuasive, are not controlling; and furthermore that in making the judicial appraisal of the effect of the facts, the court is not bound by narrow and technical rules of local law but must consider the question from the larger viewpoint of fundamental constitutional rights. Giving full weight to these well established principles the question remains in each factual situation whether the action taken amounts to State action.

[3] In the latest pronouncement of the Supreme Court upon this subject (in the 'restrictive covenants' case) it was said in the opinion by the Chief Justice:

'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' (Italics supplied) Shelley v. Kraemer, 1948, 68 S.Ct. 836, 842.

[4][5] In this case the discrimination was made by the Maryland Institute, a Maryland corporation. The ultimate question, therefore, is whether its action constituted private or public conduct. If the Institute is a private corporation, then its conduct is also private. The legal test between a private and a public corporation is whether the corporation is subject to control by public authority, State or municipal. To make a corporation public, its managers, trustees, or directors must be not only appointed by public authority but subject to its control. I understand this to be the well established general law resulting from both federal and state decisions. And I do not read the opinion in the Pratt case as disapproving that legal test. On the contrary, as I read the case, the court applied that test to the factual situation reaching the conclusion from its historical interpretation of the applicable legislation and financial history that the Trustees of the Pratt Library were in effect 'representatives of the state to such an extent and in such a sense that the great restraints of Constitution set limits on their action.'

After extended consideration, I reach the conclusion that the legal and factual situation of the Maryland Institute does not bring its case within the scope of either the facts or the principle of the Pratt Library case. The

present legislative charter of the Maryland Institute was contained in the Act of 1878, c. 313, and the prior expired charters are not essentially different in their provisions. By the Act of 1878 it was provided that the corporation should consist of its members from time to time *459 and should be managed by its officers and twenty-one managers annually elected by the members. The State made no designation of particular individuals as managers, and reserved no visitorial powers with regard to the management of the corporation other than the generally applicable legislation affecting private corporations. It has twice been expressly held by the Maryland Court of Appeals with respect to the Maryland Institute that it was not a public corporation according to the test of any reserved public control over the management of its affairs. In Clark v. Maryland Institute for the Promotion of Mechnic Arts, 87 Md. 643, 41 A. 126, 128, it was said in the opinion of the court:

'The Maryland Institute is essentially a private corporation. It was not created for political purposes, nor endowed with political powers. It is not an instrument of the government for the administration of public duties. It has none of the faculties, cunctions of features of a public corporation as they are designated in the Regents Case, 9 Gill & J. 365 (31 Am.Dec. 72), and the many other cases which have followed that celebrated decision. The Act of 1878, which renewed its charter, granted it the annual sum of $3,000, but this grant did not make it an instrumentality of government, nor make any change in its corporate character. The Regents Case, 9 Gill & J. (365), 398, (31 Am.Dec. 72), shows that it could not have such an effect. The Maryland Institute holds its property in its own right, and has the power to manage its concerns according to its own discretion within the limitations of its charter.'

And in the earlier case of St. Mary's Industrial School for Boys v. Brown, 45 Md. 310, 329, 330, in opinion by Judge Alvey (afterwards Chief Judge of the United States Court of Appeals for the District of Columbia) it was said with regard to the corporations there involved, including the Maryland Institute:

'They are separate and distinct corporations, composed of private individuals, and managed and controlled by officers and agents of their own, and over which the City has no supervision or control, and for the management of which there is no accountability to the City whatever. No ordinance or resolution of the City Council can control the powers and discretion vested in the managing boards of these institutions, nor have the Mayor and City Council the power to determine who shall or who shall not receive the benefits of the charities dispensed by them.'

And again, it was said in the opinion:

'So far, therefore, as the City is concerned, these corporations are entirely separate from and independent of it, in all corporate action and control. And as to the Maryland Institute for the Promotion of the Mechanic Arts, the mere fact that the City may own the ground upon which the building is erected, or that the City, in its deed to the institution, has reserved certain privileges in the use of the Hall, as part of the consideration for the grant, cannot constitute that corporation a municipal agency. It is, like the other corporations just mentioned, without municipal relation, and is under no obligation to the City to discharge any mere municipal function for which it can legally claim compensation.'

This statement of the rule of law authorizing the test as to whether the corporation was public or private has been the consistently applied doctrine of the Maryland Court of Appeals for more than a hundred years. Regents Case, 1838, 9 Gill & J. 365, 31 Am.Dec. 72; Finan v. City of Cumberland, 154 Md. 563, 141 A. 269; University of Maryland v. Murray, 1935, 169 Md. 478, 182 A. 590, 103 A.L.R. 706. It is also the expressed federal rule as announced by the Supreme Court in the early cases of Dartmouth College v. Woodward, 4 Wheat. 518, 671, 4 L.Ed. 629, and Vincennes University, Board of Trustees

v. Indiana, 14 How. 268, 276, 14 L.Ed. 416. It is likewise the general law upon the subject. 18 C.J.S., Corporations, Sec. 18, p. 394, et seq. Most of these cases are cited and reviewed in the opinion in the Pratt case apparently without disapproval. With particular reference to the Maryland cases, the opinion referred to them as 'persuasive' but not conclusive, with respect to the different factual situation presented by the history of the Pratt Library which, as the court found, was 'completely owned and supported from *460 its inception by the State'. (Italics supplied)

From the above recited history of the Maryland Institute it appears that at least since 1881 there has been in force between the City and the Institute a contract whereby a certain number of free scholarships are allotted to nominees of the members of the City Council in consideration of which the City has paid to the Institute varying annual sums of $3,000 to $26,000 per year. In 1898 when the Clark case was decided the amount was $9000. Presently it is $26,000. This not quite threefold increase is not disproportionate to the changing value of the dollar with respect to purchasing power. In the earlier case of St. Mary's School v. Brown, purely voluntary contributions had been made by Baltimore City to the several charitable and educational private corporations involved in that case. In a taxpayer's suit the Court of Appeals held that the City did not have legislative authority from the State to make these voluntary contributions to private corporations lacking in government control. But it was indicated that possibly a contractual relationship might be validly made between the City and the Institutions, or some of them. Apparently the contract with the Maryland Institute resulted from this suggestion. In the later Clark case the Court had before it the particular contract then in force between the City and the Institute. The existence of the contract was not considered to affect the legal status of the Institute as a purely private corporation not subject to public control. It did not make the Maryland Institute a part of the Public School System. 87 Md. p. 662, 41 A. i29.

[6] Counsel for the plaintiff advances a new and far-reaching proposition not within the principle of the Pratt Library Case. The contention is that whenever the State or Baltimore City as a municipal agency of the State, advances moneys to a private corporation of an educational nature in an appreciably substantial amount which thereby becomes mingled with other general funds of the institution, that action of the institution or City thereby becomes State action within the scope of the 14th Amendment. No authority is cited for this proposition and I know of none. In my opinion it is untenable. It is directly contrary to the long established law and practice of Maryland. At each session of the Maryland Legislature there is passed an Omnibus Appropriations Bill giving State aid to may private institutions for educational and charitable purposes. It is, I think, common knowledge and my understanding that many of these State aided institutions are private corporations which currently admit as students or inmates only white persons; while others are for the benefit of only colored persons. This policy and action of the Maryland Legislature was expressly approved by the Court of Appeals of this State in the case of Clark v. Maryland Institute for Promotion of Mechanic Arts, supra., [FN12] where it was said, at page 663 of 87 Md., at page 130 of 41 A.:

FN12. For instance, see Laws of Maryland, 1945, pp. 1249-1252, making appropriations to the following educational institutions: Charlotte Hall School; the Johns Hopkins University; McDonogh School for Boys; Maryland Institute; St. John's College; Washington College; West Nottingham Academy and Western Maryland College. For many of these appropriations the State received from the Institutions a number of free scholarships. See also Md. Code, 1939, Art. 77, Secs. 236-254. So far as I am aware all of these educational institutions are privately managed corporations receiving (possibly with some minor exceptions) only white students. Among the privately managed institutions of a charitable nature receiving State aid but exclusively for the benefit of colored persons I understand are Provident Hospital of Baltimore; St. Peter Clavers Industrial School (home for colored girls) and House of the Good Shepherd for Colored

> Girls. I also understand that other appropriations are made both by State and City to a 'general welfare' fund distributed by State or City agencies to hospitals and other private charitable corporations that aid both white and colored irrespective of race or color, as for instance the Johns Hopkins Hospital.

'But it cannot be doubted that the legislature has ample power to make appropriations to special objects, whenever, in its judgment, the public good would be thereby promoted. It has constantly exercised this power from the beginning of the State government. The legislature may make donations without regard to class, creed, *461 color or previous condition of servitude. The only condition limiting this exercise of this power is that it must in some way promote the public interest. The state has never surrendered this power to the general government, and never can surrender it without stripping itself of the means of providing for the good order, happiness, and general welfare of society.'

And finally on this part of the case, it is to be importantly noted that the plaintiff has not received an appointment, nor has he ever sought such an appointment, by the City to a free scholarship under the contract between the Institute and the City, and is therefore not suing as a beneficiary of the contract. Therefore, the case does not present for decision what may be the federal rights of a plaintiff having such an appointment.

[7] I conclude therefore that the plaintiff is not entitled to the declaratory judgment prayed for because the act of discrimination did not constitute 'State action'. It results that that portion of the complaint must be dismissed.

Counsel for the plaintiff emphasizes the fact that the Market Place Building owned by the City is leased to the Maryland Institute for the nominal sum of $500 a year; and it is argued that in view of this fact the City is attempting to do indirectly what it could not do directly, that is, operate a public school contrary to the 14th Amendment. In support of this contention reference is made to a recent decision of the District Court for the Southern District of West Virginia in the case of Lawrence v. Hancock, 76 F.Supp. 1004. But the facts of that case are very different from the instant case. There the City under legislative authority constructed at its own cost with the proceeds of bond issues, a swimming pool for public recreation and then leased it to a private corporation for $1.00 a year for operation, and it excluded negroes. The facts recited in the opinion, however, led the district judge to the conclusion of fact that the lease was a mere strategem or device for the express purpose of excluding negroes.

The facts of this case entirely disprove any such existence of attempted evasion by the City. The Maryland Institute had been using a building on the same site constructed principally from its own funds, for fifty years prior to the great Baltimore fire of 1904. The land on which the building was constructed had always been owned by the City and the first floor had been used as a market. After the fire the City revised the surrounding streets but determined to rebuild the market and at the same time to construct two upper floors which later were rented to the Maryland Institute for continuation of its educational purposes in the field of the promotion of mechanical arts and mechanical drawing and design. The Fine Arts Department was, however, transferred to the new building on Mt. Royal Avenue erected at a cost of $500,000, none of which was contributed by the City, although some part was contributed by the State of Maryland. The bill of complaint in this case asks no relief with regard to the State's appropriations to the Maryland Institute. The policy of the Institute with regard to the admission of students was announced more than ten years before the new Market Place Building was built. The history of the matter, therefore, is quite inconsistent with any conclusion that the present lease of the building to the Maryland Institute is in the nature of an attempted evasion of constitutional rights. Moreover, the plaintiff has never applied for enrollment as a student at the Market Place building and the City has no relation whatever to the Institute's Mt. Royal Avenue building except its contractual relation for scholarships.

The alternative relief prayed for in the complaint invokes the equity jurisdiction of the court to enjoin the separate defendant, Baltimore City, from 'appropriating any public money or allocating any public property or resources' to the Maryland Institute 'if it is a private corporation beyond the restraints of the Federal Constitution and laws'. The reasons assigned for the injunction are that such appropriation of public money is (1) ultra vires and void and (2) constitutes the taking of plaintiff's property without due process of law in violation of the 14th Amendment.

This part of the complaint, both as to jurisdiction of the court and on the merits ***462** presents a different question from that heretofore discussed. Similar alternative relief was prayed for in the complaint in this court in the Pratt Library Case but was dismissed in the opinion of this court (54 F.Supp. 514, 526, 527); but on appeal it was found unnecessary to discuss that feature of the case. I have concluded that this alternative relief in the present case should not be granted for somewhat different reasons than those stated by this court in the Pratt Library Case.

[8][9] The prayer for alternative relief here does not present a case within the jurisdiction of this federal court. The plaintiff asserts federal jurisdiction for both branches of the case relying particularly on section 41, subsections (1)(a) and (14) of title 28 U.S.C.A. Under section 41(1)(a) district courts are given jurisdiction of questions arising under the Constitution and the laws of the United States only where the amount in controversy exceeds $3,000 exclusive of interest and costs; while under subsection 14 the jurisdictional amount is not required. The relief prayed in this case against the Institute is for the alleged deprivation by State action of a personal right of the equal protection of the laws. And, therefore, the jurisdiction under subsection 14 was properly invoked without averment or proof of the amount in controversy. Douglas v. Jeannette, 319 U.S. 157, 162, 63 S.Ct. 877, 87 L.Ed. 1324; Hague v. C.I.O. 307 U.S. 496, 530, 59 S.Ct. 954, 83 L.Ed. 1423 (separate opinion of Justice Stone). But the prayer for alternative relief is essentially a taxpayer's suit to protect the plaintiff from being required to pay allegedly unlawful taxes and, therefore, of course, relating only to his property and not to a personal constitutional right. Federal jurisdiction of a suit of this nature falls under subsection (1)(a) of section 41 of title 28 which requires a showing that the amount in controversy exceeds $3,000. The complaint avers that the plaintiff is a taxpayer and the answer of the City admits this; but it is not alleged in the pleadings that the amount in controversy (that is the tax paid or to be paid by the plaintiff) exceeds $3,000; nor is there any proof in the case of any amount of taxes paid or to be paid by the plaintiff, by reason of the alleged invalid appropriation by the City. The charge that the appropriations are ultra vires obviously presents not a federal but only a State question. Snowden v. Hughes, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497; Owensboro Water Works Co. v. Owensboro, 200 U.S. 38, 47, 26 S.Ct. 24, 50 L.Ed. 361; Reese v. Holm, D.C., 31 F.Supp. 435. The only other ground assigned for federal jurisdiction is lack of due process under the 14th Amendment. But with respect to taxpayers' suits or where property interests are involved in such a case, there must be a showing of the requisite amount in controversy. Scott v. Frazier, 253 U.S. 243, 40 S.Ct. 503, 64 L.Ed. 883; Holt v. Indiana Mfg. Co., 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374; Murphy v. Puget Sound, D.C., 31 F.Supp. 318; Risley v. City of Utica, C.C.N.Y., 168 F. 737; Colvin v. Jacksonville, 158 U.S. 456, 460, 15 S.Ct. 866, 39 L.Ed. 1053; Rose Federal Jurisdiction and Procedure, 4th Ed. s. 218, pp. 219220; Dobie on Federal Procedure, Sec. 72, pp. 253-255.

[10] It results that we have in the one case two causes of action joined together, one within and the other without the federal jurisdiction. The question is whether when the court decides the question within federal jurisdiction on the merits, even though the relief is denied, it properly has jurisdiction to also decide the non-federal question. This very point was carefully considered in Hurn v. Oursler, 289 U.S. 238, 24553 S.Ct. 586, 589, 77 L.Ed. 1148, where, after stating the general rule that a federal court in such a

situation may in certain cases decide both questions, it was added:

'But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal *463 question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter it may not do so upon the nonfederal cause of action.'

To the same effect see Pearce v. Pennsylvania R. Co., 3 Cir., 162 F.2d 524; FitzHenry v. Erie R. Co., D.C., 7 F.Supp. 880. The alternative relief in this case falls within the exception stated in Hurn v. Oursler, supra. It does not constitute any ground in support of the first cause of action but is itself a separate and distinct cause of action against a defendant other than the one involved in the first cause of action. It therefore follows that the court does not have jurisdiction of this alternative relief; while, of course, the State court does clearly have such jurisdiction. St. Mary's Industrial School for Boys v. Brown, 45 Md. 310 (a taxpayer's suit).

[11] There are substantial reasons why the alternative relief prayed for should be litigated primarily in the State courts rather than in the federal courts. There is no diversity of citizenship between the parties and the suit is essentially merely a taxpayer's suit. It is generally preferable that such questions should be litigated in the State rather than in the federal courts. If the plaintiff relies upon a federal constitutional ground for resisting the tax and is unsuccessful in the Maryland Court of last resort, he can have the federal question determined by the Supreme Court of the United States. It is desirable that all questions of State law should be authoritatively decided by the State courts in such litigation before the federal constitutional question is presented for final determination by the Supreme Court.

[12] There is still another substantial reason why federal jurisdiction should be declined in this case. The plaintiff seeks a remedy in equity by injunction contrary to a longstanding important feature of Maryland State policy. --in balancing equities in this case it is apparent that the granting of the injunction would be of slight benefit to the plaintiff compared to the detriment of many Maryland State aided institutions. Federal courts should properly be reluctant to interfere by injunction with State policy unless there is undoubted jurisdiction, and substantial justice can be accomplished only by use of the extraordinary equitable remedy of an injunction. See Douglas v. Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324.

For these reasons I conclude as a matter of law that the alternative relief prayed for in the complaint must also be dismissed, for lack of jurisdiction and therefore 'without prejudice'.

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Circuit Court of Appeals, Fourth Circuit.

KERR et al.
v.
ENOCH PRATT FREE LIBRARY OF BALTIMORE CITY et al.

No. 5273.

April 17, 1945.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; W. Calvin Chesnut, Judge.

Action by T. Henderson Kerr and another against the Enoch Pratt Free Library of Baltimore City and others for pecuniary damages, for injunctive relief, and for declaratory judgment. From a judgment dismissing the complaint, 54 F.Supp. 514, plaintiffs appeal.

Reversed and remanded.

West Headnotes

[1] Constitutional Law ⇐ 47
92k47 Most Cited Cases

[1] Federal Courts ⇐ 221
170Bk221 Most Cited Cases
(Formerly 106k282.2(11), 106k282(3), 106k8)

The determination whether refusal to receive a Negress as a member of library training course violated the Fourteenth Amendment and Civil Rights Act, prohibiting a state from denying equal protection of the laws, involved a federal question for federal courts which were not to be governed merely by technical rules of law but should appraise the facts in order to determine whether board of trustees of library corporation might be classified as representatives of the state to such extent that their action was subject to constitutional restraints imposed upon the state. 42 U.S.C.A. §§ 1981, 1983; U.S.C.A.Const. Amend. 14, § 1.

[2] States ⇐ 87
360k87 Most Cited Cases

The maintenance of a public library is a proper function of the state.

[3] States ⇐ 45
360k45 Most Cited Cases

The state may set up a board of trustees as an incorporated instrumentality to carry out its educational work.

[4] Constitutional Law ⇐ 213(4)
92k213(4) Most Cited Cases

(Formerly 92k213)

Evidence established that, although donor furnished the inspiration and the funds initially for establishment of a free library in city, state's authority was invoked to create the institution and to vest power of ownership in one instrumentality and power of management in another with injunction upon former to see to it that latter faithfully performed its trust, and hence such instrumentalities were subject to constitutional restraints imposed upon the state itself. 42 U.S.C.A. §§ 1981, 1983; U.S.C.A.Const. Amend. 14, § 1.

[5] Constitutional Law ⇐ 219
92k219 Most Cited Cases
(Formerly 92k215)

The special charter of city library whose funds were supplied by city and which was managed by private board of trustees created by donor was not construable as endowing the library with power to discriminate between people of the state on account of race, and if charter was susceptible of such construction it violated the Fourteenth Amendment, since the board of trustees must be deemed the representatives of the state. Acts Md.1882, c. 181; Acts Md.1908, c. 144; Acts Md.1927, c. 328; Acts Md.1939, c. 16; 42 U.S.C.A. §§ 1981, 1983; U.S.C.A.Const. Amend. 14, § 1.

[6] Constitutional Law ⇐ 47
92k47 Most Cited Cases

In determining whether a library was a private corporation with authority to refuse to receive a Negress as a member of library training course, court must be guided not by technical rules of law of principal and agent but must determine whether trustees of the library corporation might be classified as representatives of the state. 42 U.S.C.A. §§ 1981, 1983; U.S.C.A.Const. Amend. 14, § 1.

[7] Civil Rights ⇐ 242(2)
78k242(2) Most Cited Cases
(Formerly 78k13.13(3), 78k3)

[7] Constitutional Law ⇐ 219
92k219 Most Cited Cases
(Formerly 92k213, 92k215)

Evidence including showing that the state through municipality continued to supply library corporation with means of existence established that library was an instrumentality of the state, and hence refusal to receive Negress as member of library training course violated Civil Rights Act and Fourteenth Amendment, notwithstanding executive control was vested in self-perpetuating board first named by donor of the library. Acts Md.1882, c. 181; Acts Md.1908, c. 144; Acts Md.1927, c. 328; Acts Md.1939, c. 16; 42 U.S.C.A. §§ 1981, 1983; U.S.C.A.Const. Amend. 14, § 1.

***213** Charles H. Houston, of Washington, D.C. (W. A. C. Hughes, of Baltimore, Md., on the brief), for appellants.

John Henry Lewin, of Baltimore, Md. (Harry N. Baetjer and Allen A. Davis, both of Baltimore, Md., on the brief), for appellees.

Before PARKER, SOPER, and DOBIE, Circuit Judges.

SOPER, Circuit Judge.

This suit is brought by Louise Kerr, a young Negress, who complains that she has been refused admission to a library training class conducted by The Enoch Pratt Free Library of Baltimore City to prepare persons for staff positions in the Central Library and its branches. It is charged that the Library is performing a governmental function and that she was rejected in conformity with the uniform policy of the library corporation to exclude all persons of the colored race from the training school, and that by this action the State of Maryland deprives her of the equal protection of the laws in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States and of the Civil Rights Act codified in 8 U.S.C.A. § 41. She asks for damages, as provided in that act, 8 U.S.C.A. § 43, for a permanent injunction prohibiting the refusal of her application, and for a declaratory judgment to establish her right to have her application considered

without discrimination because of her race and color. Her father joins in the suit as a taxpayer, and asks that, if it be held that the library corporation is a private body not bound by the constitutional restraint upon state action, the Mayor and City Council of Baltimore be enjoined from making contributions to the support of the Library from the municipal funds on the ground that such contributions are ultra vires and in violation of the Fourteenth Amendment since they constitute a taking of his property without due process of law.

The defendants in the suit are the library corporation, nine citizens of Baltimore who constitute its board of trustees, the librarian and the Mayor and City Council of Baltimore. The defendants first named defend on two grounds: (1) That the plaintiff was not excluded from the Training School solely because of her race and color; and (2) that the Library is a private corporation, controlled and managed by the board of trustees, and does not perform any public function as a representative of the state. The municipality joins in the second defense and also denies that its appropriations to the Library are ultra vires or constitute a taking of property without due process of law. The District Judge sustained all of the defenses and dismissed the suit.

In our view it is necessary to consider only the first two defenses which raise the vital issues in the case. It is not denied that the applicant is well qualified to enter the training school. She is a native and resident of Baltimore City, twenty-seven years of age, of good character and reputation, and in good health. She is a graduate with high averages from the public high schools of Baltimore, from a public teachers' training school in Baltimore, has taken courses for three summers at the University of Pennsylvania, and has taught in the elementary public schools of the City. We must therefore consider whether in fact she was excluded from the training school because of her race, and if so, whether this action was contrary to the provisions of the federal constitution and laws.

There can be no doubt that the applicant was excluded from the school because of her race. The training course was established by the Library in 1928, primarily to prepare persons for the position of library assistant on the Library staff. There is no other training school for librarians in the state supported by public funds. Applicants are required to take a competitive entrance examination which, in view of the large number of applications for each class, is limited to fifteen or twenty persons who are selected by the director of the Library and his assistants as best qualified to function well in the work in view of their initiative, personality, enthusiasm and serious purpose. Members of the class are paid $50 monthly during training, since the practical work which they perform is equivalent to part time employment. In return for the training given, the applicant is expected to work on the staff one year after graduation, provided a position is offered. All competent graduates have been in fact appointed to the staff as library assistants, and during the past two or three years there have been more vacancies than graduates.

***214** During the existence of the school, more than two hundred applications have been received from Negroes. All of them have been rejected. On June 14, 1933, the trustees of the Library formally resolved to make no change in the policy, then existing, not to employ Negro assistants on the Library service staff 'in view of the public criticism which would arise and the effect upon the morale of the staff and the public.' This practice was followed until 1942 when the trustees engaged two Negroes, who had not attended the Training School, as technical assistants for service in a branch of the Library which is patronized chiefly by Negroes. There are in all seventy senior and eighty junior library assistants employed at the Central Building and the twenty-six branches. There is no segregation of the races in any of them and white and colored patrons are served alike without discrimination. The population of Baltimore City is approximately eighty per cent white and twenty per cent colored.

Notwithstanding the appointment of two

colored assistants in one branch of the Library, the board of trustees continued to exclude Negroes from the Training School for the reasons set forth in the following resolution passed by it on September 17, 1942:

'Resolved that it is unnecessary and unpracticable to admit colored persons to the Training Class of The Enoch Pratt Free Library. The trustees being advised that there are colored persons now available with adequate training for library employment have given the librarian authority to employ such personnel where vacancies occur in a branch or branches with an established record of preponderant colored use.'

It was in accordance with this policy that the application made by the plaintiff on April 23, 1943, was denied.

The view that the action of the Board in excluding her was not based solely on her race or color rests on the contention that as the only positions as librarian assistants, which are open to Negroes, were filled at the time of her application, and as a number of adequately trained colored persons in the community were then available for appointment, should a vacancy occur, it would have been a waste of her time and a useless expense to the Library to admit her. The resolution of September 17, 1942, and the testimony given on the part of the defendants indicate that these were in fact the reasons which led to the plaintiff's rejection, and that the trustees were not moved by personal hostility of prejudice against the Negro race but by the belief that white library assistants can render more acceptable and more efficient service to the public where the majority of the patrons are white. The District Judge so found and we accept his finding. But it is nevertheless true that the applicant's race was the only ground for the action upon her application. She was refused consideration because the Training School is closed to Negroes, and it is closed to Negroes because, in the judgment of the Board, their race unfits them to serve in predominantly white neighborhoods. We must therefore determine whether, in view of the prohibition of the Fourteenth Amendment, the Board is occupying tenable ground in excluding Negroes from the Training School and from positions on the Library's staff.

The District Judge found that the Board of Trustees controls and manages the affairs of the Library as a private corporation and does not act in a public capacity as a representative of the state. Hence he held that the Board is not subject to the restraints of the Fourteenth Amendment which are imposed only upon state action that abridges the privileges or immunities of citizens of the United States or denies to any person the equal protection of the laws. His opinion, D.C., 54 F.Supp. 514, reviews at length the corporate history of the institution and applies the rule, enunciated in state and federal courts, that to make a corporation a public one its managers must not only be appointed by public authority, but subject to its control. See 18 C.J.S.,Corporations, § 18, p. 394 et seq.; Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 671, 4 L.Ed. 629.

The Court of Appeals of Maryland has used this test in somewhat similar cases and has held corporations to be private in character although public funds have been placed at their disposal to aid them in serving the public in the exercise of functions which could appropriately be performed by the state itself. For example, the rule was applied in Clark v. Maryland Institute, 87 Md. 643, 41 A. 126, where a colored youth was refused admission to an educational institution to which he had been appointed by a member of the City Council of Baltimore under a contract between the City and the Institute which authorized each member of the Council to make one appointment in consideration of an annual appropriation *215 by the City of $9,000 per year for the education of the pupils. It was held that the Institute was within its rights in excluding colored persons because it was a private corporation and not an agency of the state, subject to the provisions of the Fourteenth Amendment. See also St. Mary's Industrial School v. Brown, 45 Md. 310; Finan v. City of Cumberland, 154 Md. 563, 141 A. 269; University of Maryland v. Murray, 169

Md. 478, 182 A. 590, 102 A.L.R. 706; University of Maryland v. Maas, 173 Md. 554, 197 A. 123; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am.Dec. 72.

[1] These decisions are persuasive but in none of them was the corporation under examination completely owned and supported from its inception by the state as was the library corporation in the pending case. Moreover, a federal question is involved which the federal courts must decide for themselves so that a final and uniform interpretation may be given to the Constitution, the supreme law of the land; and in the performance of this duty in the pending case, we should not be governed merely by technical rules of law, but should appraise the facts in order to determine whether the board of trustees of the library corporation may be classified as 'representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.' Nixon v. Condon, 286 U.S. 73, 88, 89, 52 S.Ct. 484, 487, 76 L.Ed. 984, 88 A.L.R. 458; Smith v. Allwright, 321 U.S. 649, 662, 64 S.Ct. 757, 151 A.L.R. 1110.

With this test in view, we must examine the legal background and the activities of the Library. It was established in 1882 through the philanthropy of Enoch Pratt, a citizen of Baltimore. His purpose was to create an institution which would belong to the City of Baltimore and serve all of its people; but he was fearful lest its management might fall into the hands of local politicians who would impair its efficiency by using it for selfish purposes. Accordingly, he erected and furnished a central library building at a cost of $225,000 and provided a fund of $833,000 and gave them to the city on condition that the city would create a perpetual annuity of $50,000 to be paid to the Board of Trustees for the maintenance of the Library and the erection and maintenance of four branches. But he also made it a condition of the gift that a Board of Trustees, to be selected by him from the citizens of Baltimore, be incorporated, with the power to manage the Library and fill all vacancies on the Board irrespective of religious or political grounds, and with the duty to make an annual report to the city showing the proceedings, the condition of the Library, and its receipts and disbursements for the year. These conditions were met; the corporation was formed, and the conveyances by gift were made to and accepted by the city which assumed the required obligations.

The steps by which these objects were given legal effect included an Act of the Legislature of Maryland of March 30, 1882, Acts 1882, Ch. 181; Ordinance No. 106 of the city of July 15, 1882, Ordinance No. 64 of May 14, 1883, and Ordinance No. 145 of October 10, 1884. The Act described the terms of the gift and the means which it offered to perpetually promote and diffuse knowledge among the people of the city, empowered the city to accept the gift and to agree by ordinance, to be approved by the voters of the city, to make the stipulated annual payment and directed the city to appoint a visitor to examine the books and accounts of the trustees annually and report to the city, and in case of abuse by the trustees to resort to the proper courts to enforce the performance of the trust. The Act also named nine citizens of Baltimore to constitute the Board of Trustees and to be a body corporate by the name of 'The Enoch Pratt Free Library of Baltimore City,' and empowered them to fill vacancies in the Board and to do all necessary things for the control and management of the Library and its branches, and to make all necessary by-laws and regulations for the administration of the trust and the appointment of necessary officers and agents. The trustees were directed to make an annual report to the city of their proceedings and of the condition of the Library, with a full account of receipts and disbursements. The real and personal property vested in the city by virtue of the act, as well as future acquisitions, were exempted from state and city taxes. The ordinances of the city contained appropriate provisions to give effect to the plan.

The Library was managed and conducted in accordance with these provisions until the year 1907 when Andrew Carnegie gave the city $500,000 for the erection of twenty

additional branch buildings on the sole condition that the city should provide the sites and an annual sum of not less than ten *216 per cent of the cost of the buildings for maintenance. The city accepted the gift upon these conditions by Ordinance No. 275 of May 11, 1907, and directed that the annual appropriation be expended by the trustees for the branch libraries in such manner as might be specified by the city from year to year in its ordinance of estimates. The legislature impliedly ratified the gift by the Act of 1908, Ch. 144, by enacting an amendment to the city charter empowering the city to appropriate and pay over such sums as it might deem proper for the equipment, maintenance or support of the library, provided that the title of ownership to the property should be vested in the Mayor and City Counsel of Baltimore.

By the year 1927 the central library had outgrown its quarters and the Legislature of the state, by the Act of 1927, Ch. 328, authorized the city, if the voters should approve, to issue bonds in the sum of $3,000,000 for the acquisition of additional real estate and the erection of a new building for a free public library in Baltimore City. The bond issue was authorized by Ordinance No. 1053 of April 13, 1927, which was submitted to and approved by the voters. Thereafter the city acquired the necessary land and erected thereon a modern library which constitutes the central building of the institution. Ordinance No. 1195, approved December 16, 1930, authorized the incorporation into the new site of the land previously occupied by the central building. The building has been completed and has been in use for some years past. The Library now includes this central building and twenty-six branches.

The existing fiscal arrangement between the city and the Library throws strong light on the question now under consideration. The work of the Library has been so expended and its usefulness to the people of Baltimore has been so clearly demonstrated under the management of the Board of Trustees that the city has gradually increased its annual appropriations until they far exceed the obligations assumed by it under the gifts from Enoch Pratt and Andrew Carnegie. These obligations, as we have seen, amounted to the annual appropriation of $50,000 to meet the condition imposed by Mr. Pratt, offset by the income from the capital sum of $833,000 donated by him, and also the annual appropriation of $50,000 to meet the condition of Mr. Carnegie's gift. But in addition, the city has appropriated large additional sums. The total amounted to $511,575 in 1943 and $650,086.90 in a944. In addition the city pays large sums for bond interest, bond retirement, and the retirement funds for library employees which in 1944 amounted to $82,160 for bond interest, $86,000 for bond retirement and $40,000 for the retirement fund, so that the city's total contribution to the Library for the year 1944 totaled the sum of $858,246.90.

Until ten years ago the appropriations made by the city were turned over to the trustees to be expended for library purposes; but for the past ten years all disbursements from city appropriations are made through the City Bureau of Control and Accounts on vouchers submitted by the trustees to the Bureau for payment. Salary checks are issued by the city's payroll officer and charged against the Library's appropriation. Library employees are not under the city's merit system, but their salaries conform to the city's salary scale and if an increase in salary or the creation of a new position is desired, the trustees are obliged to take up the matter with the Board of Estimates. The trustees submit an itemized budget to the city which is reviewed by the city's budget committee and the library budget is included in the regular city budget. All of the income of the Library is thus received from and disbursed by the city with the exception of an annual income of special gifts which has recently averaged from $6,000 to $8,000 annually, or about one per cent of the city's outlay.

By the Act of Legislature of 1939, Ch. 16, the city was authorized to include library employees within the municipal employees' retirement system, and this arrangement was accomplished upon the request of the trustees of the Library by Ordinance No. 961 of May

29, 1939. The annual contribution of the city to the retirement fund for library employees is about $40,000.

From this recital certain conclusions may be safely drawn. First. The purpose which inspired the founder to make the gift and led the state to accept it, was to establish an institution to promote and diffuse knowledge and education amongst all the people.

Second. The donor could have formed a private corporation under the general permissive statutes of Maryland with power both to own the property and to manage the business of the Library independent of the state. He chose instead to seek the aid *217 of the state to found a public institution to be owned and supported by the city but to be operated by a self perpetuating board of trustees to safeguard it from political manipulation; and this was accomplished by special act of the legislature with the result that the powers and obligations of the city and the trustees were not conferred by Mr. Pratt but by the state at the very inception of the enterprise. They were in truth created by the state in accordance with a plan which was in quite general operation in the Southern and Eastern parts of the United States at the time. [FN1]

Third, during the sixty years that have passed since the Library was established, the city's interests have been greatly extended and increased, as the donor doubtless foresaw would be the case, until the existence and maintenance of the central library and its twenty-six branches as now conducted are completely dependent upon the city's voluntary appropriations. So great have become the demands upon the city that it now requires the budget of the Library to be submitted to the municipal budget authorities for approval and in this way the city exercises a control over the activities of the institution.

We are told that all of these weighty facts go for naught and that the Library is entirely bereft of governmental status because the executive control is vested in a self perpetuating board first named by Enoch Pratt. The District Court held that Pratt created in effect two separate trusts, one in the physical property, of which the city is the trustee, and the other a trust for management, committed to the board of trustees, and that the purpose and effect of the act of the legislature 'was merely to ratify and approve the agreement between Mr. Pratt and the city, and to give the necessary authority of the state to the city to carry out the agreement'; and that the practical economic control of the Library by the city, by virtue of its large voluntary contributions, is immaterial, because 'the problem must be resolved on the basis of the legal right to control and not possible practical control through withholding appropriations.'

[2] We do not agree with this analysis of the situation. It is generally recognized that the maintenance of a public library is a proper function of the state; and nowhere has the thought been better expressed than in Johnson v. Baltimore, 158 Md. 93, 103, 104, 148 A. 209, 213, 66 A.L.R. 1488, where the court said:

' * * * At the present time it is generally recognized and conceded by all thoughtful people that such institutions form an integral part of a system of free public education and are among its most efficient and valuable adjuncts. An enlightened and educated public has come to be regarded as the surest safeguard for the maintenance and advancement of the progress of civilized nations. More particularly is this true in republican forms of government, wherein all citizens have a voice. It is also true that education of the people ought not to and does not stop upon their leaving school, but must be kept abreast of the time by almost constant reading and study. It would therefore seem that no more important duty or higher purpose is incumbent upon a state or municipality than to provide free public libraries for the benefit of its inhabitants.'

[3][4] It is equally true that the state may set up a board of trustees as an incorporated instrumentality to carry on its educational work, as it has done in the case of the

University of Maryland. See University of Maryland v. Murray, 169 Md. *218 479, 182 A. 590, 103 A.L.R. 706; Maryland Declaration of Rights, Article 43, Md. Code 1939, Art. 77, Sec. 15. It is our view that although Pratt furnished the inspiration and the funds initially, the authority of the state was invoked to create the institution and to vest the power of ownership in one instrumentality and the power of management in another, with the injunction upon the former to see to it that the latter faithfully performed its trust. We know of no reason why the state cannot create separate agencies to carry on its work in this manner, and when it does so, they become subject to the constitutional restraints imposed upon the state itself.

[5] We think that the special charter of the Library should not be interpreted as endowing it with the power to discriminate between the people of the state on account of race and that if the charter is susceptible of this construction, it violates the Fourteenth Amendment since the Board of Trustees must be deemed the representative of the state. The question of interpretation is not unlike that which was before the Supreme Court in Steele v. Louisville & N.R. Co., 323 U.S. 192, 65 S.Ct. 226, where it was held that a labor union which was empowered by the Federal Railway Labor Act to represent a whole craft of employees could not discriminate against Negro members thereof. The court said, 65 S.Ct.at pages 230, 232:

'If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

'We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J. I. Case Co. v. National Labor Relations Board, supra, 321 U.S. (332), 335, 65 S.Ct. 579 (88 L.Ed. 762), but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.'

For like reasons we think that the charter of the Library which empowers the Board of Trustees to manage the institution for a benevolent public purpose should not be construed to authorize them to pass a regulation in respect to the appointment of its agents which violates the spirit of the constitutional prohibition against race discrimination. Nor do we assume that the act would be so interpreted by the Court of Appeals of Maryland which in Mayor & c. v. Radecke, 49 Md. 217, 33 Am.Rep. 239, pointed out the duty of the courts to look beneath the language of an act to find the true purpose of a grant of legislative power. In that case the court said: 'While we hold that this power of control by the Courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an Ordinance passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the

presumption that the Legislature never intended to confer the power to pass it, and to justify the Courts in interfering and setting it aside as a plain abuse of authority.'

[6] In any event, it is our duty in this case in passing upon the nature of the library corporation and its relationship to the state not to be guided by the technical rules of the law of principal and agent, but to apply to test laid down in Nixon v. *219 Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458, to which we have already referred. There the Supreme Court held that an executive committee of a political party, which had been authorized by a Texas statute to determine the qualification of the members of the party, was not acting merely for the political organization for which it spoke but was acting as a representative of the state when it excluded Negroes from participation in a primary election. In declaring that this action was subject to the condemnation of the Fourteenth Amendment the court said (286 U.S.at pages 88, 89, 52 S.Ct.at page 487, 76 L.Ed. 984, 88 A.L.R. 458):

' * * * The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere. The test is not whether the members of the executive committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.'

For further application of this principle, see Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987.

[7] We have no difficulty in concluding that in the same sense the Library is an instrumentality of the State of Maryland. Even if we should lay aside the approval and authority given by the state to the library at its very beginning we should find in the present relationship between them so great a degree of control over the activities and existence of the Library on the part of the state that it would be unrealistic to speak of it as a corporation entirely devoid of governmental character. It would be conceded that if the state legislature should now set up and maintain a public library and should entrust its operation to a self perpetuating board of trustees and authorize it to exclude Negroes from its benefits, the act would be unconstitutional. How then can the well known policy of the Library, so long continued and now formally expressed in the resolution of the Board, be justified as solely the act of a private organization when the state, through the municipality, continues to supply it with the means of existence.

The plaintiff has been denied a right to which she was entitled and the judgment must be reversed and the case remanded for further proceedings.

Reversed and remanded.

FN1. We learn from Joeckel, The Government of the American Public Library, University of Chicago Press, 1935, that the oldest form of free public library existent today is that having a corporate existence. Accurate description of the libraries comprising this group is impossible because of the

many variations of legal detail but the essential distinction between these and other public libraries lies in the fact that control and sometimes ownership is vested wholly or in part in a corporation, association or similar organization which is not part of the municipal or other government. Frequently there is some form of contractual relationship between the corporation and the city. But regardless of legal organization, these libraries all render service freely to all citizens on precisely the same terms as public libraries under direct municipal control. No less than 56 or 17% of all the public libraries in American cities having a population in excess of 30,000 fall into this category. Geographically these libraries are confined to the East and especially to the South where more than one-third of the cities in the 30,000 or over population group are served by libraries of this type. The Enoch Pratt Free Library belongs to this group.

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Maryland Law Review
1993

*1137 AN ADEQUATE EDUCATION FOR ALL MARYLAND'S CHILDREN: MORALLY RIGHT, ECONOMICALLY NECESSARY, AND CONSTITUTIONALLY REQUIRED

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Thousands of children from low-income families are not being adequately educated in Maryland. This unfortunate situation is resulting in a tremendous loss of human potential and capital, as well as creating an ever-increasing danger of complete class stratification. The emergence of a permanent underclass is inconsistent with any ideal of equality of opportunity and attacks the very foundation of our democracy.

Marylanders cannot ignore this deepening crisis. Welfare dependency and incarceration of huge numbers of poor illiterates are draining the State's limited fiscal reserves, while crime and blight are spreading across political, social, and economic boundaries. The State can no longer afford to neglect such a large and growing segment of the population. The vitality of the State's economy is increasingly dependant on training every available individual for skilled employment. Economic competition is fierce and increasingly international, and properly trained workers are becoming scarcer. And as the population grows older, a smaller pool of workers will ultimately support an increasing number of retirees.

The need for educational reform in Maryland is great. Such change inevitably bears a price tag that residents must either agree to pay now or face the twenty-first century with a diminished potential for prosperity. At the present time, the State's success at educating low-income children falls below a realistic standard of what is both needed and required. These children--and their parents--have limited political influence over state expenditures and educational *1138 activities. As such, the

need for judicial intervention is greater. If the political process fails, courts must rise to the call and protect the constitutional right of all Maryland children to an adequate and appropriate education.

This Article describes the educational plight of low-income children and explores the political, social, moral, and economic costs of miseducation. It then analyzes the State's constitutional obligation to correct the problem and establish an effective public school system for all children. Finally, this Article outlines the process by which Maryland's current education system can be held accountable, improved, and brought into constitutional compliance.

I. Successfully Educating Low-Income Children

Certain identifiable groups of students are failing in school at disproportionately high rates. At various times during the last twenty-five years, educators have labeled these students "under-achievers," "low performers," "disadvantaged," "culturally deprived," "educationally handicapped," and most recently, "at-risk." [FN1] Poverty is the best indicator of "at-risk" status. [FN2] Nationally, poor children are three times more likely to drop out of high school than nonpoor students, [FN3] and twice as likely to be low academic achievers. [FN4] Moreover, the longer a child lives in poverty, the stronger the correlation is to academic problems. [FN5] In addition, surrounding an impoverished child exclusively with other low-income *1139 students in school will have a negative impact on that child's education. [FN6]

The State's own studies reveal the extraordinarily tight correlation between poverty and low achievement among Maryland school children. [FN7] Indeed, no other factor more accurately predicts educational performance than poverty. [FN8]

Despite the tremendous failure at educating low-income children, these students are fully capable of matching the academic success of wealthier students. [FN9] In fact, some schools with low-income children are already succeeding, [FN10] and proven programs exist that can be readily implemented on a large scale. [FN11] Most promising are early intervention programs that serve to prevent younger children from experiencing academic failure and dropping out. [FN12] The earlier a program intervenes, the better the results; [FN13] and researchers have developed dramatically successful pre- school, [FN14] kindergarten, [FN15] and *1140 elementary school programs, including Head Start, [FN16] Success For All, [FN17] Reading Recovery, [FN18] the Comer Model, [FN19] the Accelerated School Program, [FN20] and others. [FN21] These programs have helped low-income students complete their elementary education at a standard matching the national norms or better. Other programs have successfully targeted poor middle and high school students, [FN22] although *1141 the longer students are undereducated, the more expensive and difficult it is to bring them up to national standards. [FN23]

In general, studies show that at-risk children benefit from structured programs with high expectations. [FN24] Programs that keep students with their peers, rather than pulling them out into separate classrooms, are also more effective. [FN25] Integration not only prevents stigmatization, but it also enables at-risk children to work with more able children and exposes them to the challenges of a more rigorous academic program. [FN26] Furthermore, individual attention is valuable whenever possible, whether in the form of smaller schools. [FN27] or computer assisted instruction. [FN28] Finally, programs that address non-educational barriers to academic success--for example, inadequate family involvement [FN29] and insufficient health care [FN30]--have received *1142 increased focus.

Unfortunately, even for the very successful interventions, the significance of favorable results diminishes each year after students leave the programs. [FN31] There is no magic pill that permanently cures at-risk students of their academic weaknesses. Although the intensity of the

services can be greatly reduced over time, [FN32] even the best pre-school or kindergarten program must be followed by continued intervention. [FN33] Nevertheless, the existence of these programs is proof that at-risk children can be helped and that we at least know what to do to begin to help.

II. The Undereducation of Low-Income Children

[T]o those who need the best our education system has to offer, we give the least. The least well-trained teachers. The lowest-level curriculum. The oldest books. The least instructional time. Our lowest expectations. Less, indeed, of everything that we believe makes a difference. [FN34]

Despite the existence of proven instruction techniques and intervention programs, most schools continue to use ineffective and even counterproductive approaches. For example, children identified as underperforming are often stigmatized and suffer from the lowered expectations of their teachers, [FN35] who themselves are frequently *1143 the least qualified and experienced in their districts. [FN36] Schools often force at-risk children to repeat a grade, [FN37] despite clear evidence of the educational harm of this practice. [FN38] Furthermore, as early as elementary school, teachers and administrators place at-risk children in classes with other low achievers-- a technique called tracking or ability grouping--where they tend to fall further behind other students. [FN39] Academically troubled children who are also from poor families are provided with often-ineffectual compensatory services. [FN40] Students who continue to fail are placed in segregated *1144 special education classes or schools, where they usually remain indefinitely. [FN41] In sum, these techniques are triply ineffective because they are used only after a student's school failure has significantly progressed; they do little or nothing to help the student catch up; and in fact, they often result in further slippage. [FN42]

Yet if schools decided to use the effective programs described above, most schools would lack the financial resources to provide the programs for every low-income child. [FN43] Virtually every proven strategy entails substantial increased costs above the amount that a district normally spends on students who are not at-risk. [FN44] However, low-income students, despite their need for additional services, are more likely to attend the schools with the least money to spend. [FN45] These schools are often in cities with shrinking tax bases. [FN46]

*1145 The failure to provide schools with the resources needed to implement effective programs is shortsighted. The high cost of improvement programs is justified by an overall cost savings, both for the school district, which needs fewer remedial services in the long run, and society, which gains more productive citizens and avoids welfare dependency and criminal activity. [FN47] Thus, money spent on proven strategies and high quality programs is a sound investment. [FN48] Indeed, failing to spend the money now is likely to result in tremendous political, economic, and social costs in the future.

III. Political, Social, and Moral Costs

A dream has pervaded this country for over two-hundred years. A dream that is etched in our culture and in our national conscience. A dream that any American child could, through hard work and dedication, rise to the top and succeed in building a better life for himself and his children. . . . We are now in danger of losing that dream. For if you do not possess the basic skills required to survive in today's world, then you cannot get into the system, you cannot get a job, you cannot succeed, and you will spend a lifetime on the outside looking in. [FN49]

The often-cited American rags-to-riches story is meant to be more than a fantasy. It is an important part of our ethos that even the poorest child can achieve the "American Dream" with its attendant economic success. In theory, every child is supposed to have an equal opportunity to achieve the

Dream. Education is the critical means by which less-advantaged children can climb the economic ladder. [FN50] The fact that poor children do not have access to the same *1146 quality of instruction as their more well-off peers threatens to shatter this ideal of equal opportunity. [FN51] The growing disparity in education threatens to undermine and destroy not only the democratic concepts of fairness and equal opportunity, [FN52] but may also create a permanent and isolated caste of undereducated, underskilled, and underemployed citizens. [FN53] This caste would pose an ever-growing threat of political radicalism and violent explosiveness. [FN54] The growing sense of isolation and victimization can only be diffused by providing real economic opportunity, which for young people starts with educational opportunity.

This issue can have great impact on the nature of our democracy. [FN55] Our founding fathers recognized that an educated populace is needed for a democracy to survive. [FN56] Indeed, education is necessary for a person to be an effective and responsible citizen. [FN57] After all, today's low-income students will soon constitute a large portion of the country's voters. [FN58]

IV. Economic Costs

The change our country is undergoing as it moves from a manufacturing, mineral and industrial economy to a service and technological economy has resulted in three altered characteristics of American labor that are extremely significant *1147 for education. First, business and industry can no longer absorb even a portion of the growing pool of unschooled, untrained, cheap, unskilled labor that formed the backbone of the American labor force in the past. Second, the failure of the schools to educate a large segment of the population has created a financial liability in terms of lost wages, lost taxes, incarceration, rehabilitation, welfare and delinquency which costs many times more than the cost of education. . . . Third, the private sector is already experiencing problems in acquiring the skilled labor necessary for the competitiveness and even the survival of American technology-oriented business and industry. It is anticipated that this shortage of skilled labor will become much more extensive and critical in the years ahead. [FN59]

Education--long a moral, social, and political need--is now inextricably bound to the economic future of this country and this State. There is a grave risk that without substantial educational reform, the standard of living in the United States will decrease. Our children will enjoy less prosperity than we do.

The chronic undereducation of low-income children poses a particularly severe risk. Undereducation results in increased welfare dependency, drug use, participation in illegal activities, and incarceration. [FN60] Society pays for welfare, police, prisons, and courts, in addition to the economic and personal costs of the crimes committed and opportunities lost. Maryland is paying large and ever-increasing sums of money to support the welfare or jail expenses of adults who started life as poorly educated children in low-income families. [FN61]

At a broader level, the economic costs are even greater, because the disenfranchised are not contributing positively to the economy, lacking both the education and skills to do so. Future trends indicate that not only is education becoming an increasingly important *1148 job requirement, but that the country will also need the skilled involvement of every citizen if it is to maintain its competitive position in the global economy. [FN62]

A. The Economic Need for Improved Education in the Twenty-First Century

In the past, well-paying, secure jobs were available for a sizeable fraction of high school dropouts in this country. The manufacturing sector provided opportunities for unskilled workers to attain middle-class incomes and enjoy relative prosperity. [FN63] Those days are largely over. [FN64]

Foreign competition decreased American heavy industry in the 1970s and 1980s, significantly reducing the total number of manual labor jobs. [FN65] The American economy now relies for much of its economic growth on service industries, which require of employees increased skills and sophistication. [FN66]

As the global economy continues to evolve and expand, foreign countries are progressing beyond the scientific and technological capabilities of the United States. [FN67] This deficiency is evidenced by the fact that the United States has the lowest rate of productivity *1149 growth in the industrialized world. [FN68] Economic progress depends on the improved efficiency of American workers, [FN69] which in turn must be built on better-educated citizens with strengthened work skills. [FN70] Indeed, the vast majority of jobs in the new service economy demand higher levels of expertise than was required by previously common jobs, particularly those in the sciences, engineering, and mathematics. [FN71] The average new job in the early twenty-first century will require an education estimated to be one- and-a-half years beyond high school education. [FN72] Even the military, historically an employer of the last resort, no longer takes high school dropouts. [FN73]

Students who drop out of high school, fail to finish high school with decent skills, or choose not to pursue post-secondary educations will find themselves increasingly left out of the American economic mainstream. [FN74] They will experience higher unemployment rates and lower earnings potential. [FN75] These missed professional opportunities for those who have been undereducated will translate, on a national level, into lost economic output and lost tax revenue totalling in the billions of dollars. [FN76]

*1150 B. Demographics of the Changing Workforce

Just as the American economy requires an increasingly high level of skill from its workers, students who have disproportionately failed to acquire these important skills in schools are becoming a dramatically growing part of the workforce. Americans can ignore these children only by risking their own prosperity, as these children will either become the backbone of the national economy or prove to be the deadweight that sinks the country's economic ship. By 2020, an estimated twenty-seven percent of all children will be living in poverty. [FN77] While the proportion of children at risk of school failure is now estimated at almost thirty percent of the student population, dramatic increases are predicted. [FN78]

Economic reliance on disadvantaged children is also likely to rise, as a result of a second demographic shift: the aging of the American population. As the work force ages, there will be fewer young people available to support a large retired community. [FN79] Social Security and many other pension systems rely on the continued contributions of current workers to support those no longer working. These demographic trends strongly suggest that neither the national nor the state economy will be able to rely exclusively on a young middle-class population to meet their labor needs in the twenty-first century. Each child who drops out of high school will be one more person unable to contribute effectively to the prosperity of the United States. The threat of these children dragging down the economy is growing and is of increasing concern to the American people. [FN80] As one report concluded, "The willful neglect of *1151 America's poor children is not only immoral; it is 'just plain stupid.'" [FN81]

V. The Right to an Adequate, Substantially Equal Education

In Maryland, the failure to educate impoverished children is not "just plain stupid;" it is unconstitutional. The State's Constitution maintains that "[t]he General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance." [FN82] This language requires the State to

provide every child with an adequate education and equal educational opportunity.

The Court of Appeals has never explicitly defined "thorough and efficient," the Education Clause's most important phrase. [FN83] In addition, the framers who drafted the language in 1867 never specifically discussed their intended meaning of these words. [FN84] This leaves four critical tools available to analyze the requirements of a "thorough and efficient" education. [FN85] First, and most importantly, *1152 the language "thorough and efficient" carried certain definitive meanings and implications for the framers and their contemporaries. [FN86] Second, the historical context in which the clause was adopted provides insight into the intent of the framers. Third, the interpretations of the words by the state legislature and its delegated agency, the Maryland State Board of Education, are illustrative. [FN87] Finally, the experiences of other states that adopted similar or identical language, both before and after 1867, provide important points of comparison and information, [FN88] particularly because the Maryland drafters knowingly selected language already used in three other state constitutions. [FN89]

Today, virtually every state constitution contains an education clause, making comparisons inevitable. [FN90] Maryland's language requiring a "thorough and efficient" education is similar to language *1153 found in 12 other states. [FN91] State-funding-equity suits based on the "thorough and efficient," "thorough" or "efficient" language have proven to be extraordinarily successful in recent years, providing four of the five most current major victories for education reform. [FN92]

A. History of "Thorough and Efficient"

Educational reform was one of the great social and political movements of the nineteenth century. [FN93] For Thomas Jefferson, an educated people was essential for a self-governing democracy. [FN94] *1154 For Horace Mann, education created a unified citizenry out of the many different groups in the United States. [FN95] Equally important, a school of political economics arose based on Adam Smith's Wealth of Nations. [FN96] These writers advocated universal education as a means of enhancing the American economy and reducing crime and unemployment. [FN97] Jefferson, Mann, and the political economists fought for the creation of state-funded "common schools" in which poor children could receive the same quality of education as their wealthier peers. [FN98] They also maintained that all children had a right to education. [FN99]

*1155 Based on these philosophies, Maryland's education reformers pursued change in the early and mid-1800s despite virulent resistance. [FN100] While some districts had established successful public schools, others had "made practically no headway in the education of children." [FN101] The antireformers, principally wealthy property and slave owners, who dominated the state legislature viewed education as a threat to the social order. [FN102] Only after the Civil War severely damaged the political and economic power of the slave owners were reformers able to pass a constitutional amendment that established an educational entitlement for every child in Maryland. [FN103] The 1864 education clause called for "an uniform system of free public schools" [FN104] and specifically required the hiring of a state superintendent of schools who would have wide authority to improve the quality of education in the State. [FN105]

*1156 The State's first superintendent, Libertas Van Bokkelin, quickly moved to establish a highly centralized system of public schools, [FN106] financed primarily by the state government. [FN107] Although he made dramatic headway, [FN108] resistance was significant. [FN109] Some citizens disliked the additional state tax used to pay for the schools, [FN110] while others resented the centralized nature of the system. [FN111] The old pro-Confederate forces, previously relegated to the political backwaters of the State, began reasserting themselves and mobilizing the anti-Union, anti-Yankee forces. [FN112] These forces coalesced at the 1867 Constitutional Convention for the purpose, among others, of dismantling the state-controlled system of free public schools. [FN113] Ultimately,

however, they largely failed.

A new education clause adopted in 1867 represented a compromise between reformers and antireformers; yet it was a compromise that heavily favored the reformers. Although the antireformers were able to excise the 1864 requirement of a state-run system, [FN114] ***1157** they were unable to mandate a locally run system or eliminate the State's ultimate responsibility for education. [FN115] Instead, the convention adopted the "thorough and efficient" language, which maintained the State's commitment, adding a qualitative component to the constitutional mandate. [FN116]

The various uses of the two words before, during, and after the convention prove that "thorough" and "efficient" each imply concepts of adequacy and effectiveness. Webster's dictionary defined "efficient" in 1864 as "causing effects; producing results; actively operative; not inactive, slack or incapable; characterized by energetic and useful activity." [FN117] An 1815 synonym for "thorough" was "complete," [FN118] and an 1872 dictionary defined "thorough" as "complete; full; perfect." [FN119] The delegates to the 1851 convention repeatedly used "efficient" to describe an adequate education system. [FN120] The unsuccessful education clause proposed by reformers in 1851 read, "It shall be the duty of the Legislature . . . to provide for the establishment of efficient common schools, adequate to the education of every white child of this State." [FN121]

Horace Mann described his visionary common school, which provided adequate education for all children, as "efficien[t]." [FN122] He ***1158** used "thorough" to describe the education parents looked for in public schools, but could only find in the high quality private institutions. [FN123] Abraham Flexner and Frank Bachman, in their 1916 analysis of education in Maryland, repeatedly used "efficient" to describe their ideal system. [FN124]

Thus, in using these words, the delegates intended to mandate an adequate system of education throughout the State. [FN125] If they had meant anything else, they would not have used such strongly qualitative language. The major change from the 1864 clause to the 1867 version was to give the legislature greater freedom to design the structure of the State's education system without a requirement of full state centralization.

B. The Hornbeck Decision

In 1979, several Maryland school districts sued the State, claiming that the educational finance system violated the federal and state ***1159** constitutions. [FN126] The Hornbeck court explained:

> The complaint alleged that because of the insufficiency of school funds caused by the State's discriminatory, unequal and inadequate school financing system, the plaintiff school boards were unable to meet their constitutional obligations under state and federal equal protection guarantees or under the "thorough and efficient" clause of § 1 of Article VIII of the Maryland Constitution. [FN127]

The plaintiffs argued that the State was constitutionally required to ensure equality of funding for each child in the State, [FN128] relying heavily on the equal protection clauses of both the federal and state constitutions. [FN129] In order to determine whether the State violated the equal protection clauses, the Court of Appeals applied the rational basis test. [FN130] First, it found that the State's desire for local control was a legitimate governmental objective. [FN131] Second, it established that reliance on local taxation was a reasonable means to encourage the goal of local control. [FN132] Finally, the court explained that the financial disparities, which were at the heart of the plaintiffs' complaint, were simply the inevitable side effects of the State's legitimate reliance on local taxation. [FN133]

For the purpose of determining the meaning of "thorough and efficient," the Hornbeck decision is only indirectly helpful. For instance, the opinion does not define the precise requirements of the education clause. Indeed, because the plaintiffs provided no evidence that their schools were not providing an adequate education, [*1160 FN134] the court did not need to define "thorough and efficient" or determine whether any school failed to meet that constitutional standard. [FN135]

Nevertheless, the Hornbeck dicta generally hints at the meaning of the education clause. For example, the court commented that "the trial court did not find that the schools in any district failed to provide an adequate education measured by contemporary standards," implying that such a finding would have established a constitutional violation. [FN136] The court also described the mandate of Article VIII's "thorough and efficient" language as requiring no more than a "basic or adequate education," even though it provided no indication of what a "basic or adequate" education entailed. [FN137] The full meaning of "thorough and efficient," however, remained unresolved by the decision.

C. What Quality of Education is "Thorough and Efficient?"

The vision of the Maryland reformers who framed the "thorough and efficient" language parallel the national reformers and therefore entailed an educational system that served political, social, and economic goals. [FN138] First, the reformers expected schools to provide students with the skills needed to vote intelligently and to *1161 participate fully in the American democracy. [FN139] The mere ability to read the names in a voting booth would fall far short of the desired level of skills needed to understand the issues involved in an election and to remain reasonably involved between elections. [FN140] Second, the reformers' ideal placed responsibility on schools to provide enough exposure to American culture and values to bring a heterogenous group of students under a common philosophical umbrella. [FN141] This goal required children to learn about the history and culture of the United States and its people. Finally, the reformers expected schools to provide all of Maryland's children with the skills needed to compete economically with people throughout the State and with those from other states. Today, this would include the language, mathematic, and scientific skills necessary to obtain a job in the service- and technology-based economy. Anything less than a high school education would irreparably hurt the chances of a person attempting to enter the economic mainstream. [FN142]

Putting these political, social, and economic pieces together, a "thorough and efficient" education includes the basics, but should extend far beyond the "three Rs" in both rigor and scope. [FN143] A system that produces barely literate graduates cannot possibly satisfy the "thorough and efficient" or "basic or adequate" requirements--nor can a system in which thousands of students fail to graduate at all.

Judicial opinions from other states with similar constitutional language strongly confirm this requirement of a comprehensive education. The courts in West Virginia and New Jersey--states with "thorough and efficient" education clauses--established rigorous and broad constitutional standards that cover the ability of students *1162 to succeed economically, socially, politically, and morally. For example, in Abbott v. Burke, [FN144] the high court in New Jersey described the breadth of the constitutional mandate as it was to be understood in that state:

> Thorough and efficient means more than teaching the skills needed to compete in the labor market, as critically important as that may be. It means being able to fulfill one's role as a citizen, a role that encompasses far more than merely registering to vote. It means the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends. [FN145]

The court therefore ruled that the New Jersey school system could not limit course offerings to basic

skills and still meet the constitutional mandate. [FN146]

The West Virginia Supreme Court of Appeals subsequently explored and defined "the words 'thorough,' 'efficient' and 'education' to ascertain the boundaries of the legislature's constitutional mandate." [FN147] In Pauley v. Kelly, [FN148] the court declared that a "thorough and efficient" system of schools must "develop as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and do so economically." [FN149] The court further maintained that the constitutional provision "command s that the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters." [FN150] In conclusion, the court found that "the Thorough and Efficient Clause requires the development of certain high quality educational standards, and that ***1163** it is in part by these quality standards that the existing educational system must be tested." [FN151]

Courts in Arkansas, [FN152] Idaho, [FN153] Montana, [FN154] and Texas [FN155] have also defined standards that are comprehensive. Indeed, of the states with "thorough and/or efficient" language, no court has conclusively rejected the requirement of a high-quality education. Even courts in Colorado, [FN156] Illinois, [FN157] Minnesota, [FN158] Ohio, [FN159] and Virginia, [***1164** FN160] which have wavered somewhat in their declarations, tend to be conscious of the importance of a quality education. [FN161]

***1165** The board responsible for carrying out Maryland's educational mandate has also described the State's education obligation in broad and rigorous terms. The Maryland State Board of Education (MSBE or the Board), which is given broad authority over education by the General Assembly, [FN162] has asserted that the "mission of public education is to enable all students to grow intellectually, personally and socially, to become responsible citizens and to enjoy a productive life." [FN163] The Board expects the state to "provide each student the opportunity to graduate able to participate in an increasingly competitive world economy and job market, function as a responsible citizen in a democratic society, and achieve a personally fulfilling life." [FN164]

The Maryland Department of Education has also established explicit criteria that it expects every school and school district to reach by 1995. [FN165] As part of the Maryland School Performance Program (MSPP), students must meet certain "satisfactory" standards described as "realistic and rigorous level s of achievement indicating proficiency in meeting the needs of students." [FN166] These standards are comprehensive. [FN167]

Overwhelming evidence suggests that Maryland's education mandate, as embedded in the "thorough and efficient" clause, is to provide an education that enables all students to become effective citizens, workers, and members of society.

D. Does "Thorough and Efficient" Require Equal Educational Opportunity?

Constitutional drafters in 1864 were gravely concerned with the State's uneven quality of public education. [FN168] Their concern provided***1166** the original driving force behind Maryland's constitutional amendment regarding education. Public schools in a number of counties, particularly those with limited financial resources, were severely limited in scope and resources. [FN169] Everywhere, poor, rural, and black children lacked the same access to schools as their wealthier peers. [FN170] The schools in Baltimore City were relatively strong, [FN171] and one of the primary goals of educational reforms in the mid-1800s was to improve schools in other counties to the level of quality of schools in the city. [FN172] Taking a cue from drafters, the first State Superintendent moved forcefully to make an adequate quality education available to every child in Maryland. [FN173]

Although the drafters changed the language of Maryland's education clause from "uniform" to "thorough and efficient," there is no evidence that they wished to ignore the State's concern about *1167 inequality in education opportunity. The antireformers objected to a state-run system where the schools operated in a uniform fashion. [FN174] Nevertheless, the inclusion of "thorough" in the clause indicates a continued desire to end wide disparities in educational outcomes, even though each district might achieve that goal in its own unique way.

The constitutional language does not require that every school be identical in structure, appearance, or operation. [FN175] Nor does it prevent some schools from offering services that other districts cannot or do not wish to provide. [FN176] The education clause, however, does require all schools to provide students with an education that enables them to compete for jobs in the State. At-risk students who fail to receive the quality of education being provided to the vast majority of others are inevitably unable to compete for jobs with their better-educated peers. When this happens, it cannot be said that the students are receiving a "thorough and efficient" education.

The Hornbeck court apparently implied that a constitutional system could exist where a few students receive a "Chevrolet" education, while all other students receive a "Cadillac" education, as long as the "Chevrolet" version constituted a "basic public school education." [FN177] Yet it is impossible--and illusory--to define a "basic public school education" without any reference point at all. To illustrate, in a state where very few students attend secondary school, a high school education might be constitutionally optional. But where a certain quality and scope of education is standard across the state, students who fail to receive that type of education are placed at an unconstitutional disadvantage. Consequently, the "thorough and efficient" clause does mandate some degree of equality of educational opportunity within Maryland. That equality need not be exact, but it must be such that students at the lower end are not shut out of mainstream opportunities.

Courts from other states have unanimously found "thorough and efficient," or similar language, to require a component of equality. *1168 [FN178] As in Maryland, the drafters in those states were motivated by the desire to make education accessible to all students, in particular the impoverished and minorities. In New Jersey, for example, the high court emphatically stated, " W e do not doubt that an equal educational opportunity for children was precisely in mind when the delegates approved the education clause in 1875 . The mandate that there be maintained and supported 'a thorough and efficient system . . .' can have no other import." [FN179] The Supreme Court of Kentucky similarly stated:

Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. [FN180]

*1169 It is clear that equal educational opportunity does not exist where one group of students is receiving a significantly poorer education than others. To provide opportunity for these children, the State must provide the programs that have proven effective for atrisk students, even if those programs cost additional money. As the court in New Jersey proclaimed, achieving a thorough and efficient education for disadvantaged children "necessarily means that in poor urban districts something more must be added to the regular education in order to achieve the command of the Constitution." [FN181] A system that does the opposite--spends more money on wealthy students than low- income children--violates the constitutional command. [FN182]

In a state educational finance system that depends heavily on local funding (for example, property taxes), poor districts are unable to raise as much money as wealthier ones. [FN183] As a result, poor districts are unable to provide intensive services to low-income students. [FN184] Without such services, these students cannot and do not receive a "thorough and efficient" education. Thus, a state

school system that fails to implement effective programs for poorly performing low-income students because of heavy reliance on local funding is unconstitutional. [FN185]

*1170 E. How Much Discretion Does the State Have?

The words "thorough" and "efficient" require interpretation and elaboration to become working standards by which a specific education system can be judged for constitutionality. Often the drafters of constitutional language purposefully use language that is able to bend and adjust to the changing needs of society. [FN186] As the Maryland Court of Appeals explained:

The meaning of the Constitution is not restricted to the meaning of particular words employed as they were understood at the time of its adoption. . . . [The framers] could not, of course, foresee what changes were to come, so they wisely did not attempt to define what they meant by education. They left that to be interpreted in the light of conditions at any given time when such a question should arise. [FN187]

Following a line of precedent, the Hornbeck court recognized that the standards required by the education clause were not completely fixed by the drafters, but changed according to "contemporary educational standards." [FN188] Courts in other states have agreed unanimously, [FN189] adding to the educational mandates services not common 100 years ago, but considered necessary in modern *1171 society. [FN190]

Courts have often viewed the legislature as the more appropriate body to add flesh to the vague constitutional skeleton of education clauses and keep their mandates consistent with the changing times. [FN191] However, courts have not given complete freedom to state legislatures, insisting that legislative interpretations be bound by the purpose and values imbedded in the constitutional educational clauses themselves. [FN192] The Hornbeck court clearly distinguished between the state government's educational standards and those required by the constitution, recognizing the possibility that the state- defined standards might not live up to the constitutional requirements. [FN193]

State high courts are obligated to interpret their states' constitutions and to judge whether a mandate is being put into effect. [FN194] Without judicial intervention, citizens cannot enforce their constitutional*1172 rights against intrusions or neglect by the other governmental branches. This is especially true with respect to those who have a limited voice in the legislature. While the precise definition of "thorough and efficient" must change over time, the phrase will become meaningless if it is fully subject to the whim of whomever dominates the legislature.

Certainly, the delegates at the 1867 Constitutional Convention sought to provide more flexibility to the state legislature as to the structure of Maryland's public school system. [FN195] Indeed, they removed the explicit educational structure mandated by the 1864 education clause. [FN196] Yet, the new language obligated the State to set up a system of "thorough and efficient" public education: instituting a statewide system of adequate quality, providing equal opportunity, and producing effective citizens and contributing members of society. [FN197] Had the drafters wished to give complete freedom to the legislature, they would have omitted an education clause altogether or taken out the "thorough and efficient" language that demands adequate standards throughout the state. As a delegate to the Ohio constitutional convention of 1850-51--where the "thorough and efficient" language originated [FN198]--said, " i f we should leave everything to the legislature, why not adjourn this convention sine die, at once?" [FN199]

F. Is Effort Alone Enough?

A key issue is whether the State can defend its educational record simply by pointing to its various

attempts to improve education across the state and, in particular, its attempt to help low-income students perform at a higher level. The case for requiring results instead of effort alone is strong. The "thorough and efficient" language established a qualitative mandate that focused on results without excusing well-intentioned but ultimately inadequate and ineffective state efforts. Indeed, by definition such a system would not be "efficient," as it would cost money without producing results.

*1173 On the other hand, the State cannot be expected to do the impossible. For example, because many severely mentally disabled children cannot attend college, the State cannot be expected to provide college- preparatory courses to every such child. Nevertheless, the State cannot rely on stereotypical or erroneous impressions of students' abilities. The State's obligation must be based on what state-of-the-art research indicates about the capabilities of each child. [FN200] For example, until the 1960s, many handicapped students were viewed as uneducable and were excluded from the nation's public schools. [FN201] Only after research and experience demonstrated that all children could learn--including the severely disabled-- did courts find a state obligation to provide public education, as well as additional special programs and services. [FN202]

If evidence existed that low-income students were unable to learn or achieve the level of skills of wealthier children, no constitutional violation would occur when those children failed to do well in school. [FN203] Research, however, has revealed numerous programs and educational strategies that, when properly implemented, allow at-risk students to achieve up to national norms. [FN204]

These programs cost significantly more than regular programs and are therefore impossible to implement in many local districts that badly need them. Yet high cost is not an excuse for the State's failure to fund and implement necessary programs for at-risk students. The framers determined the appropriate balance between educational quality and state finances when they drafted the "thorough and efficient" language, which the citizens of the state then approved. Had the framers wanted to limit the State's financial *1174 commitment, they could have adopted language similar to Alabama's constitution:

> It is the policy of the State of Alabama to foster and promote the education of its citizens in a manner and extent consistent with available resources, and the willingness and the ability of the student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense. [FN205]

Maryland has not taken such an approach, and Maryland's education clause should not be diluted to reflect such an approach.

The Hornbeck decision did include one statement referring to effort: "[E]ducation need not be 'equal' in the sense of mathematical uniformity, so long as efforts are made, as here, to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child." [FN206] However, the court's statement refers to the plaintiffs' claim of "mathematical uniformity" of finances, not the overall effort of State money and oversight, the result of which must be an adequate education which gives every child a reasonable chance to compete for typical jobs in the changing state economy.

G. Does "Thorough and Efficient" Require Local Control?

Under the Hornbeck court's equal protection analysis, local taxation and the resulting financial disparities were justified as a rational means of achieving the legitimate state purpose of local control. [FN207] The court correctly noted that local control was an important goal for many delegates at the 1867 convention and provided the underlying rationale behind changing the system from "uniform" to "thorough and efficient." [FN208] In Pennsylvania, where delegates also rejected a "uniform" system, the high court also found local control to justify reliance on local taxation.

[FN209]

Nevertheless, the Hornbeck opinion did not imply that local control was constitutionally mandated. Indeed, the antireformers in *1175 1867 failed to establish local control as a constitutional requirement. [FN210] Efforts by Baltimore City delegates to have Baltimore's school system declared constitutionally independent were rebuffed. [FN211] Section 2 of Article VIII even gave the state legislature the authority to continue the centralized system if it so chose. [FN212] The very passage of a new education clause affirmed the desire for continued state involvement, as complete elimination of an education clause would have been the most obvious method to end state involvement and permanently establish local control. [FN213] Instead, the "thorough and efficient" language that was adopted placed the burden to create a public school system firmly on the State, rather than local counties. [FN214] In states with similar constitutional language, courts have unanimously affirmed this state obligation, even though local districts have assumed significant responsibility within the state education system. [FN215]

*1176 In summary, the State, in implementing its obligation to create and maintain a "thorough and efficient system of Free Public Schools," [FN216] may choose to grant considerable discretion to local districts. [FN217] Nevertheless, " a lthough the state may assign wide prerogatives to local school districts . . ., it is the individual state that is responsible for the quantity and quality of education in that particular state." [FN218] Therefore, "each state faces the responsibility for providing the necessary funds for implementation and operation." [FN219]

Although the political climate of 1867 resulted in the disbanding of the state-run system, the dissolution of the state board of education, and the firing of the state superintendent, [FN220] within five years the General Assembly had recreated the state board and had given it extremely broad powers. [FN221] The State continued to enforce rules concerning curriculum, length of school year and day, teacher certification, record-keeping and annual inspections over every high school. [FN222] However, political resistance resulted in inadequate funding of the state department of education. [FN223] An influential 1916 study noted this lack of funding as the single most important cause of Maryland's educational shortcomings. [FN224] Lacking significant *1177 state involvement, schools had poor instruction, [FN225] poorly trained teachers, [FN226] inconsistent quality, [FN227] irregular enrollment and attendance, [FN228] weak outcomes, [FN229] and poor overall quality. [FN230] Local county politicians refused to adequately fund public schools, forcing the state legislature to intervene through special bills mandating local contributions. [FN231] One report in the 1916 study claimed that increased state involvement was the only possibility to supply the proper consistency of quality throughout Maryland: "If the matter were left to county and districts, the disparity in educational opportunity would be intolerable. The state's contribution must therefore be employed to equalize conditions." [FN232]

From that point on, state involvement accelerated and widespread improvement ensued. Today, Maryland has codified a host of educational decisions including teacher credentials [FN233] and minimum salaries, [FN234] graduation requirements, [FN235] general curriculum outlines, [FN236] student suspension rules, [FN237] school missions, [FN238] minimum length of school day and school year, [FN239] and holiday schedules. [FN240] In addition, the State Superintendent has authority to stay any local school board decision. [FN241]

*1178 Local control of schools is a valuable feature of a state school system because local control invites local involvement, concern, and support. State involvement is important as well, not only because it is constitutionally mandated, but also because it is needed to create an adequate system across the state. [FN242] A careful balance is the best strategy: the State establishes required outcomes and ensures adequate resources, local districts implement programs, and then the State monitors schools and school systems to ensure they are producing results. [FN243]

This balance falls apart when a school or school district is unable or unwilling to fulfill the educational obligation delegated to it by the State. If a district lacks the money to create a "thorough and efficient" system, the State must provide the additional money and see that it is spent on effective programs. If a county lacks the ability to manage a "thorough and efficient" system, then the State must step in and require specific changes or assert direct control over specific failing schools. In either case, the principle of local control must give way to the State's paramount constitutional obligation to guarantee an adequate quality education for every child.

H. Constitutional Conclusions

We are left with several critical and unavoidable conclusions. Adoption of the "thorough and efficient" language mandated the establishment and maintenance of an adequate quality system of free public schools with considerable equality of educational opportunity throughout Maryland. Schools must provide students with the abilities and skills needed to become effective citizens, voters, workers, parents, and supporters of the arts. The required level of ability and nature of the skills change over time, according to the demands of the workplace and competition from outside the State. In response, the state legislature can design any system it deems appropriate, provided that the system produces people with the skills and abilities demanded by the constitution. The State may delegate authority and the financial burden of schools to local districts, but it may not relieve itself of the duty to do whatever is necessary *1179 to establish and maintain a statewide system of "thorough and efficient" schools for all children, even if it means assuming increased financial or operational responsibility.

VI. Education in Maryland

In summary, the need for an adequate education for the State's low-income children is rooted not only in social, political, and economic needs, but also in a constitutional mandate which has existed since 1867. That low-income children are not currently receiving an adequate education in Maryland is clear. [FN244] The State in recent years has implemented several programs to improve the quality of education, particularly in the lowest achieving schools. The State is also considering additional efforts, some of which are in formal proposal form. Despite these efforts, the question remains whether the State has properly identified its constitutional shortfalls and is taking the necessary steps to correct the deficit with all reasonable speed.

A. Has the State Fully Identified the Scope of Its Constitutional Violation?

1. Current State Efforts.--Although existing measures already reveal widespread educational inadequacy for poor children in Maryland, the State has expanded and focused its assessments of educational outcomes through annual evaluations of every school and school district. [FN245] This four-year-old effort, called the Maryland School Performance (MSP) program, measures schools and districts according to thirteen measures, including high school dropout rates and passing rates for state-prepared high school tests in reading, writing, mathematics, and citizenship. [FN246]

Schools and districts must achieve certain standards in each category in order to be deemed "satisfactory," which the State defines as "a realistic and rigorous level of achievement indicating proficiency in meeting the needs of students." [FN247] A satisfactory dropout rate can be as high as three percent in one year (or about twelve percent over the four years of high school). [FN248] The State established different passing rates for each of its four high school tests and also stated that, by the end of eleventh grade, ninety percent of *1180 students should have passed all four. [FN249]

In MSP's 1992 report, the state school system as a whole failed to achieve a satisfactory level in six areas. [FN250] In the district evaluations, only two school systems were rated satisfactory or better

in all thirteen areas (Carroll and Howard counties), while one district failed in eleven (Baltimore City). [FN251]

2. Proposed Additions.--The State plans to add measures to its MSP annual reports. Starting in 1993, MSP will evaluate the percentage of graduates "who have completed minimum course requirements that would qualify them for admissions to the University of Maryland System, . . . who have completed an approved occupational program, and . . . who have completed both university and occupational requirements." [FN252] The State has also developed special tests, called the Maryland School Performance Assessment Program (MSPAP), to measure students' knowledge in mathematics, reading, science, language usage, and social studies. [FN253] Students are tested in third, fifth, and eighth grade. [FN254] The State plans to incorporate the results from the MSPAP testing into MSP. [FN255] Finally, a new high school level test is also being contemplated. A task force has recommended a group of content-based and skill-based tests that students would need to pass in order to graduate. [FN256]

3. Analysis.--The initial MSP program falls far short of defining a constitutionally adequate program. The sole achievement indicators, the high school tests, require only a ninth-grade ability to *1181 pass. [FN257] Moreover, the program accepts a twelve percent dropout rate over four years and requires that only ninety percent of students pass all four tests. Thus, the State would rate a school "satisfactory" where as many as twenty-one percent of students fail to achieve even a ninth-grade education. [FN258] This standard falls far short of the requirement that all students acquire the skills needed to compete in the modern economy. Indeed, it fails to live up to the MSP program's own stated objective of providing "each student the opportunity to graduate able to participate in an increasingly competitive world economy and job market, function as a responsible citizen in a democratic society, and achieve a personally fulfilling life." [FN259]

Introduction of the high school graduation test may address this problem if the test is sufficiently rigorous and if the State requires a sufficiently high passing rate. Even so, the State cannot wait three-to-five years, as currently planned, for full implementation of these tests to address the needs of students for whom current measures already reveal severe educational deficits.

Indeed, even under the enhanced MSP program, the measures fail to contain the full breadth of educational skills inherent in an adequate education. As courts in West Virginia and Kentucky have defined the elements of a "thorough and/or efficient" education, they have included several areas that Maryland's program do not fully address, including writing, art, music, and physical and mental well-being. In Pauley v. Kelly, [FN260] the West Virginia high court interpreted a "thorough and efficient" education as encompassing eight areas:

(1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work--to know his or her options; (5) work-training and advanced academic training as the child may intelligently *1182 choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theater, literature and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society. [FN261]

In Kentucky, the supreme court defined an "efficient" education as containing seven components:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his of her mental and physical wellness; (v) sufficient

grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market. [FN262]

These two lists highlight five essential features of any constitutional definition of "thorough and efficient." First, the definition must include the basic subjects: reading, writing, math, science, and social studies. Second, it must contain the political, historical, and community skills needed to become an effective citizen and voter. Third, it must measure appreciation of the arts and culture. Fourth, it must include physical and mental well-being. Finally, the definition must look to the actual future success of high school graduates in college or the workplace.

Thus, while MSP constitutes a good beginning, it currently lacks full constitutional breadth. Expected additions will bring the definition closer to compliance. Nevertheless, more changes will be needed to bring the State's definition fully within the scope of "thorough and efficient."

*1183 B. Is the State Providing Enough Financial Resources to Allow Schools To Provide an Adequate Education?

While money is not necessarily the salvation of schools, it is clear that money, if used properly, can make a major educational difference for low-income children. [FN263] Indeed, every truly successful program for low-income students has utilized resources significantly greater than required for other students. Because the State bears the ultimate responsibility of ensuring an adequate education, Maryland must verify that each failing school has sufficient resources to implement effective programs for every low-income child. Having now determined what an adequate education is, the State is obligated to ensure that every school has the resources needed to achieve adequacy for every child.

1. Current State Efforts.--Maryland has several funding programs for education. The largest program, called Basic Current Expenses, attempts to provide a foundation level of funding for every student. [FN264] The foundation level is based on an average of past spending across the state. The State provides money to help districts reach seventy-five percent of that foundation level, taking into account the relative wealth of the districts. Other programs, including retirement pay, transportation, construction, and special education, do not consider district wealth and indeed often provide more money per student to wealthier districts. [FN265] The State provides additional money for each poor child in a district, with extra money *1184 going to districts with concentrated poverty. [FN266]

2. Proposed Changes.--One modification to the funding system recently proposed by the State Superintendent would recalculate the foundation at the average spending of three successful districts that have limited at-risk populations. [FN267] In other words, the State Superintendent indicated that a school needs this amount of money per non-at-risk student to achieve adequacy. The State would help districts reach that new, higher level, considering the capacity of a district to pay. Extra money would go to schools with poor children, on a $500 per student basis. [FN268] Larger grants would be available on an competitive basis for schools with concentrated poverty. [FN269] Additional money would also go to children of limited English proficiency and those who are in special education. [FN270] The proposal would require a substantial increase in state support for education. [FN271]

3. Analysis.--Current state funding efforts fall far short of constitutional requirements in both concept and practice. The State's support for public education is too low. While Maryland is the

seventh wealthiest state in the Union, the State's support for education ranks 41st. [FN272] The State's funding is not based on an actual determination of what a school needs to educate a child adequately. Past spending justifies current spending. [FN273] As a result, local districts must rely extensively on local wealth, which means that the very schools that need extra resources--those in low- income areas--have *1185 the least to spend. [FN274] Funding disparities between the wealthy and poor school districts have widened and are projected to continue to widen. [FN275] Research has shown that in Maryland there is a "definite correlation" between per-pupil expenditures and student performance among the districts. [FN276]

The State Superintendent's proposed recalculation of the base level of funding represents a significant improvement. However, the $500-per-student increase for low-income students is insufficiently large, and the competitive grant program would penalize students in schools whose applications are not chosen. For districts with large populations of disabled students, the extra amount provided for special education would also be inadequate.

Also, neither the State's current funding system nor the proposed new one provides incentives to schools and districts to promote improvement. Personnel at failing schools suffer no consequences. Staff whose efforts result in dramatically improved student performance receive no benefits. This lack of true accountability contrasts sharply with the system in Kentucky, where staffs are rewarded with salary bonuses when their schools exceed improvement expectations. [FN277]

C. Is the State Adequately Addressing the Programmatic Problems of Poorly Performing Schools and School Districts?

Some schools and school districts already manifest educational shortfalls; others will demonstrate deficits under the MSP program and its proposed enhancements. The failure of a particular school may result most directly from local decisions and inadequacies; however, the State bears the constitutional obligation to correct the problem regardless of fault.

1. Current State Efforts.--Under the State's MSP program, schools failing to meet standards in any category must develop and *1186 implement school improvement plans. [FN278] The plans are designed and put into effect without state comment, involvement or monitoring. [FN279] For twenty-eight schools evaluated as being among the worst in the state, Maryland implemented the Challenge Schools program. [FN280] These schools receive additional funds and agree to participate in an improvement process. [FN281] The State and local superintendents must "agree on a person who is to serve as principal in each Challenge School." [FN282] These principals assemble School Improvement Teams "from among teachers, public agencies, parents, school community, students, and the school system or area offices." [FN283] Based on local superintendent recommendations, the State also assembles an external On-Site Review Team to evaluate the school and submit a written report. [FN284] The School Improvement Team, along with a state consultant, then "write s and sign s -off on a School Improvement Plan with outcomes, milestones, timelines, plan evaluation, and budget information." [FN285] The Maryland State Department of Education reviews the plan, and it is then implemented. [FN286]

2. Proposed Additions.--The State recently proposed an intervention process by which chronically underperforming schools might be "reconstituted" under state oversight. [FN287] Schools would qualify if, based on a subsection of MSP results from this past school year, they fail to achieve a satisfactory level in any one standard and their overall average under all measures is both unsatisfactory and declining. [FN288] Other schools will qualify if, based on this current school year's results, they fail to achieve a satisfactory level in any *1187 one standard and have an overall average that "does not show substantial and sustained improvement through implementation of its school improvement plan." [FN289] The average used in the calculation includes the existing high

school test scores for first-time takers, the dropout rate, and achievement rates in the new MSPAP tests in reading, math, social studies, and science for third, fifth and eighth graders. [FN290] To achieve an acceptable mark in this last category, seventy percent of students must score "level 3," a standard which is undefined in the proposed regulation. [FN291]

Reconstitution can entail a change in administration, staff, organization, or instructional program. [FN292] A third party might also takeover the school under contract. [FN293] Although the school district submits the original plan for reconstitution, the State Board must approve the plan and can adopt its own plan instead. [FN294]

The reconstitution process is part of a larger accreditation process that the State has yet to fully define or propose. [FN295] Under current thinking, the State plans to categorize each school every three years, in a program entitled the School Performance Review System. [FN296] However, most schools will still not be required to do anything more than implement school improvement plans prepared under the school's own guidance and without state oversight.

3. Analysis.--As with the assessment process, the State's intervention efforts constitute a solid beginning which still falls short of what is required. Numerous vital details are missing from the reconstitution proposal, such as how much "substantial and sustained" progress a school must make to avoid reconstitution. The further below standards a school is, the greater the expected level of improvement should be. The State should explicitly formulate this sliding scale of improvement so that schools know what the expectations are. There must be true accountability for failure. Under the reconstitution proposal, staff at reconstituted schools might only face transfer to other schools, according to a process established by their collective bargaining agreements.

*1188 The State also needs some independent information on each school if it is meaningfully to approve, reject, or modify a reconstitution plan proposed by the local district. The very barriers which have resulted in inadequate education may also result in incomplete plans or improper implementation. Therefore, the State must examine the adequacy of a school's resources (e.g., finances) and programmatic structure (e.g., teachers, administration, instructional methodologies and materials, and school policies and structure).

Once a school or school district demonstrates its inadequacy, either according to the regular MSP reports or the subset used for reconstitution, state involvement is needed in the development, implementation, and monitoring of school improvement efforts. A structure similar to the Challenge Grant process is needed, but in every school needing improvement. As part of the intervention, the State should also place state educators inside the failing schools to monitor improvement, assess needs, and recommend changes to the State Board. In Kentucky, so-called Distinguished Kentucky Educators are placed in failing schools with extraordinary powers to assess the needs of the school and make changes. [FN297]

Also, the State must pressure schools and school districts to use educational strategies and programs proven by research to be effective. The more a school is failing, the greater its choices should be restricted to a list of successful programs.

Finally, the State needs an equivalent of the Challenge Grant program for entire districts which are failing state standards. Currently, there is no attempt to address district-wide problems, which greatly hinder the ability of an individual school to improve. Indeed, at least one district--Baltimore City--has an alarmingly high percentage of failing schools and may need special assistance. [FN298] Baltimore City may present a special problem because of its relatively large number and concentration of low-income children, its inability to provide additional financing, its chronic lack of resources, the history of ineffective educational management, the particularly low educational

outcomes present in city schools, and the grievous threat posed to the fabric of the entire state by the problem. [FN299] The State must determine whether the city schools have adequate *1189 financial support for basic programs, which special support for low-income children is intended to supplement. If not, the State must make up the difference. The State must ensure that effective programs are adopted while holding schools accountable for achieving results.

VII. Conclusion

The State must take action to correct the unconstitutionally poor quality of education being received by low-income students. While the State deserves credit for taking significant steps in the proper direction, Maryland must enhance its effort to address fully and swiftly the constitutional violations that currently exist. The reform engineered by Kentucky in wake of its landmark court decision serves as an excellent model from which Maryland can pattern its own reform.

First, the State must add to the breadth and rigor of the MSP standards. The State's new graduation test must reflect the type of education needed by workers in the new century. The passing rate *1190 should be as close to 100 percent of children as reasonably possible. Second, the State should establish explicit improvement goals for schools based on the extent to which a school falls below satisfactory standards. The further below state standards, the more a school should be expected to improve. The State should also disaggregate data for low-income children and require improvement for these children according to a separate sliding scale.

Third, the State should, in cooperation with local districts, evaluate each school that is far below the standards or failing to meet improvement goals. The assessments should determine what barriers are blocking educational success, including inadequate resources, leadership, instructional staff, and curricular materials. Each school should be provided with adequate resources, taking into account the greater difficulty of teaching at-risk students. Fourth, school staff should be rewarded with salary bonuses for achieving success at meeting or exceeding improvement goals. In consistently failing schools, the State should place a consultant with the power to replace personnel and make any other necessary changes. Students should be permitted to transfer schools. Ultimately, the State should maintain direct involvement in schools not making adequate progress.

Fifth, the State should provide intensive help to schools currently failing under MSP standards of measurement. The Challenge Grant program should be expanded to all schools failing to educate a sizeable portion of its students. Additional resources should be provided based on an assessment of available resources, wealth of the district, severity of the educational problem, and the percent of students from low-income families. Sixth, the State should develop a district assistance program for a school system failing as a whole. Similar to the Challenge Grants program, the district program would provide additional resources, but require development of an improvement plan as a joint product of the State and district. Baltimore City Public Schools undoubtedly would constitute one of the first districts involved in such a program.

Finally, the State's funding must be based on the cost of educating a student, considering poverty and other factors that require additional programs to address. Then, the State should provide aid to districts according to the ability of a jurisdiction to pay through its own tax effort. Districts should be required to raise money according to their capacity, considering both wealth and the other financial burdens the jurisdiction bears.

*1191 Correcting the educational plight of low-income children is as important as it is difficult. There are a thousand political and practical reasons why educational reform in Maryland cannot happen as described above. Fortunately, the efforts of other states provide guidance to Maryland as it begins its own effort to end this problem, which not only violates the constitution but also threatens

the political, social, and economic health of the State. Change will not come overnight. But to wait any longer than necessary and to not press for dramatic change now will leave the minds of thousands of children in darkness and cloud the future of Maryland.

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[FN1]. See Bruce C. Bowers, Meeting the Needs of At-Risk Students, Res. Roundup, vol. 1, no. 1 (National Association of Elementary School Principals, Alexandria, Va.) Fall 1990. The terms used to define this population often symbolize the strategies used to address the problem. See Aaron M. Pallas, Who Is at Risk? Definitions, Demographics & Decisions, in Overcoming Risk: An Annotated Bibliography of Publications 1 (Wendy Schwartz & Craig Howley eds., 1991) (suggesting that the changing emphasis on themes such as cultural deprivation, educational disadvantages, problems of youth, and at-risk children have brought about different approaches to problems in education).

[FN2]. See Kenneth Hoyt, The Changing Work Force Part II, Wis.Vocational Educator, May 1989, at 1. Poverty is closely associated with a number of other characteristics traditionally linked to poor school achievement. For example, a poor child is more likely to be homeless, a member of a minority group, grow up in a single-parent family, and suffer from malnutrition, lead poisoning, or drug or alcohol exposure. John I. Goodlad, Common Schools for the Common Weal: Reconciling Self-Interest With the Common Good, in Access to Knowledge--An Agenda for Our Nations Schools 1, 4 (John I. Goodlad & Pamela Keating eds., 1990) [hereinafter Access].

[FN3]. Hoyt, supra note 2, at 1.

[FN4]. See Martin E. Orland, Demographics of Disadvantage: Intensity of Childhood Poverty & Its Relationship to Educational Achievement, in Access, supra note 2, at 43, 46.

[FN5]. Id. at 50 ("For each year of student poverty, the likelihood of falling behind in grade level increases by two percent.").

[FN6]. Id. at 46. Thus, a low-income child who attends a school with predominantly middle-class students will generally receive a better education than a similar child who attends a school exclusively with students of the same economic background. Id.

[FN7]. Memorandum from Lois A. Martin to Donald Hutchinson, Chair, and Members of the Governor's Commission on School Funding 10 (Aug. 26, 1993) (on file with authors).

[FN8]. Maryland State Department of Education, The Relationship of School Performance Characteristics to School Performance (manuscript at 5, on file with authors).

[FN9]. See Robert E. Slavin et al., Preventing Early School Failure: What Works?, Educ. Leadership, Dec. 1992/Jan. 1993, at 10 ("[A] growing body of evidence refutes the proposition that school failure is inevitable for any but the most retarded children."); James M. McPartland & Robert E. Slavin, Policy Perspectives, Increasing Achievement of At-Risk Students at Each Grade Level (U.S. Dept. of Education, Washington, D.C.), July 1990, at 7 ("Against this depressing and often told story is mounting evidence that almost every child can be successfully taught to read in the early grades, and

the same is almost certainly true of other basic skills.").

[FN10]. See Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex.L.Rev. 777, 796-97 (1985) (citing New York, Houston, and Philadelphia as successful school systems in their educational efforts with at-risk students).

[FN11]. See id. at 795 ("Successful schools do have important characteristics in common. These characteristics are capable of being replicated.").

[FN12]. See Linda J. Stevens & Marianne Price, Meeting the Challenges of Educating Children at Risk, Phi Delta Kappa, Sept. 1992, at 23 (discussing the success of early intervention programs).

[FN13]. See Dominic F. Gullo, The Effects of Gender, At-Risk Status & Number of Years in Preschool on Children's Academic Readiness, Early Educ. & Dev., Jan. 1991, at 32 (citing Nicholas J. Anastasiow, Development and Disability: A Psychobiological Analysis of Special Educators (1986)).

[FN14]. See, e.g., Slavin et al., supra note 9, at 12 (highlighting three effective programs for infants from birth to age three); Maryland State Department of Education, Urban & Supplementary Programs--The Effectiveness of Preschool Education 4, 6 (1993) (prepared as part of the 1983 Joint Chairmen's Report, Maryland General Assembly) (describing successful preschool programs for three and four year olds).

[FN15]. McPartland & Slavin, supra note 9, at 9 (finding impressive results from full-day kindergarten programs).

[FN16]. Head Start is a federal program created by legislation under President Johnson's War on Poverty. See Sally Reed & R. Craig Sautter, Children of Poverty, The Status of 12 Million Young Americans, Phi Delta Kappa, June 1990, at K1, K7 (highlighting the increased employment, graduate, and college attendance rates of students attending one Head Start program).

[FN17]. Success For All, developed by The Johns Hopkins University, involves one-on-one instruction by certified teachers, as well as specialized curricula and home visits. Henry M. Levin, Financing the Education of At-Risk Students, Educ. Evaluation & Pol'y Analysis, Spring 1989, at 47, 55; Slavin et al., supra note 9, at 12 (indicating that Success For All has had "substantial positive effects on reading performance . . ., reductions in retentions and special education placements").

[FN18]. Reading Recovery, originally developed in New Zealand, focuses intensely on the reading skills of first graders. Levin, supra note 17, at 55. Teachers must complete a year-long training program, and students with the lowest level of achievement are given 30 minutes of one-on-one tutoring daily. Gay Su Pinnell, Success for Low Achievers Through Reading Recovery, Educ. Leadership, Sept. 1990, at 17, 18.

[FN19]. The Comer Model, which focuses on family support and the mental health of the child, has shown remarkable success in increasing standardized test scores. James P. Comer, Home, School & Academic Learning, in Access, supra note 2, at 23.

[FN20]. The Accelerated School Program aims to bring students up to grade level on a short-term basis rather than remediating them indefinitely. Donna Harrington-Lueker, Where More is Better, Executive Educator, June 1992, at 24, 25-26. Parental involvement is a key component of the program, which has shown some results at a moderate cost. Accelerated Schools claim to focus on the strengths of students rather than their weaknesses and to make education a relevant part of their lives and cultures. Id. at 25.

[FN21]. Tutoring has proven to be one of the most effective techniques for helping students succeed in school. For example, the Prevention of Learning Disabilities program, which provides tutoring for first and second graders, has shown results in reading and perception skills. The Wallach Tutoring Program, which uses paraprofessionals as tutors, has also improved students' reading skills. Barbara Wasik & Robert E. Slavin, Preventing Early Reading Failure with One-on-One Tutoring: A Best Evidence Synthesis 17-20 (1990) (published by Center for Research on Effective Schooling for Disadvantaged Students, The Johns Hopkins University).

[FN22]. Numerous studies have commented generally on the inadequacies of the nation's middle schools and recommended changes. See, e.g., Carnegie Council on Adolescent Development, Turning Points, Preparing American Youth for the Twenty-First Century 8 (June 1989) [hereinafter Carnegie] (executive summary) ("Middle grade schools . . . are potentially society's most powerful force to recapture millions of youth adrift, and help every young person thrive during early adolescence. Yet all too often these schools exacerbate the problems of young adolescents."). For high school students, many promising dropout prevention programs exist. See McPartland & Slavin, supra note 9, at 18 (discussing the Boston Compact, which uses job and college opportunities to encourage school attendance, and the I Have a Dream Foundation, which pays college expenses for qualifying students). In addition, apprenticeship programs, common in Germany and Sweden, offer great potential for improving the school-to-work transition for the 50% of American youth who do not got to college. See Donna Harrington-Lueker, Muscle Won't Make It, Executive Educator, Sept. 1991, at 34 (arguing that apprenticeship programs are necessary to stay competitive with the European workforce).

[FN23]. Slavin et al., supra note 9, at 3 ("Trying to remediate reading failure later on is very difficult, because by then students who have failed are likely to be unmotivated, to have poor self-concepts as learners, to be anxious about reading and to hate it.").

[FN24]. See Bowers, supra note 1, at 1 ("At-risk students need to be maximally engaged in an educational program that is carefully structured to meet their individual needs, and they must be taught by people who firmly believe that these children will succeed. These seem to be the core requisites for a successful program serving at-risk children.").

[FN25]. Virginia Richardson et al., School Children At-Risk 145 (1989) (discouraging the use of pullout programs).

[FN26]. See generally id. at 148 (urging "careful procedures" to help at- risk students adapt to their regular classes). One example of integration is cooperative learning, where students of different achievement levels are placed in small groups and required to work together. McPartland & Slavin, supra note 9, at 10-11.

[FN27]. See Richardson et al., supra note 25, at 145 ("In order to create [a proper learning] environment, some one person needs to care for the school life and personal growth of each student . . . . Given this requirement, it is easy to see why a small school . . . would more easily create this environment than a large one . . . ."). See also Aaron M. Pallas et al., The High Costs of High Standards--School Reform & Dropouts, Urban Educ., Apr. 1987, at 103, 107 (for general support of individualized instructional programs).

[FN28]. Although computer instruction can be a useful program, cost is high relative to its results. See Nancy A. Madden & Robert E. Slavin, Effective Pullout Programs for Students at Risk, in Effective Programs for Students at Risk 68 (Atlyn & Bacon eds., 1989) ("Overall, results for the computer assisted instruction program, (CAI) . . . are well-established and positive, though in the best-controlled studies they are usually modest in magnitude . . . Since the costs of CAI can be very

high . . . this approach can be compared to adult tutoring, which tends to have larger effects." (citations omitted)). Id. at 12.

[FN29]. There is a growing sense that schools must work more closely with families of poor children because it is often the families that have created a substantial part of academic failure. See James A. Banks, Citizenship Education for a Pluralistic Democratic Society, Soc.Stud., Sept.-Oct. 1990, at 210, 211.

[FN30]. Reed & Sautter, supra note 16, at 7 ("[T]here is growing public support for offering a wider array of social and health services in the schools.").

[FN31]. Gullo, supra note 13, at 32; McPartland & Slavin, supra note 9, at 8 ("[W]hile there are strong effects on the language and I.Q. scores of disadvantaged children immediately after the preschool experience, these effects diminish each subsequent year until they are undetected by the second or third grade.").

[FN32]. Slavin et al., supra note 9, at 14 ("[F]or the great majority of students . . ., we believe that intensive intervention will only be needed for a brief period, primarily one-on-one tutoring in first grade. After these students are well launched in reading, they still need high-quality instruction and other services in the later elementary grades to continue to build on their strong base.").

[FN33]. See id. at 6 ("It is clear that attendance at a high-quality preschool program has long-term benefits for children, but it is equally clear that in itself preschool experience is not enough to prevent early school failure."); McPartland & Slavin, supra note 9, at 9 ("As with preschool, full- day kindergarten may start students off with good language skills and promote school readiness, but it is not a sufficient intervention by itself.").

[FN34]. The Commission on Chapter 1, Making Schools Work for Children in Poverty, in Educ.Wk ., Jan. 13, 1993, at 46, 47 (a summary) [hereinafter Chapter 1 Commission].

[FN35]. Pallas, supra note 1, at 8 (recognizing "the pernicious effects of publicly classifying children, as teachers . . . may change their expectations and behaviors to conform with stereotypes associated with these classifications"). See also Chapter 1 Commission, supra note 34, at 46 ("Our low expectations are consigning [poor children] to lives without the knowledge and skills they need to exist anywhere but on the margin of our society and consigning the rest of us to forever bear the burden of their support.").

[FN36]. Linda Darling-Hammond & Joslyn Green, Teacher Quality & Equality, in Access, supra note 2, at 237, 239 ("Perhaps the single greatest source of educational inequity is this disparity in the availability and distribution of highly qualified teachers."). One of the few incentives offered to the more senior and high quality teachers is an assignment to a more middle-class school and classroom. Id. at 243. Meanwhile, new and inexperienced teachers are assigned to the toughest schools and classrooms. Id. at 243-44. See also Comment, Children at Risk: The Inequality of Urban Education, 9 N.Y.L. Sch.J.Hum.Rts. 161, 169 (1991) ("[T]eachers in the urban districts tend to be the least experienced, as well as the lowest paid. The student/teacher ratios and the education level of teachers are far superior in the suburban districts." (footnote omitted)).

[FN37]. McPartland & Slavin, supra note 9, at 3 ("[M]any urban school systems routinely hold back 15 or 20 percent of students at each grade level, and by grade 10, up to 60 percent of students in these schools have been retained at least once.").

[FN38]. Grade retention is a thoroughly disproved strategy. The common practice of holding back

kindergartners for another, prefirst grade has no long-term benefits. Slavin et al., supra note 9, at 8. In fact, retained students are much more likely to drop out of school than similar nonretained students. Id.

[FN39]. See, e.g., Goodlad, supra note 2, at 14 ("Children in the lowest groups rarely are moved to the highest groups; the disparity between the attainment of the highest and lowest groups grows greater over time."); McPartland & Slavin, supra note 9, at 5 ("Over time, tracking may also have a cumulative effect that actually widens the achievement gap between students in the top and bottom levels."). See also Jeannie Oakes & Martin Lipton, Tracking & Ability Grouping: A Structural Barrier to Access & Achievement, in Access, supra note 2, at 187, 189 (finding that poor, black, and Hispanic children are disproportionately assigned to lower tracks).

[FN40]. Most of the present interventions are funded with federal money for disadvantaged and underperforming students, called Chapter 1. Lorin W. Anderson & Leonard O. Pellicer, Synthesis of Research on Compensatory & Remedial Educ., Educ. Leadership, Sept. 1990, at 10, 11. In general, Chapter 1 has proven to yield limited benefits, and what little effect does exist disappears after third grade. Slavin et al., supra note 9, at 3; Levin, supra note 17, at 47-48. One group of prominent educators has proposed a fundamentally altered Chapter 1 program based on emphasis on advanced skills, greater flexibility at the local level, stress on whole-school reform, and accountability for results. Chapter 1 Commission, supra note 34, at 47. Yet, even if the money were properly spent, the amount of federal funds allocated to the program is too low to cover all at-risk students. Levin, supra note 17, at 47. Nationally, only 50% of Chapter 1-eligible students receive services. Reed & Sautter, supra note 16, at 8.

Finally, Chapter 1 is premised on two false assumptions: (1) districts have an equal amount of money for basic education, and (2) the federal money can merely supplement local funds. Chapter 1 Commission, supra note 34, at 48. "The reality is that millions of disadvantaged students live in property-poor urban and rural areas that cannot generate sufficient dollars for education even where citizens tax themselves highly." Id.

[FN41]. McPartland & Slavin, supra note 9, at 5-6 ("[I]ndividuals designated for special education usually remain in that status throughout their school tenure, and this, in turn, severely limits their future educational and occupational opportunities."). The number of students classified as learning disabled (LD) has doubled over the past 15 years, "even though the numbers of students classified with physical disabilities or mental retardation in special education have not substantially changed." Id. Consequently, students who "receive the costly special education services via the LD designation may not benefit, since research fails to document any sizeable improvements in learning outcomes for these students." Id. at 6.

[FN42]. One study noted: "Ability grouping and grade retention are examples of organizational strategies that have the unintended consequence of reinforcing patterns of failure in school. A vicious cycle exists in schools, whereby early patterns of poor academic performance track students into educational environments that perpetuate their low achievement." Pallas, supra note 1, at 19.

[FN43]. In Maryland, for example, local school districts must supplement state funds to provide an adequate standard of education, a responsibility poorer districts simply cannot fulfill. See Elizabeth C. Derrrig [sic], Comment, Judicial Intervention in Public Education, 20 U.Balt.L.Rev. 429, 440- 44 (1991).

[FN44]. See generally Board of Educ. v. Nyquist, 408 N.Y.S.2d 606, 634 (1978) ("Effective programs to remedy or alleviate the problems of severe underachievement and failure cost much more money per pupil than the regular educational program because they require substantial numbers of additional personnel.").

[FN45]. See Darling-Hammond & Green, supra note 36, at 239 ("Because the distribution of teacher quality is skewed toward those students who attend affluent, well-endowed schools, poor and minority students are chronically and disproportionately exposed to teachers with less training and experience."). See also Derrrig [sic], supra note 43, at 443-44 (noting that the less affluent district of Baltimore City provides below average financing to its schools).

[FN46]. Department of Fiscal Resources for Region IV Conference, American Society for Public Administrators, Maryland Fiscal Data app. at 3 (Sept. 24, 1992). For example, Baltimore City's population shrunk 6.5% from 1980 to 1990, and its employment level fell 5.6% from 1981 to 1991. Correspondingly, the city's property tax base declined by 6.4% from 1970 to 1993 (projected), and its net taxable income shrank from 1990 to 1991 for the first time. Id. at 3-4. At the same time, its tax effort significantly exceeds that of other jurisdictions. Id. at 4-6. With a statewide average of 100, the tax effort in Baltimore City averaged 161 from 1988 to 1990. Id. The rest of the State's effort was 81, while that of the four large countries around the city was 101. Id.

[FN47]. Slavin et al., supra note 9, at 4 (citing W.S. Barnett & C.M. Escoban, The Economics of Early Intervention: A Review, Review of Educational Research, 57, 387-414) (noting that expenses of early intervention can be justified on cost-effective grounds if they produce subsequent savings).

[FN48]. Janella Rachal & Diane Garbo, A Three-Year Longitudinal Study of Sustained Effects of Early Childhood Education on the Kindergarten & First Grade Performance of Former Program Participants 3 (Apr. 1988) (prepared for 1988 Annual Meeting of the American Educational Research Association; available through ERIC) (indicating that quality is needed for long-term results).

[FN49]. Secretary of Labor Elizabeth Dole, State of the Work Force Address 3 (Oct. 26, 1991).

[FN50]. Harold Howe II & Marion Wright Edelman, Excerpts from Barriers to Excellence: Our Children at Risk, Equity & Excellence, Summer 1986, at 111 ("The unique promise of this nation has been its commitment to extend opportunity to all--not just some--of its children."). Public schools were started to help immigrants learn the American culture and the skills needed for economic success. Goodlad, supra note 2, at 1.

[FN51]. Goodlad, supra note 2, at 4 ("[The United States] already has within it a population of children, youth, and adults who simply will not manage to take advantage of the yellow brick road to an acceptable standard of living, let alone fame and fortune.").

[FN52]. John DeCuevas, Our Children Are in Trouble, Harv. Mag., Sept.-Oct. 1992, at 46 ("If you cannot promise every child in America the opportunity to achieve the success you and I enjoy, we will have lost our soul as a nation." (quoting Sen. John D. Rockefeller IV)).

[FN53]. Carnegie, supra note 22, at 9.

[FN54]. Levin, supra note 17, at 50 ("Economic and educational inequality in conjunction with equal political rights suggest future polarization and intense conflict.").

[FN55]. See Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

[FN56]. See infra notes 93-99 and accompanying text (describing the educational philosophies of Horace Mann and Thomas Jefferson).

[FN57]. See generally Allen W. Hubsch, Education and Self-Government: The Right to Education Under State Constitutional Law, 18 J.L. & Educ. 93, 99- 100 (1989) ("Education instills civil responsibility, ethical values, communication skills, and objective knowledge so that citizens will better communicate and reach consensus among themselves.").

[FN58]. See Levin, supra note 17, at 50 (noting that in several states today's disadvantaged students will constitute a majority of voters in future elections).

[FN59]. Jose A. Cardenas, Political Limits to an Education of Value: The Role of the State, in Access, supra note 2, at 278.

[FN60]. The large majority of inmates in the nation's prisons are high school dropouts. Maryland's Challenge: A Report of the Commission for Students at Risk 5 (Jan. 1990) [hereinafter At-Risk Commission]. In Maryland, 93% of 17,000 inmates were found to be functionally illiterate and 80% were high school dropouts. Id.

[FN61]. Compare William D. Schaefer, Maryland State Budget, I-977, II-57, II-210 (fiscal year 1994) and William D. Schaefer, Maryland State Budget for the Fiscal Year Ending June 30, 1989, I-945, II-41, II-186 (Jan. 20, 1988). During the five-year period from 1987 to 1992, expenditures for Aid to Families with Dependent Children (AFDC) increased from $254 million to $336 million. Id. Medical Assistance increased from $828 million to $1.9 billion. Id. Money spent on corrections increased from $196 million to $364 million. Id.

[FN62]. As one article summarized:

High dropout rates, low test scores, and poor academic performance of a group that will become a larger and larger portion of the school population mean that more of the future labor force will be undereducated for available jobs. Here we refer not only to managerial, professional, and technical jobs, but to even the lower level service jobs that are increasingly dominating job growth in the U.S. economy. Clerical workers, cashiers, and salesclerks all need basic skills in oral and written communications, the acquisition of which is hardly guaranteed in the schooling of the disadvantaged.

Levin, supra note 17, at 51 (citations omitted).

[FN63]. See Banks, supra note 29, at 211 ("Our schools were designed for a different population at a time when immigrant and poor youths did not need to be literate or have basic job skills and become self-supporting citizens.").

[FN64]. See Dole, supra note 49, at 2 ("The assembly line jobs that once required only hand-eye coordination are headed the way of the dinosaurs. The same job now requires the ability to read complex manuals, analyze data, organize information and make judgments.").

[FN65]. Hoyt, supra note 2, at 16 (stating that "more than 70 percent of America's goods-producing industries [are] now subject to foreign competition").

[FN66]. See Roselyn Frank, School Restructuring: Impact on Attitudes, Advocacy & Educational Opportunities for Gifted & Talented Students, in Challenges in Gifted Education--Developing Potential & Investing in Knowledge for the Twenty-First Century 57, 58 (1992) (emphasizing increased demands placed on workers in today's "high-tech settings").

[FN67]. See E.R. Carlisle, Educating for the Future, Planning & Changing, Fall 1988, at 131, 132 (noting that in one ranking involving 13 industrial nations, the best United States students placed ninth in physics, eleventh in chemistry, and thirteenth in biology).

[FN68]. Id. at 135 (citing Robert Z. Lawrence, Can America Compete? (The Brookings Institution) (1984)).

[FN69]. See id. at 134 (noting that "[t]he source of technological change, which spurs productivity growth, is a highly trained workforce").

[FN70]. See id. ("It is technological innovation that ultimately enhances machine efficiency, and hence the productivity of the labor using it.").

[FN71]. Id. "High skill jobs are expected to be in greatest demand: over one half in engineering, computer specialties, and the health professional occupations." Id. at 131.

[FN72]. At-Risk Commission, supra note 60, at 6 ("Projections . . . estimate that in 10 years, new jobs will require workers whose median level of education includes at least a year and a half of college--not to be the boss, just to hold a job." (citation omitted)). See also Dole, supra note 49, at 2 ("[O]ver half the jobs in our economy will soon require education beyond high school.").

[FN73]. Paul Sloan, Choosier Army Skips over Troubled Teens, Chi.Trib., July 18, 1993, at 1 (noting that the military almost always insists that recruits be high school graduates).

[FN74]. See Levin, supra note 17, at 51 (stating that students who fail to finish high school successfully will be unable to either "work productively in available jobs or to benefit from employer training"); Banks, supra note 29, at 210 ("It is very difficult for youth who drop out of school or who experience academic failure to become effective and productive citizens in a post- industrial, knowledge-focused society."); Comer, supra note 19, at 26 ("Never before in the history of the world has academic or formal education been so necessary for individuals to meet basic human needs.").

[FN75]. See The Report of the Governor's Commission on School Performance 1 (Aug. 1989) [hereinafter Governor's Commission].

[FN76]. Levin, supra note 17, at 53 (estimating that the nation's male dropouts aged 25 to 34 have cost $237 billion in lost economic output). The country will also lose employment taxes if American businesses move abroad in response to the difficulty of meeting employment needs locally.

[FN77]. Id. at 48. This figure increased from 16% to nearly 20% between 1969 and 1990. Reed & Sautter, supra note 16, at 3. Children are now the poorest segment of the American population. Id. The number of children living with only one parent is expected to rise from 16 million in 1984 to more than 21 million by 2020. Levin, supra note 17, at 48. The number of children exposed to drugs or abused or neglected has increased substantially in recent years and is likely to continue to rise as well. Reed & Sautter, supra note 16, at 6.

[FN78]. Betty F. Williams, Changing Demographics: Challenges for Educators, Intervention in Sch. & Clinic, Jan. 1992, at 157. By some estimates, 25%--or 7 million children--are currently extremely vulnerable, and an equal number are moderately at risk of school failure. Carnegie, supra note 22, at 8. Not only is the proportion of these students expected to increase, but the intensity of disadvantage is expected to grow as well. Levin, supra note 17, at 49.

[FN79]. See At-Risk Commission, supra note 60, at 6. See also Governor's Commission, supra note 75, at 1 (discussing the projected shortfall of workers).

[FN80]. See Louis Harris, The Public Takes Reform to Heart, Agenda, Winter 1992, at 15 (noting the public perception that America's ability to compete abroad correlates to the quality of education at

home). Eighty-one percent of those polled said that the failure to educate poor and minority children would have a "major effect" on the ability of the country to compete in the world market. This concern has increased from 68% in 1986. Id.

[FN81]. Reed & Sautter, supra note 16, at 3.

[FN82]. Md.Const. art. VIII, § 1. The provision also states: "The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education." Id. § 3.

[FN83]. The court has, however, obliquely referred to the education clause. See, e.g., Revell v. Mayor of Annapolis, 81 Md. 1, 8, 31 A. 695, 696 (1895) (declaring that the constitutional language was premised upon the importance of "enlightened public opinion"); State ex rel. Clark v. Maryland Inst. for the Promotion of the Mechanic Arts, 87 Md. 643, 661, 41 A. 126, 129 (1898) (The education clause "means that the schools must be open to all without expense. The right is given to the whole body of the people.").

[FN84]. Maryland Assoc. for Retarded Children v. State, Equity No. 100/182/77676 (Baltimore City. Cir.Ct. 1974) ("There is nothing in the reports of the debates in the Constitutional Convention . . . that suggests these words had any definite and specific meaning.") (printed in Robert L. Burgdorf, Jr. & Donald N. Bersoff, Equal Educational Opportunity, in The Legal Rights of Handicapped Persons--Cases, Materials & Text 53, 185 (Robert L. Burgdorf, Jr. ed., 1980)).

[FN85]. The traditional tools for interpreting constitutional language include the text itself, constitutional conventions and debates, historical events leading up to the adoption of the language, opinions from courts in other states and legislative and administrative interpretations. See Norris v. Mayor of Baltimore, 172 Md. 667, 676, 192 A. 531, 535 (1937). The court stated:

> In determining the true meaning of the language used, the courts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the time it was framed, the common usage well known to the people, and the history of the growth or evolution of the particular provision under consideration.

Id.

[FN86]. Molly McUsic, The Use of Education Clauses in School Finance Reform Litigation, 28 Harv.J. on Legis. 307, 308 n.3 (noting that "the text itself must play a primary role" and one should examine the "common and ordinary meaning" of the education language).

[FN87]. Norris, 172 Md. at 676, 192 A. at 535 ("In aid of an inquiry into the true meaning of the language used, weight may also be given to long- continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.").

[FN88]. Because reliance on state constitutions for enforcement of basic rights is a relatively new phenomenon, there are comparatively few decisions on many constitutional phrases. Thus, a state court may have little precedent on which to base its interpretation. Judicial interpretations of similar language in other state constitutions are therefore particularly instructive. Paul Czech, Education & the School Financing Problem: Has New Jersey Found the Answer?, 1 Temp.Pol. & Civ.Rts.L.Rev. 149, 158 (1992) (calling this phenomenon "horizontal federalism"). Indeed, failure to consult with other states' interpretations can result in inconsistencies and illegitimacy. See William E. Thro, The Third Wave: The Impact of the Montana, Kentucky & Texas Decisions on the Future of Public School Finance Reform Litigation, 19 J.L. & Educ. 219, 248 (1990). The author stated:

> [R]endering a different interpretation of nearly identical education clause language could undermine the legitimacy of the court's decision. . . . [T]he average citizen is not apt to understand why a thorough and efficient education clause is grounds for school finance reform in a neighboring

state, but has no effect in his state.
Id.

[FN89]. Ohio, Minnesota, and West Virginia each had adopted "thorough and efficient" language prior to 1867. The drafters at the 1867 Convention knew of the prior attempts of other states to frame constitutional language on public schools. Brief of Appellants at 32, Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983) (No. 81-93) [hereinafter Appellants' Brief] (noting that the Education Committee "studied in detail the education provisions in all the existing state constitutions").

[FN90]. McUsic, supra note 86, at 311. New states admitted to the union were required to include a state educational obligation in their constitutions. Lawrence C. Pierce, School Finance, 67 Or.L.Rev. 31, 35 (1988).

[FN91]. Five states have "thorough and efficient" language: Minnesota, Minn.Const. art. VIII, § 1 ("The legislature shall make such provision by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."); New Jersey, N.J.Const. art. VIII, § 4 (amended 1875) ("The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the state between the ages of five and eighteen."); Ohio, the first state to adopt the "thorough and efficient" language, Ohio Const. art. VI, § 2 ("The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."); Pennsylvania, Pa.Const. art. III, § 14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."); and West Virginia, W.Va.Const. art. XII, § 1 ("The legislature shall provide, by general law, for a thorough and efficient system of free schools.").

Five others have "efficient" without "thorough": Arkansas, Ark.Const. art. 14, § 1 ("[T]he State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education."); Delaware, Del.Const. art. X, § 1 ("The General Assembly shall provide for the establishment and maintenance of a general and efficient system of the free public schools."); Kentucky, Ky. Const., § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state."); Illinois, Ill.Const. art. X, § 1 ("The state shall provide for an efficient system of high quality public educational institutions and services."); and Texas, Tex.Const. art. III, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

Two use "thorough" without "efficient": Colorado, Colo.Const. art. XI, § 2 ("The General Assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools."); and Idaho, Idaho Const. art. IX, § 1 ("[I]t shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.").

[FN92]. See William E. Thro, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 Va.L.Rev. 1639, 1663-68 (1989) (describing the case law and explaining the strengths of a suit based on "thorough and/or efficient" language.

[FN93]. Lawrence A. Cremin, American Education, The National Experience, 1783-1876, at 103 (1980) ("No theme was so universally articulated during the early decades of the Republic as the need of a self-governing people for universal education.").

[FN94]. Thomas Jefferson, Democracy 137 (Saul K. Padover ed., 1939) [hereinafter Democracy] ("If a

nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."); Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786) ("Let our countrymen know . . . that the tax which will be paid for this purpose is not more than the thousandth part of what will be paid to kings, priests and nobles who will rise up among us if we leave the people in ignorance."); Jefferson--Public & Private Papers 39 (1990) (stating Jefferson's belief that education of the people was a means to prevent tyranny). Many others took up Jefferson's cause after his death. Cremin, supra note 93, at 104.

[FN95]. The Republic & the Schools, Horace Mann on the Education of Free Men 8 (Lawrence A. Cremin ed., 1957) [hereinafter Mann] (Mann feared the "destructive possibilities of religious, political, and class discord.").

[FN96]. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (Edwin Cannan ed., Univ. of Chicago Press 1976).

[FN97]. See, e.g., Stephen Simpson, The Working Man's Manual: A New Theory of Political Economy, on the Principle of Production and the Source of Wealth 199 (1831) ("Nothing is so essentially connected with the wealth of nations, and the happiness of the people, . . . as the proper cultivation, expansion, and discipline of the popular mind.").

Mann shared the political economists' belief in the connection between education and wealth. Mann, supra note 95, at 61 ("An educated people is a more industrious and productive people."). He also said:

[A]ny community, whether national or state, that ventures to organize a government, or to administer a government already organized, without making provision for the free education of all its children, dares the certain vengeance of Heaven; and, in the squalid forms of poverty and destitution, in the scourges of violence and misrule, in the heart-destroying corruption of licentiousness and debauchery, and in the political profligacy and legalized perfidy, in all the blended and mutually aggravated crimes of civilization and of barbarism, will be sure to feel the terrible retributions of its delinquency.

Id. at 76.

[FN98]. There was great unity among the reformers, despite somewhat different philosophical underpinnings. As Mann said, "The moralist . . . takes up the argument of the economist. He demonstrates that vice and crime are not only prodigals and spendthrifts of their own, but defrauders and plunderers of the means of others." Mann, supra note 95, at 61.

[FN99]. Cremin, supra note 93, at 132 (citing Simpson's "proposal for a 'general system of popular education, reaching beyond the mere attainment of reading and writing' as a matter of right in common schools"); Mann, supra note 95, at 63 ("I believe in the existence of a great, immutable principle of natural law . . . which proves the absolute right of every human being that comes into the world to an education.").

[FN100]. See William S. Myers, The Maryland Constitution of 1864, at 85 (1901) ("[N]umerous attempts had been made at the various sessions of the Legislature to inaugurate some sort of general education system, but for one reason or another these attempts had always resulted in failure."); James W. Harry, The Maryland Constitution of 1851, at 64 (1902) (unpublished dissertation) (noting the legislature's rejection of an amendment that would have authorized it to create "a uniform system of public schools throughout the State, adequately endowed to educate every white child within its limits"). 2 Debates & Proceedings of the Constitutional Convention of 1851, at 812 (1851) [hereinafter 1851 Debates] (detailing the roll call vote in which the proposal was ordered to be set aside).

A similar 1856 legislative bill failed in the State Senate because of opposition from rural senators

from southern counties. See 2 The Debates of the Constitutional Convention of the State of Maryland, Assembled at the City of Annapolis, Wednesday, April 27, 1864, at 1221. (W.M. Blair Lord ed., 1864) [hereinafter 1864 Debates].

[FN101]. L.E. Blauch, Education & the Maryland Constitutional Convention, 1850-51, 25 Md.Hist.Mag. 169, 175 (1930). See also Basil Sollers, Secondary Education in the State of Maryland, in History of Education in Maryland 39. Of 100,000 white children between the ages of eight and ten, half were not enrolled in any school. William Hunter Shannon, Public Education in Maryland (1823-1868) With Special Emphasis Upon the 1860s, at 46 (1964) (unpublished dissertation, University of Maryland). Even in Baltimore City, which had the highest quality schools in the State, "large numbers of children [were] receiving no instruction." Id. at 84.

[FN102]. Shannon, supra note 101, at 19-21 (noting the General Assembly's hesitancy to "set up centers of enlightenment that might lead to questions concerning the social and economic basis for the state's economy.").

During the Civil War, Maryland was occupied by federal troops. Their presence helped pro-Union political forces, the Unionists, drive the pro-Confederate Democrats out of office and positions of power. Id. at 122. Many pro- Confederate slave and property owners were disenfranchised, jailed, or removed from office. Id. at 174-75.

[FN103]. See also Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 622, 458 A.2d 758, 771 (1983) ("It was not until the adoption of the Maryland Constitution of 1864 that a statewide system of free public schools was established in this State.").

[FN104]. See Myers, supra note 100, at 85 (1901).

[FN105]. Id. at 85-86. The 1864 language adopted the main concepts reformers had unsuccessfully tried to include in the 1851 Constitution. Harry, supra note 100, at 65.

[FN106]. Sollers, supra note 101, at 66-67 (describing uniform practices of discipline and testing). The State Superintendent set the school calendar, established a uniform statewide curriculum, determined which textbooks would be used, and instituted a teacher certification process. He also hired district heads to implement his plan on the local level. 1864 Debates, supra note 100, at 1218.

[FN107]. Most local districts were either too poor to pay for free public schools or simply refused to do so. L.E. Blauch, The First Uniform School System of Maryland, 1865-68, 26 Md.Hist.Mag. 205, 214-16 (1931). Indeed, only two districts--Alleghany and Baltimore--opted for local taxes. Id. at 211.

[FN108]. Shannon, supra note 101, at 228-29. The new State Superintendent moved quickly to expand the number of primary, grammar, and high schools and put in place statewide systems of excellence, which resulted in significant increases in educational quality. Id. at 261. He proposed compulsory school attendance and upgrading standards of professional competence of teachers. Id. at 268.

[FN109]. Amy C. Crewe, No Backward Step Was Taken, Highlights in the History of the Public Elementary Schools in Baltimore County 35 (1949) ("It was a courageous ideal, but, involving as it did an attempt to establish at one leap a system more elaborate than any other State in the Union was supporting at that time, it ran into difficulties almost immediately.").

[FN110]. Blauch, supra note 107, at 213.

[FN111]. Id. at 225; Shannon, supra note 101, at 327. Wishing to be exempt from the state mandates,

Baltimore City challenged the State Superintendent in court but lost. Blauch, supra note 107, at 218.

[FN112]. Shannon, supra note 101, at 240 (from a report from Calvert County) ("The demagogue dreaded the free school which encouraged free thought and inspired individual initiative. The sectionalist considered the schools nothing more than the spawn of Yankeedom. The aristocrat looked upon public education as detrimental to the contentment of the poor."). Although politically weakened, the property owners still greatly feared an expanded educational system. Id.

[FN113]. Id.

[FN114]. The new clause no longer required that the system be "uniform" and took out the requirement that a state superintendent be hired who would then hire the local superintendents. See Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 623-24, 458 A.2d 758, 772 (1983).

[FN115]. Antireformers wanted a dissolution of the entire system and reestablishment of total local control. Crewe, supra note 109, at 37. Reformers felt that the centralized system was essential for quality. Debates of the Maryland Constitutional Convention of 1867, at 247 (Philip B. Perlman ed., 1923) [hereinafter 1867 Debates] ("There can be no efficient system which was not general." (quoting Delegate Brown)).

[FN116]. There was little debate over the exact import of the phrase. See Shannon, supra note 101, at 334.

[FN117]. Noah Webster, An American Dictionary of the English Language 430 (1864) (quoted in Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 395 (Tex. 1989)). Another contemporary dictionary said that "efficient" meant "causing effects; that makes the effects to be what it is." Latnam, A Dictionary of the English Language (London, 1872) (quoted in Appellants' Brief, supra note 89, at 26 n.11).

[FN118]. Edwards, A Complete and Universal English Dictionary (1815) (quoted in Pauley v. Kelly, 255 S.E.2d 859, 874 (W.Va. 1979)).

[FN119]. Latnam, supra note 117.

[FN120]. Delegate McHenry declared, "There is no system of police comparable to that furnished by an efficient common school education, which trains up the children of a community to be good citizens." 1851 Debates, supra note 100, at 813. One delegate summed up the thinking of many of his colleagues in saying, "If it was the last word he had to say, he would say, let us have an efficient system of education." Id. at 810 (quoting Delegate Fiery). Delegate Fiery refused to consider spending another dollar on physical improvements in the State until the State developed a "uniform and efficient system of education for every child." Id.

[FN121]. Blauch, supra note 101, at 175.

[FN122]. Cremin, supra note 93, at 137. He said:

> Let the common school be expanded to its capabilities, let it be worked with the efficiency of which it is susceptible, and nine tenths of the crimes in the penal code would become obsolete; the long catalogue of human ills would be abridged; men would walk more safely by day; every pillow would be more inviolable by night; property, life, and character held by strong tenure; all rational hopes respecting the future brightened.

Id.

[FN123]. Mann, supra note 95, at 30 (stating that people were "turn[ing] away from the common schools, in their depressed state, and seek[ing], elsewhere, the help of a more enlarged and thorough education").

[FN124]. Abraham Flexner & Frank P. Bachman, Public Education in Maryland, A Report to the Maryland Educational Survey Commission 83 (1916) ("An efficient system of public schools not only enrolls children, but [retains them] . . . until they have finished the elementary, if not the high school, course."); id. at 57 ("[T]he efficiency of the schools depends upon the preparation of the teachers and upon the intelligence with which teachers are chosen."); id. at 24 ("Our real concern is as to the efficiency with which the work of the [State's education] department has been carried on.").

[FN125]. The use of "efficient" did not mean that the drafters wanted an "inexpensive" or "cheap" system as some have argued. Rather, the concerns delegates expressed over the high cost of the outgoing system were based on their goal of establishing a system of schools that produced educated students without excessive waste. Thus, the emphasis was on spending money wisely, not refusing to spend it at all. See Appellants' Brief, supra note 89, at 35-36.

[FN126]. See Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 607, 458 A.2d 758, 764 (1983). The plaintiffs were the Boards of Education of Somerset, Caroline, and St. Mary's Counties and the School Commissioners of Baltimore City; taxpayers; students; parents; public officials; and school superintendents. Id. The defendants were the Comptroller of the Treasury, the State Superintendent of Schools, and Montgomery County by intervention. Id. at 607-08, 458 A.2d at 764.

[FN127]. Id. at 608, 458 A.2d at 764.

[FN128]. Id. at 611, 458 A.2d at 776. The complaint asserted that "poor children in the plaintiff school districts require extra educational assistance to overcome learning disadvantages but receive less as a result of the State's discriminatory public school financing system." Id. at 610, 458 A.2d at 765.

[FN129]. Id. at 608, 458 A.2d at 764.

[FN130]. Id. at 656-57, 458 A.2d at 789-90. This test was defined in San Antonio Sch.Dist. v. Rodriguez, 411 U.S. 1, 55 (1972) ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest.").

[FN131]. Hornbeck, 295 Md. at 657, 458 A.2d at 790.

[FN132]. Id.

[FN133]. Id. at 654, 458 A.2d at 788 ("We think the legislative objective of preserving and promoting local control over education is both a legitimate state interest and one to which the present financing system is reasonable related.").

[FN134]. Id. at 639, 458 A.2d at 780. The court stated:

No evidentiary showing was made in the present case--indeed no allegation was even advanced--that these qualitative standards were not being met in any school district, or that the standards failed to make provision for an adequate education, or that the State's school financing scheme did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Art. VIII of the 1967 Constitution.

Id.

[FN135]. See McUsic, supra note 86, at 327 (stating that the court was not required to define a minimum standard of education because the plaintiffs failed to argue inadequacy).

[FN136]. Hornbeck, 295 Md. at 639, 458 A.2d at 780. The court wrote, "[s]imply to show that the educational resources available in the poorer school districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State's financing system for all students to obtain an adequate education." Id. The defendants' brief emphasized this point. Appellants' Brief, supra note 89, at 16 ("Although the trial court's opinion focused on financial disparities, it did not find that any student, or group of students in Maryland was denied the opportunity to receive an adequate education."). The defendants also stated, "The Plaintiffs did not establish any 'contemporary educational standards' with which any subdivision does not comply." Id. at 24.

[FN137]. Hornbeck, 295 Md. at 632, 458 A.2d at 776 ("To conclude that a 'thorough and efficient' system under § 1 means a full, complete and effective educational system throughout the State, as the trial judge held, is not to require a statewide system which provides more than a basic or adequate education to the State's children.").

[FN138]. See generally supra notes 100-105 and accompanying text (for underlying philosophies of reformers).

[FN139]. Id.

[FN140]. Ratner, supra note 10, at 782-83 (describing the necessary political skills as including literacy and ability to write).

[FN141]. See supra notes 100-105 and accompanying text.

[FN142]. See, e.g., Ratner, supra note 10, at 787-88 n.30 (stating that courts have found a twelfth-grade education to be the absolute minimum required). A twelfth-grade level of reading ability is needed to read and understand most newspapers. Id. at 788 n.30.

[FN143]. As Horace Mann summarized:

> [U]nder a republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge;--such an education as teaches the individual the great laws of bodily health; as qualifies for the fulfilment [sic] of parental duties; as is indispensable for the civil functions of a witness or a juror; as is necessary for the voter in municipal affairs; and finally, for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.

Mann, supra note 95, at 63.

[FN144]. 575 A.2d 359 (N.J. 1990).

[FN145]. Id. at 397-98 ("If absolute equality were the constitutional mandate, and 'basic skills' sufficient to achieve that mandate, there would be little short of a revolution in the suburban districts when parents learned that basic skills is what their children were entitled to, limited to, and no more.").

[FN146]. Id. at 398. A subsequent historical analysis of the education clause revealed that the framers had rejected language without a qualitative standard and instead had added the "thorough and efficient" language. F. Clinton Broden, Note, Litigating State Constitutional Rights to an

Adequate Education & the Remedy of State Operated School Districts, 42 Rutgers L.Rev. 779, 782-83 (1990) (stating that this "strongly suggests that the intent was not simply to guarantee a free education but an effective one as well").

[FN147]. See Jonathan Banks, Note, State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?, 45 Vand.L.Rev. 129, 146 (1992).

[FN148]. 255 S.E.2d 859 (W.Va.1979).

[FN149]. Id. at 877.

[FN150]. Id. at 874. The court said that "[l]exically . . . the words have not changed [from 1815 to 1976]." Id. It added that the system "must produce results without waste." Id.

[FN151]. Id. at 878.

[FN152]. In 1983, Arkansas's highest court declared:
The evidence offered may have shown that the appellee districts offered the bare rudiments of educational opportunities, but we are in genuine doubt that they were proved to be suitable and efficient. However, even were the complaining districts shown to meet the bare requirements of educational offerings, that is not what the constitution demands.
Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983).

[FN153]. The Supreme Court of Idaho stated that "[t]here is, at least in the context of our present society, more inherent in a thorough system of education than instruction in the three 'R's.'" Thompson v. Engelking, 537 P.2d 635, 648 (Idaho 1975).

[FN154]. In a 1930 decision, the Supreme Court of Montana asked "[w]hat, then, constitutes a 'thorough' system of education in our public schools?" McNair v. School Dist. No. 1, 288 P. 188, 190 (Mont. 1930). The answer:
[T]he solemn mandate of the Constitution is not discharged by the mere training of the mind; mentality without physical well-being does not make for good citizenship--the good citizen, the man or woman who is of the greatest value to the state, is the one whose every faculty is developed and alert . . . . Education may be particularly directed to either mental, moral, or physical powers or faculties, but in its broadest and best sense it embraces them all.
Id. (citation omitted). The McNair court's definition also included a vocational training component: "The common schools are doorways opening into chambers of science, art, and the learned professions, as well as fields of industrial and commercial activities." Id. at 191.

[FN155]. The Texas Supreme Court has interpreted the requirement of efficiency to include a decent quality education for every child. See Edgewood Indep.Sch.Dist. v. Kirby, 777 S.W.2d 391, 395 (Tex. 1989). The court rejected the notion that "efficient" meant "'economical,' 'inexpensive' or 'cheap,'" and instead referred back to old dictionary definitions. Id. The court also determined that "'[e]fficient' conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste." Id. (citations omitted).

[FN156]. Until 1983, the state's highest court had never considered the import of Colorado's education clause. See Lujan v. Colorado St. Bd. of Educ., 649 P.2d 1005, 1024-25 (Colo. 1982). Without "any historical background to glean guidance regarding the intention of the framers," the court could only speculatively talk in negatives. Id. In its holding, the court rejected the notion that a "thorough and uniform system requires equal expenditures within the districts." Id. Although a dissenting justice warned that the majority was holding that "the constitutional standard is satisfied

if the state insures that some unspecified minimum of educational opportunity is available in each school district," there is no explicit affirmative declaration by the court of the actual standard. Id. at 1041 (Lohr, J., dissenting). Consequently, Judge Lohr's concern appears to be unfounded.

[FN157]. The state's highest court has been reluctant to elaborate on the meaning of the language, other than to reiterate the description already included in the constitution that every child should receive a "good common school education." People ex rel. Leighty v. Young, 139 N.E. 894, 895 (Ill. 1923). See also People ex rel. Russell v. Graham, 134 N.E. 57, 60 (Ill. 1922) (reiterating the "good common school education" language as a constitutional element of "thorough and efficient").

[FN158]. There is little judicial interpretation of the educational requirement in Minnesota. In 1913, the highest court declared that "[t]he object is to insure a regular method throughout the state whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic." Board of Educ. v. Moore, 17 Minn. 391, 394 (1871).

[FN159]. The overwhelming evidence indicated that the Ohio education clause established a rigorous constitutional mandate for a high quality of education throughout the state. See 2 Report of the Debates & Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850- 51, at 13-17 (1851) (J.V. Smith, official reporter) [hereinafter Ohio Debates]. For the most part, Ohio courts have correctly followed this historical purpose. In 1923, the state Supreme Court recognized that "the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state." Miller v. Korns, 140 N.E. 773, 776 (Ohio 1923). Other states' courts, in examining the Ohio record, have also found the education clause to establish a high standard. As West Virginia's highest court said, "The tenor of the discussion . . . by those advocating the entire education section as it was finally adopted, leaves no doubt that excellence was the goal, rather than mediocrity." Pauley v. Kelly, 255 S.E.2d 859, 867 (W.Va. 1979).

In its most recent interpretation of the education clause, Ohio's highest court did not directly refute this high standard. In Board of Education v. Walter, the court apparently implied that as long as a school had enough funds to instruct students in basic academic subjects, and thereby met the legislative standards, it met the constitutional standards. See Board of Educ. v. Walter, 390 N.E.2d 813, 825-26 (Ohio 1979), cert. denied, 444 U.S. 1015 (1980). The court commented that although financial hardships resulted in school closings, the instructional year for students did not fall below 182 days, the length mandated by law. Id. This decision indicated only that a system bereft of certain basics cannot be thorough and efficient; it does not necessarily indicate that a system with those basics and nothing else would necessarily be thorough and efficient.

[FN160]. In 1963, Virginia's highest court declared that the constitutional language did not even require the state to have public schools at all. See County Sch.Bd. v. Griffin, 133 S.E.2d 565, 573 (Va. 1963). In Griffin, pro-segregationists were permitted to close schools to avoid racial integration without violating the constitution. Id. This finding sharply conflicted with the court's own prior holdings. In 1959, under similar circumstances, the court had stated that "the state constitutional provision requires the State to 'maintain an efficient system of free public schools throughout the state.'" Harrison v. Day, 106 S.E.2d 636, 646 (Va. 1959). The court therefore concluded that "the State must support such public schools in the State as are necessary to an efficient system." Id. (quoting Va.Const. of 1869, art. XI, s 129). The notion that a non-existent school system could be "efficient" strictly contradicts that finding.

[FN161]. In addition, although courts in Pennsylvania and Kentucky have made only vague comments about the qualitative nature of the educational mandate, these comments evidence a high value placed on education. Pennsylvania's highest court has said that failure to provide every child with a "basic, adequate or minimum education" would be unconstitutional. Danson v. Casey, 399

A.2d 360, 365 (Pa. 1979). The court, however, has never affirmatively defined the constitutional standard beyond asserting that "'thorough and efficient' must not be narrowly construed." Id. at 366. Kentucky's court declared that the state was constitutionally required to "provide funding which is sufficient to provide each child in Kentucky an adequate education." Rose v. Council of Better Educ., Inc., 790 S.W.2d 186, 212-13 (Ky. 1989).

[FN162]. See infra notes 233-241 and accompanying text. MSBE oversees the Maryland State Department of Education, a state agency headed by the State Superintendent. Md. Code Ann., Educ., §§ 2-101 to -103 (1992).

[FN163]. Res. No. 1990-6, Maryland State Board of Education, State Goals for Public Education 1 (May 22, 1990).

[FN164]. Maryland State Department of Education, Maryland School Performance Program Report, 1992, at iii (1992) [hereinafter MSP 1992].

[FN165]. Id. at 6-59.

[FN166]. Res. No. 1990-30, Maryland State Board of Education, Maryland School Performance Program--Projected Five Year Standards for 1990-1995, at 1 (Aug. 29, 1990).

[FN167]. Id. (listing projected standards for attendance, promotion, reading, writing, math, and citizenship within the ninetieth percentile).

[FN168]. See 1864 Debates, supra note 100, at 1225 (emphasizing the importance of establishing a school system to which "any son of Maryland" can refer "with satisfaction, as evidence of a system which has elevated the community") (quoting Del. Cushing).

[FN169]. Without significant financial help from the state, each district was virtually left to its own to establish schools. Shannon, supra note 101, at 19 ("Outside of modest financial aid, the state did not in any way regulate or supervise the county schools."). Many of the poorer, more rural counties lacked the money to do an adequate job. Sollers, supra note 101, at 50.

[FN170]. At the 1851 Constitutional Convention there was a strong desire to erase great educational disparities both geographically and socioeconomically. See Blauch, supra note 101, at 179, 187-88 (quoting one delegate whose proposal sought to "spread the opportunities and advantages of education in the various parts of the country, and among the different orders of the people"). See also 1851 Debates, supra note 100, at 805 ("[W]e are desirous to have a general system, where the children of the poor may have the full benefit of it; where all classes (rich and poor) may meet upon a common platform, and receive the blessing designed."). These problems had not been eradicated by the 1864 Convention, at which even delegates from Baltimore City, on whose monetary shoulder an enhanced system would surely be financed, spoke strongly in favor of a new clause. 1864 Debates, supra note 100, at 1225-26. The majority of the 1864 delegates rejected several attempts to explicitly exclude black children from the constitutional mandate. Shannon, supra note 101, at 224-25.

[FN171]. "On the eve of the Civil War, Baltimore had set an example in education that matched the record of any city in the North and surpassed that of most southern cities." Shannon, supra note 101, at 101. It had pioneered educating young girls, forming one of the east coast's first female high schools. Id. at 63. It had also established a "floating school" to train sailors, which served as a model for similar schools in other cities. Id. at 79-83.

[FN172]. See generally supra notes 168-171.

[FN173]. As the state superintendent said in his first report to the state legislature:

Why not rank also with those that provide universal education, not the education which halts before the door of the primary school, but marches on; takes the poorest youth, whom God has endowed with intellect, nurtures that intellect, gives it the benefit of the best culture and exhibits the pure benevolence of Republicanism, which by bestowing equal privileges upon all, gradually levels up the humble to an equality with those who enjoy all the benefits of wealth and social position.

Report of the State Superintendent of Public Instruction to the General Assembly of Maryland 1865 (quoted in Shannon, supra note 101, at 230).

[FN174]. 1864 Debates, supra note 100, at 1221.

[FN175]. See Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 639, 458 A.2d 758, 780 (1983) (holding that "education need not be 'equal' in the sense of mathematical uniformity").

[FN176]. Id.

[FN177]. See Hornbeck, 295 Md. at 632, 458 A.2d at 776-77 ("[A]t most, the legislature is commanded by § 1 to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education. To the extent that § 1 encompasses any equality component, it is so limited.").

[FN178]. Courts in Arkansas, Idaho, and Pennsylvania have also found the education clause to mandate substantial equality of opportunity. See Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983); Thompson v. Engelking, 537 P.2d 635, 637 (Idaho 1975); Danson v. Casey, 382 A.2d 1238, 1242 (Pa.Commw.Ct. 1979), aff'd, 399 A.2d 360 (Pa. 1979). In Ohio, a "thorough and efficient" state, the court has never addressed the equality aspect of the state's education article. However, historical analysis reveals that equal opportunity was a principal thrust of the reformers who created the original "thorough and efficient" articles. Ohio Debates, supra note 159, at 14-15.

Some courts have even found that equality of opportunity also requires equality of educational finances. See, e.g., Rose v. Council of Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (holding that "the great disparity and inadequacy . . . of financial effort throughout the State made the Kentucky educational system inefficient, and thus a violation of the Kentucky Constitution"); Edgewood Indep.Sch.Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (holding that "[c]hildren who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds"); Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990). Although Maryland rejected that notion in Hornbeck, the broader idea of equal opportunity in education has not necessarily been rejected. Indeed, equality of opportunity may require a state to go beyond equality of finances, because a district with many disadvantaged children may need additional money to provide the same opportunity as wealthier districts can for nondisadvantaged students.

[FN179]. Robinson v. Cahill, 303 A.2d 273, 294 (N.J.), cert. denied, 414 U.S. 976 (1973). The court examined the disparities in the state's system again in 1985 and stated that:

[T]he thorough and efficient education issues all for proofs that, after comparing the education received by children in property-poor districts to that offered in the property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children.

Abbott, 495 A.2d at 390. In a 1990 extension of the Abbott case, the court stated that "[a] thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society." Id. at 403.

[FN180]. Rose, 790 S.W.2d at 211. The court found a strict notion of equality imbedded in the

"efficient" language, saying, "Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic independence." Id. at 212-13. In Texas, the high court expressed a similar finding, saying that "[c]hildren who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds." Edgewood Indep.Sch.Dist., 777 S.W.2d at 397. The court also added, "It is apparent from the historical record that those who drafted and ratified [the education clause] never contemplated the possibility that such gross inequalities could exist within an 'efficient system.'" Id. at 395 (footnote and citation omitted).

[FN181]. Abbott, 575 A.2d at 403.

[FN182]. This is true in Maryland. See Robert E. Slavin, Funding Inequities Among Maryland School Districts: What Do They Mean in Practice? 7-8 (1991) ("The districts on the low end of per-pupil funding are also disproportionately represented among the lowest in student performance."). See also Joel S. Berke & Judy G. Sinkin, Developing a "Thorough and Efficient" School Finance System: Alternatives for Implementing Robinson v. Cahill, 3 J.L. & Educ. 337, 352 (1974) (stating that such a backward system would be "inefficient" and therefore unconstitutional).

[FN183]. See John Silard & Barrie Goldstein, Toward Abolition of Local Funding in Public Education, 3 J.L. & Educ. 307, 311 (1974) (stating that reliance on local property taxes results in great financial disparities).

[FN184]. Slavin, supra note 182, at 25.

[FN185]. See Berke & Sinkin, supra note 182, at 350-52 (stating that reliance on local funding results in unequal educational opportunity).

[FN186]. Norris v. Mayor of Baltimore, 172 Md. 667, 675, 192 A. 531, 535 (1937). The court stated:

> [W]hile the principles of the constitution are unchangeable, in interpreting the language by which they are expressed, it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee.

Id.

[FN187]. Clauss v. Board of Educ., 181 Md. 513, 523, 30 A.2d 779, 783 (1943). Pursuant to this reasoning, the Court found that heating and transportation were necessary elements of an education, although they were not considered as such in 1867. Id. This language echoed the court's 1897 statement that "[t]he specific components of a thorough and efficient system are for the legislature to prescribe from time to time, depending on changing circumstances." Hooper v. New, 85 Md. 565, 580 (1897).

[FN188]. Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 639, 458 A.2d 758, 780 (1983).

[FN189]. In Pennsylvania, the high court said, "The very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances." Danson v. Casey, 399 A.2d 360, 366 (Pa. 1979) (quoting Malone v. Hayden, 197 A. 344, 352 (Pa. 1938)). The court added, "More than forty years ago, this Court recognized that because educational philosophy and needs change constantly, the words 'thorough and efficient' must not be narrowly construed." Id. at 366.

See also Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973), cert. denied, 414 U.S. 976 (1973) ("The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the

labor market."); People ex rel. Leighty v. Young, 139 N.E. 894, 896 (Ill. 1923) (emphasizing that legislative discretion is to be "bound to conform to the popular understanding of what constitutes a common school education").

In summarizing the cases from around the country, the high court in West Virginia has stated that "[t]he debates and cases often mention that ingredients of a thorough and efficient education system are changeable, and most adapt to conditions its beneficiaries need meet." Pauley v. Kelly, 255 S.E.2d 859, 876 (W.Va. 1979).

Finally, the Idaho high court rejected an explicit statement by a convention delegate defining education as the "three R's" and said that more was required "in the context of present society." Thompson v. Engelking, 537 P.2d 635, 648 (Idaho 1975). Delegate Parker had stated, "The duty of the state . . . is simply the teaching of the children of the community the three R's--to learn to read, to write, and the rules of arithmetic, and the duty of the state ends right there." Id. The high court, however, noted that "today, Parker's statement cannot be given its literal meaning. There is, at least in the context of our present society, more inherent in a thorough system of education than instruction in the three 'R's.'" Id.

[FN190]. Indeed, modern children may need a host of additional skills that would have been utterly unnecessary when the constitutional language was initially implemented. See Burgdorf & Bersoff, supra note 84, at 53, 54 ("The development of public school education from the 17th century to the present is largely an evolution from the narrow concept of education as 'reading, writing and arithmetic,' to the broader notion that education should encompass such diverse subjects as chemistry, home economics, driver's training, foreign languages, and gym classes.").

[FN191]. See Hubsch, supra note 57, at 115 ("The single most difficult issue facing advocates of educational entitlement is state judicial deference to the education scheme adopted by the state legislature in response to the constitutional mandate.").

[FN192]. See, e.g., Harrison v. Day, 106 S.E.2d 636, 646 (Va. 1959) ("[T]he General Assembly may determine [for itself] what is an 'efficient system,' but it cannot impair or disregard constitutional requirements.").

[FN193]. Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 639, 458 A.2d 758, 780 (1983) ("No evidentiary showing was made in the present case . . . that [the State's] qualitative standards were not being met in any school district, or that the standards failed to make provision for an adequate education.").

[FN194]. Ratner, supra note 10, at 816 ("In interpreting state constitutions and laws, the state supreme courts are the ultimate arbiters. Thus, the state courts are free to interpret these provisions as expansively as they see fit, as long as the interpretation does not contravene federal constitutional or statutory provisions.").

[FN195]. Hornbeck, 295 Md. at 626, 458 A.2d 773-74 ("[I]t was the intention of the Convention delegates in adopting the new education article to leave implementation of the details of the public school system to legislative determination.").

[FN196]. See supra notes 114-116 and accompanying text.

[FN197]. See supra notes 116-121 and accompanying text.

[FN198]. See supra note 91.

[FN199]. Ohio Debates, supra note 159, at 11.

[FN200]. Ratner, supra note 10, at 779 ("What duties the principles of 'thorough and efficient' education . . . impose on school districts must be determined in light of the contemporary state of educational knowledge.").

[FN201]. See Burgdorf & Bersoff, supra note 84, at 54-55. One million kids were excluded, and three million were not provided with special services. Id. at 54.

[FN202]. Marcia P. Burgdorf & Robert Burgdorf, Jr., A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara L.Rev. 855, 876 (1975). The authors stated: "The major factual consideration underlying the successful lawsuits seeking education for handicapped children was the development of a comprehensive body of professional expertise supporting the premise that all handicapped persons can learn, develop and benefit from appropriate educational programs." Id.

[FN203]. Some researchers have claimed that schools cannot compensate for a student's weak educational background. See Ratner, supra note 10, at 794-95 n.50, 796-800 (summarizing and then rejecting the theories of these researchers).

[FN204]. See id. at 796-804 (discussing characteristics of effective schools and three cities in which such schools have succeeded).

[FN205]. Ala. Const., amend. 11, § 25C (emphasis added).

[FN206]. Hornbeck, 295 Md. at 639, 458 A.2d at 780.

[FN207]. See id. at 656, 458 A.2d at 789 (holding that Maryland's system of school financing complies with rational basis test).

[FN208]. Id. at 624-28, 458 A.2d at 772-75.

[FN209]. Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979) ("[T]he framers endorsed the concept of local control to meet diverse local needs and took notice of the right of local communities to utilize local tax revenues to expand education programs subsidized by the state.").

[FN210]. See Md.Const. art. VIII (1867).

[FN211]. See 1867 Debates, supra note 115, at 256.

[FN212]. Md.Const. art. VIII, § 2 ("The System of Public Schools, as now constituted, shall remain in force until the end of the said first Session of the General Assembly, and shall expire; except so far as adopted, or continued by the General Assembly.") (emphasis added).

[FN213]. See Shannon, supra note 101, at 329-30 (describing the goal of the 1867 Convention delegates to establish an organized public school system).

[FN214]. See Md.Const. art. VIII, § 1. The burden was mandatory, using the word "shall." See Hubsch, supra note 57, at 97 ("The term 'shall' expresses a mandatory duty.").

[FN215]. Pauley v. Kelly, 255 S.E.2d 859, 869 (W.Va. 1979) (noting that states whose constitutions contain a "thorough and efficient" clause "all have found the clause to make education a state, rather than local, responsibility"); Rose v. Council of Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989) (finding that the constitution's education "obligation cannot be shifted to local counties and local

school districts"); People ex rel. Leighty v. Young, 139 N.E. 894, 896 (Ill. 1923) ("The constitutional provision is a mandate to the legislature"); Board of Educ. v. Houghton, 233 N.W. 834, 835-36 (Minn. 1930) (quoting Associated Sch. v. School Dist., 142 N.W. 325, 326-27 (1913)) (""The maintenance of public schools is not a matter of local but of state concern' . . . . To what reasonable extent powers shall be conferred upon local school districts is for legislative determination."); Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990) ("The State's obligation to attain that minimum is absolute--any district that fails must be compelled to comply."); Miller v. Korns, 140 N.E. 773, 776 (Ohio 1923) (stating that the constitutional language "calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but state- wide [sic]"); Board of Supervisors v. Cox, 156 S.E. 755, 759 (Va. 1931) (finding that the education language imposed a "mandatory duty" upon the state); Kuhn v. Board of Educ., 4 W.Va. 499, 509 (1871) (stating that the "thorough and efficient" language in the West Virginia constitution made it "obligatory upon the legislature to provide for the support of such schools . . ., thus placing in the hands of the legislature, for that purpose, plenary, if not absolute, power"). California Teachers Ass'n v. Huff, 5 Cal.App. 1513, 1521 n.5 (1992) ("Education and the operation of the public school system are matters of statewide rather than local or municipal concern."); Hubsch, supra note 57, at 98 ("State court opinions have consistently held that despite the appointment of local officials to school boards, the system of public schools is a state system, under state legislative and executive control.").

[FN216]. Md.Const. art. VIII, § 1.

[FN217]. Cardenas, supra note 59, at 275.

[FN218]. Id.

[FN219]. Id. at 278.

[FN220]. See 1868 Md. Laws Ch. 407, tit. 1, ch. 1, § 1, which did not contain a provision for a state board of education or a state superintendent. Also, the law established a separate system for Baltimore City. Id. at § 7.

[FN221]. 1872 Md. Laws Ch. 377, ch. 1, § 1 ("Educational matters affecting the State and the general care and supervision of public education shall be entitled to a State Board of Education."). Almost immediately, the Court of Appeals found the law to give the State Board "visitorial power of the most comprehensive character. . . . [S]uch power is, in its nature, summary and exclusive." Wiley v. Board of County Sch. Comm'r, 51 Md. 400-01, 406 (1879). That finding was affirmed in Board of Educ. v. Hubbard, 305 Md. 774, 790, 506 A.2d 625, 633 (1986) (stating that the State Board's "paramount role . . . in interpreting the public education law sets it apart from most administrative agencies").

[FN222]. Appellees' Brief at 51; Flexner & Bachman, supra note 124, at 13, 18, 26.

[FN223]. Flexner & Bachman, supra note 124, at xvii ("[I]n general, politics and personal considerations impair the vigor, independence, thoroughness, and efficiency of the school system.").

[FN224]. Id. at xv, 25 (stating that the State Superintendent had inadequate resources to do his job); id. at 13 (criticizing the power split over teacher credentials between the State Board, the State Superintendent, and the county superintendents).

[FN225]. Id. at 106-07 (criticizing the instruction as stressing too much memorization).

[FN226]. Id. (finding that many teachers did not know the material they were teaching). The report criticized the lack of consistency on teacher credentials, noting that "the widest possible variation in the training of teachers doing the same grade of work." Id. at 58.

[FN227]. Id. at 116 ("Instruction in the colored schools is . . . distinctly inferior to that in the white schools.").

[FN228]. Id. at 84. Despite progress, many students were not enrolled in elementary school, and even more were not in high school. Id. Average daily attendance stood at only 47.1% in 1914. Id. at 94.

[FN229]. Id. at 85 (commenting that the State ranked 23rd in literacy rates); id. (stating that the dropout rate was "deplorably bad"). Many children were overage for their grade in school. Id. at 90.

[FN230]. Id. at xvi.

[FN231]. Id. at 36-37.

[FN232]. Id. at 135; id. at 65 (stating the need for a central agency to manage teacher certification).

[FN233]. Md.Regs. Code tit. 13A, § 12 (1989).

[FN234]. Md. Code Ann., Educ. § 6-301 (1989).

[FN235]. Md.Regs. Code tit. 13A, §§ 03.01.03, 03.02.03 (1989).

[FN236]. Md. Code Ann., Educ. §§ 7-407 to -411 (1989) (providing for physical education, safety education, driving education, and alcohol abuse programs in the school system); Md.Regs.Code. tit. 13A, § 04.07-04-18 (1989 & 1991) (providing for programs in arts, physical education, science, math, and other areas of study).

[FN237]. Md. Code Ann., Educ. § 7-304 (1989).

[FN238]. Md.Regs. Code tit. 13A, §§ 03.01.01, 03.02.01A (1989).

[FN239]. Md. Code Ann., Educ. § 7-103(a)(1) (1989).

[FN240]. Id. § 7-103(c).

[FN241]. Md.Regs. Code tit. 13A, § 01.02.01B (1989).

[FN242]. See Cremin, supra note 93, at 138; Flexner & Bachman, supra note 124, at 65.

[FN243]. See Flexner & Bachman, supra note 124, at 8:

> Public education in America has developed most satisfactorily in those states in which a judicious combination of state and local authority has been effected. The reason is plain. The influence of the state makes for unity of design and uniformity of standards; local initiative ensures the interest, effort, pride, and sacrifice of the community to which the school belongs.

Id.

[FN244]. See supra notes 7-8 and accompanying text.

[FN245]. MSP 1992, supra, note 164, at 1-9.

[FN246]. Id. at 7.

[FN247]. Id.

[FN248]. Id.

[FN249]. Id.

[FN250]. Id. at 10. The six areas were: the percent of first time takers passing the functional tests in mathematics and citizenship, the percent of eleventh graders not having passed the math and citizenship tests, the attendance rate for seventh through twelfth graders, and the dropout rate. Id.

[FN251]. Id. at 12-56.

[FN252]. Id. at 3, 7.

[FN253]. Executive Summary, Statewide Testing Programs in Maryland 4 (on file with authors).

[FN254]. Id.

[FN255]. Telephone Interview with Robert E. Gabrys, Assistant Superintendent for School Performance, Maryland State Department of Education (Apr. 1, 1993) [hereinafter Gabrys April Interview].

[FN256]. See Outcomes-Based Graduation Requirements Task Force, Maryland State Department of Education, Report on Performance-Based Graduation Requirements and Performance-Based Education 1-2, 5 (Sept. 1993). The report recommends full implementation of the content tests by the 1996-97 school year and of the skill tests by the 1998-99 school year. Id. at 7-8. It is not clear yet how or if the MSP program will incorporate the high school tests.

[FN257]. Telephone Interview with Robert E. Gabrys, Assistant Superintendent for School Performance, Maryland State Department of Education (Feb. 8, 1993) [hereinafter Gabrys February Interview].

[FN258]. A 3% annual dropout rate translates mathematically into a 12% four- year dropout rate. If 88% of the students graduate and 90% of graduates pass all four functional tests, only 79.2% of total students have graduated and passed all four tests.

[FN259]. MSP 1992, supra note 164, at iii.

[FN260]. 255 S.E.2d 859 (W.Va. 1979).

[FN261]. Id. at 877.

[FN262]. Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989).

[FN263]. Pallas, supra note 1, at 21 ("If schools do not have available the right resources, all the restructuring in the world is unlikely to make much of a difference.").

There is a major dispute as to the relationship between funding and quality in education. McUsic, supra note 86, at 316. Some researchers claim that the two are unrelated. See Eric A. Hanushek, When School Finance "Reform" May Not Be Good Policy, 28 Harv.J.Legis. 423, 438 (1991) (arguing that studies on the correlation between funding and education are inconclusive). Some problems that

exist in education are largely independent of funding. Id. at 454. Yet the success of certain expensive interventions proves that money can make a difference. Moreover, the absence of cost-neutral but equally effective programs indicated that bringing at-risk children into the educational mainstream will cost money in the short term, although long term savings will return the investment many times over. As one researcher said: "Throwing money at the problems will not suffice. But large sums of money are required to support ideas of promise." Goodlad, supra note 2, at 4. See also Slavin, supra note 182, at 26 ("Money itself will not solve all the problems, but it is equally true that any interventions that have a reasonable chance to solve problems will cost money.").

[FN264]. Governor's Commission on School Funding, Working Paper #2: "Problems with Existing Funding Programs and Levels" 10-11 (Aug. 4, 1993) (a working draft) (on file with the authors).

[FN265]. Id. at 11.

[FN266]. See id.

[FN267]. Nancy S. Grasmick, Preliminary Proposals for the Governor's Commission on School Funding 1 (Sept. 29, 1993) (on file with the authors).

[FN268]. Id. at 2.

[FN269]. Id.

[FN270]. Id.

[FN271]. See id. at 1.

[FN272]. Maryland State Department of Education, The Fact Book 1991-1992, at 55 (1992).

[FN273]. Joint Study Group on Education & Local Government, Department of Fiscal Resources, Final Report 14 (Oct. 29, 1991). The report stated:

As currently structured, the determination of the minimum per pupil funding level is based on the historical level of spending within the local school systems. It has not been determined what constitutes a basic level of education, and what it should cost to provide this level of service. As a proxy, state aid relies on 75 percent of allowable "basic costs" as a representation of need. As a result, education funding in Maryland is essentially divorced from standards of quality and need--spending is driven by spending.

Id.

[FN274]. At-Risk Commission, supra note 60, at 8 ("With little or no exposure to such developmental enrichments as trips, camps, museums, libraries and stimulating home environments, poor youth coming from impoverished backgrounds, have the most to gain from their school experience; yet they are more likely to attend schools with poor resources.").

[FN275]. See Joint Expenditure Study Group on Education & Human Resources, Department of Fiscal Resources, Education Pre-Kindergarten Through Grade 12, Follow up 30 (Aug. 7, 1991).

[FN276]. Slavin, supra note 182, at 9. One district--Worcester County--has disadvantaged students, but also has the money needed to improve student performance. Id. at 10.

[FN277]. See A Guide to the Kentucky Education Reform Act of 1990, Legislative Research Commission (prepared by Miller et al.) (Apr. 1990) [hereinafter Kentucky Act].

[FN278]. School Performance Review System, Executive Summary (draft) [hereinafter School Performance] (on file with authors). Gabrys April Interview, supra note 255.

[FN279]. Gabrys April Interview, supra note 255. Telephone Interview with Robert G. Gabrys, Assistant Superintendent for School Performance, Maryland State Department of Education (Sept. 30, 1993) [hereinafter Gabrys September Interview].

[FN280]. Maryland State Department of Education, On-Site Review Team Handbook for Challenge Schools 1 (Oct. 1992).

[FN281]. Id. at 11. The local superintendent selects the schools from a list of eligible schools prepared by the State. Id. The State provided a total of $9 million for the 28 schools. Gabrys April Interview, supra note 255.

[FN282]. Maryland State Department of Education, On-Site Review Team Handbook for Challenge Schools 11 (Oct. 1992).

[FN283]. Id.

[FN284]. Id. at 11-12.

[FN285]. Id. at 12.

[FN286]. Id.

[FN287]. 20 Md.Reg. 1491 (Sept. 17, 1993).

[FN288]. Id. at 1493 (§ 13A.01.04.07A(1) of the proposed regulations).

[FN289]. Id. (§ 13A.01.04.07A(2) of the proposed regulations).

[FN290]. Id. at 1493 (§§ 13A.01.04.04E and 13A.01.04.07B of the proposed regulations).

[FN291]. Id. at 1493 (§ 13A.01.04.04E of the proposed regulations).

[FN292]. Id. at 1492 (§ 13A.01.04.02B(6)(a) of the proposed regulations).

[FN293]. Id. (§ 13A.01.04.02B(6)(b) of the proposed regulations).

[FN294]. Id. at 1493 (§ 13A.01.04.07D of the proposed regulations).

[FN295]. Gabrys September Interview, supra note 279.

[FN296]. School Performance, supra note 278.

[FN297]. See Kentucky Act, supra note 277.

[FN298]. Telephone Interview with Kathleen Rosenberger, Coordinator of the MSP Team, Maryland State Department of Education (Sept. 27, 1993).

[FN299]. Slavin, supra note 182, at 25. The report states:
There is no denying that Baltimore City is in a category all of its own. Baltimore City students

score worse than students in every other district on nearly every test at every grade level. Baltimore City has far higher needs for special education. Its attendance rates are far lower than in any other district, and its retention and dropout rates are far higher. It is the only district with a large proportion of first graders who did not attend kindergarten. It offers among the lowest salaries in the State, receives far fewer applications for each teaching position, and must make offers to a far higher proportion of its applicants than any other district. It is the only district which is unable to fill a significant number of openings. In almost every category of expenditure, Baltimore City is among the lowest, from librarians and library books to computers to supplementary personnel of all kinds (except special education, where it has far more staff than any other district).
Id. In almost any indicator of quality, Baltimore City Public Schools (BCPS) ranks last among the State's twenty-four school systems. Mark Bomster, City's Schools Rank Last, Vow Renewed Effort, The Sun (Baltimore), Nov. 17, 1992, at 1B, 4B. Last year, it failed all of the State's standards, and this year it passed only two of thirteen. Id. The dropout rate was substandard, and a high percent of high school graduates were unprepared for college or employment. School Performance Report, The Sun (Baltimore), Nov. 18, 1992, at C8-9, C9. Only 29.4% of graduates met the course requirements for the University of Maryland System, and only 19.7% had completed a state approved occupational program. Id. There are 73,800 poor students in Baltimore City public schools, 67% of the entire student population. MSP 1992, supra note 164, at 17. The city's tax base is shrinking. Maryland Fiscal Data app. at 3 (Sept. 24, 1992) (prepared by Department of Fiscal Resources for Region IV Conference, American Society for Public Administrators). The city's population shrunk 6.5% from 1980 to 1990. Id. City employment fell 5.6% from 1981 to 1991. Id. The city's property tax base declined by 6.4% from 1970 to 1993 (projected), and its net taxable income shrank from 1990 to 1991 for the first time. Id. at 3-4. Meanwhile, its tax effort significantly exceeds that of other jurisdictions. Id. at 4-6. With a statewide average of 100, the tax effort in Baltimore City averaged 161 from 1988 to 1990. Id. The rest of the State's effort was 81, while that of the four large counties around the city was 101. Id.

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HANKINS, W. ASHOFF

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THE MONUMENTAL CITY BAR ASSOCIATION

By

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Race and the Law in Maryland
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June 14, 1991

counterparts. Various leaders within the NBA have asserted that the best way to achieve this and conquer racism is to work together as a bar association and not as individual attorneys.

During the week of February 2, 1936, the National Bar Association held its 13th annual convention in Baltimore at Morgan College. "A number of resolutions urging many changes in the programs of the Federal government" were drafted by a committee of which Warner T. McGuinn, a member of the Monumental City Bar Association, was a participant.[38] Overall, the committee recommended two things: one,

> that a petition be sent to the President of the United States urging him to use the influence of his high office to abolish all forms of discrimination and segregation in government agencies and departments on account of race and color;[39]

and two, that as an association, the NBA

> urge the black lawyers of this country to be alert and watchful of any effort...of persons ...attempting by the use of legal actions of whatever character, to restrain the peaceful attempts on the part of our people by speech or publication in the press, or by picketing in their efforts to bring the attention of their people to any wrongs, denials or privileges, opportunities for the employment or progress when they have just cause to complain.[40]

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38. The Afro-American, 15 February 1936, p. 20.

39. Id.

40. Id.

As early as the 1880's, black attorneys were very active in fighting battles for blacks in the Baltimore community.[41] However, much of this work was done individually and at the expense of the sole practitioner. Many black attorneys began to yearn for membership into the Bar Association of Baltimore City and the Maryland State Bar Association because of the benefits they perceived they would be entitled to, thus enabling them to have a better practice.[42] Unfortunately, membership for black attorneys (and women) in these bar associations was not acceptable until the late 1950's. Thus, it was felt that in order for black attorneys to be able to survive, and to forge ahead collectively in their struggle for civil rights, a bar association of their own was a necessity.

In the early 1930's, several black attorneys assembled to organize The Monumental City Bar Association (M.C.B.A.). Unlike their predecessors, there was never any doubt in their minds that M.C.B.A. would be open to all people, regardless of race, sex or creed. In 1934, U. Grant Tyler was elected president of M.C.B.A.

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41. Interview with Solomon Baylor, former Circuit Court Judge for Baltimore City, Baltimore, Maryland, 20 March 1991. Judge Baylor considers these attorneys to be "race-minded" and that it was their consciousness that drew them into the legal profession. They wanted to see a change and thus, decided to bring it about legally. Along with himself, several of these attorneys were inspired by their school teachers, who's mode of teaching, at the time they were in school, was well ahead of their predecessors.

42. In 1935, these benefits consisted of continuing legal education; participation in the formation of ethics and procedure rules; and most importantly, the sharing of experiences with other members of the legal profession.

and Linwood Koger was elected treasurer.[43] During the week of November 3, 1934, a petition was sent to Bernard Wells and George Cameron, then the Democratic and Republican candidates for the office of State's Attorney, on behalf of a group of local black lawyers, requesting that they appoint black assistants in the event of their election.[44] The lawyers rationale behind the petition was attributed to the fact that "at the present nine assistants in the office represented every white racial group in the city, although sixty-seven per cent of the defendants in the criminal court are" black.[45] Also, several members of the Supreme Bench "give preference in making these appointments to former state's attorneys, or men who have had experience in that office," thus interfering with the opportunities of black men being appointed.[46] The petition then went on to state that "more then fifty per cent of these defendants employ counsel of their own race to defend them thus giving evidence of their belief and confidence in the skill and integrity of" black lawyers.[47]

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43. The Afro-American, 5 January 1935, p. 24.

44. The Afro-American, 3 November 1934, p. 1. Although the article did not cite the local attorneys involved, I believe this action can be attributed to some of the members of Monumental because during the time frame in which this paper encompasses, the most active members of the black legal community were members of M.C.B.A.

45. Id.

46. Id.

47. Id.

Additional justification for black representation in the State's Attorney Office was based upon the fact that Blacks pay more than twenty-six million dollars annually in taxes while they only constituted one-sixth of the city's population and that their presence consists of forty thousand registered Republican voters and twenty-two thousand registered Democrats.[48] The lawyers also called attention to the fact that "racial restrictions are not invoked in the state's attorney's offices in several cities, some of which are in the South."[49]

In "citing the frequent commendations, by members of the supreme bench and the state's attorney's staff, of black lawyers and the frequent selection of attorneys of the group to defend indigent defendants in capital cases,"[50] the lawyers asserted in their petition that they

> wish to particularly cite the office of the black probation department, which functions efficiently and without friction, and without this office, which has been referred to by the members of the Supreme Bench as its 'right arm,' the ends of justice would not be properly served.[51]

In closing their petition, the group of lawyers stated that

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48. Id.

49. Id. These cities include New York City, Newark, Philadelphia, Washington, Chicago, Knoxville, Tenn.; Indianapolis, Ind.; Detroit, Cleveland, Boston, Toledo, Ohio; Charleston, W.Va,; St. Louis, Mo.; East St. Louis, Ill.; Kansas City, Denver, Columbus, Ohio; Buffalo, N.Y.; and Cincinnati, Ohio.

50. Id.

51. Id. p. 1-2.

they believed

> that the appointment of a black man, or men, in the state's attorney's would be productive of the same benefit. Further, the said appointment would be an advanced step toward a better understanding between the black and white groups of this city, and would place Baltimore in the fore-front of the big cities of this nation which are recognizing the fairness of our proposal.[52]

During the week of December 29, 1934, the Monumental City Bar Association held a meeting to elect new officers where a record number of members attended.[53] After a close vote was cast, Warner T. McGuinn, former member of the city council and senior partner in the firm of McGuinn and Hughes, was elected president of M.C.B.A. Other officers that were elected were George Evans, vice-president; Thurgood Marshall, secretary; and Emory Cole, treasurer.[54]

In his inaugural address, McGuinn promised as new president, "to aid in the maintenance of public respect for members of the bar in Baltimore."[55] Also during this meeting, Linwood G. Koger "won the commendation of the body" as retiring treasurer "by submitting a detailed report of the organizations financial status."[56]

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52. Id.

53. The Afro-American, 5 January 1935, p. 24.

54. Id.

55. Id.

56. Id.

Although it is not exactly clear when the Monumental City Bar Association came into existence in the 1930's, it is clear that M.C.B.A. had an existence prior to its incorporation on April 2, 1935. During the week of February 2, 1935, The Afro-American had an article entitled "Will Keep Colored Attorneys 'In Mind' --O'Conor; Monumental Bar Asked Recognition," which reported that Josiah F. Henry, Jr. and William L. Fitzgerald "presented overtures to Mr. Herbert R. O'Conor following his election asking that he consider members of the Monumental Bar Association in making appointments to his office."[57] In response to Monumental's overtures, Mr. O'Conor replied by stating that he expects "to have very few appointments to make...and that he must recognize the claims of attorneys from all over the state, however...he would consider their requests."[58]

On the evening of February 27, 1935, Monumental City Bar Association had a reorganization meeting and banquet at the Maybeth Tea Room.[59] In attendance that evening were eighty per cent of all local black practitioners. It was at this meeting that President McGuinn announced his new "five-point program" designed "to place the Monumental Bar on a plane with other organizations throughout the country."[60]

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57. The Afro-American, 2 February 1935, p. 24

58. Id.

59. The Afro-American, 2 March 1935, p. 7.

60. Id.

Specifically, McGuinn's plan called for the incorporation of the organization under the laws of the state, a move that had been overlooked for many years;[61] "the adoption of a new constitution and by-laws along with other measures intended to definitely establish the foundation of the organization which had been hazy in the past";[62] the appointment of a group of committees to carry on the work of the body;[63] and the observance of Lawyers' Day, a project decided upon in which the work of the profession would be placed before the public by speakers showing the service rendered by the bar in both in both legal and social matters.[64]

During the reorganizational meeting, four committees were established and the following people were appointed to them:

Judiciary - William L. Fitzgerald, J. Howard Payne, U. Grant Tyler, and Gregory Hawkins;[65]

Amendment to the Law - Robert P. McGuinn, William J. Gosnell, Henry N. Daniels, W. NOrman Bishop, George W. F. McMechen;

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61. Id.

62. Id.

63. Id. The chairmen of these committees would also form the inner council assisting the regularly elected officers who included, besides Warner T. McGuinn, George W. Evans, vice president; Thurgood Marshall, secretary; and Emory R. Cole, treasurer.

64. Id.

65. This committee was created for the purpose of trying to get black lawyers appointed to positions within the judiciary system.

Grievance - Karl F. Phillips, W.A.C. Hughes, Clarke L. Smith, Linwood Koger, Arthur Briscoe;[66]

Speakers' Committee - Thurgood Marshall, George W. Evans, E. Everett Lane, Roy S. Bond, and Josiah F. Henry.[67]

In addition to those named above, also in attendance that evening were William T. Buckner, John Hampton, Thomas Knox, A.B. Koger, Gobert McBeth, Dallas Nicholas, and Peter Woodberry.[68] That evening, McGuinn's reorganization of Monumental was the beginning of what The Afro-American newspaper termed "a new deal in the legal profession of Baltimore" and the beginning of a more cohesive bar association.[69]

On April 2, 1935, under the leadership of Warner T. McGuinn, Monumental City Bar Association was incorporated by Thurgood Marshall, George Evans, Emory R. Cole, W. Ashbie Hawkins, Robert McGuinn, Karl F. Phillips and Warner T. McGuinn. In § 2 of the certificate of incorporation, the above parties certified that the object and purposes sought to be obtained by the formation of M.C.B.A. were "to aid in maintaining the ethics and dignity of the profession of the law; in providing legal science, and the

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66. This committee was designed to handle what ever grievances Monumental might be confronted with.

67. Id. During this period, it was often common for organizations to invite various people to come speak from time to time. The purpose of this committee was to obtain various speakers for meetings.

68. Id.

69. Id.

administration of justice."[70]

The incorporators further certified in § 3 of the certificate "that the operations of the said corporation are to be carried on in the City of Baltimore, and that the principal office or place of business of the said organization will be located in Baltimore City."[71] Section 3 of the certificate also stated what constituted membership in M.C.B.A. at that time. Specifically

> the members of said corporate body are those members who were present at the meeting of the Association of February 27, 1935, and those members of said Bar who were invited to attend said meeting, and who have signed or shall sign the Constitution of said Association prior to the filing of this Certificate of Incorporation. Said members and such as may hereafter be made or become members of said body corporate, under and by virtue of the Constitution and by-laws thereof adopted or hereafter adopted, and any amendments thereof or additions, shall compose said corporation and exercise the functions and franchises thereof.[72]

Under § 4 of the certificate of incorporation, the incorporators certified

> that said corporation has no capital stock, or shares representing the same, and that the revenue and property of the same arises and will arise from money paid by the members thereof, as dues, and from such money or property as said corporation may receive under the laws of this State.[73]

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70. Certificate of Incorporation of The Monumental City Bar Association, Inc., 2 April 1935, liber 128, folio 68.

71. Id.

72. Id.

73. Id.

Section 5 of the certificate dealt with how Monumental (the corporation) would be managed. It was decided that a board of seven managers or directors known as "The Executive Committee of The Monumental City Bar Association" would manage the corporation. The first Executive Committee consisted of the seven incorporators and it was decided that they would "manage the concerns of the said corporation until the first annual meeting or until their successors were duly chosen and qualified."[74]

The last section of the certificate, § 6, listed the post office address of the place at which the Corporation would be located as well as the resident agent of the Corporation. Warner T. McGuinn was named the resident agent and the post office address was 4 E. Redwood Street, Baltimore City, Maryland.[75] The second page of the certificate was signed by all seven incorporators and witnessed by Sarah J. Ambers. At ten thirty a.m. April 2, 1935, M.C.B.A.'s certificate for incorporation was received for record and approved by the State Tax Commission of Maryland.[76]

Sometime shortly before The Monumental City Bar Association met on Wednesday, February 12, 1936, an election for new officers was held and George W. Evans was elected president. Along with George W. Evans, Robert P. McGuinn was elected vice

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74. Id.

75. Id.

76. Id. p.69.

president; Emory R. Cole, treasurer and Thurgood Marshall, secretary.[77]

On February 12, 1936, The Monumental City Bar Association held a meeting in the Banneker Building. During this meeting, twenty-five attorneys were appointed to six committees by president Evans. It was decided that these committees would "present reports in connection with the 1936 program at a special meeting on February 22nd."[78] The following are the committees that were established and the attorneys appointed to them:

Executive Committee - George W. Evans, chairman; Thurgood Marshall, secretary; Robert P. McGuinn, Emory R. Cole, Warner T. McGuinn.[79]

Judiciary Committee - Warner T. McGuinn, chairman; J. Howard Payne, A.B. Koger, Gregory Hawkins.[80]

Amendment Committee - Robert P. McGuinn, chairman; William L. Gosnell, Henry Daniels, George W.F. McMechen, John Hampton.[81]

Grievance Committee - W.A.C. Hughes, Jr., Clarke L. Smith, Emory R. Cole, Arthur Briscoe.[82]

Special Committee - Program - Roy S. Bond, chairman; Thurgood Marshall, F. Everett Lane, Josiah H. Henry, Jr., William

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77. The Afro-American, 15 February 1936, p. 12.

78. Id.

79. Id. As per the Certificate of Incorporation, there must always be an executive committee. This committee is the governing body of Monumental and always consists of the elected officials of the organization. It appears that due to the great strides that Warner T. McGuinn made during his term as president, McGuinn was appointed for reasons of consistency.

80. Id.

81. Id. This committee was created to make what ever revisions were necessary within the organizations constitution.

82. Id.

Buckner, Peter L. Woodbury.[83]
Co-ordination Committee - Linwood G. Koger, chairman; Dallas F. Nicholas, George W.F. McMechen, W.A.C. Hughes, Jr., Gobert McBeth, W. Norman Bishop.[84]

In 1937, The Monumental City Bar Association held its annual meeting to elect new officers at 1422 Pennsylvania Avenue. During this meeting the association re-elected George W. Evans as its President. Other officers that were elected were Robert P. McGuinn, vice president; Dallas F. Nicholas, secretary; and Emory R. Cole, treasurer.[85] The Executive Committee for the year is comprised of all the elected officers and Henry M. Daniels, Josiah F. Henry, Jr., and Linwood G. Koger. It was announced during the meeting that all committee appointments would be made sometime during the week of February 6th. As a result of the meeting, M.C.B.A. sent resolutions to Governor Nice endorsing the re-appointment of Associate Judge Duke Bond of the Baltimore Supreme Bench upon the expiration of his elective term in November.[86] The resolutions were signed by President Evans, Secretary Nicholas, and the Judiciary Committee which was comprised of Roy S. Bond, and Josiah F. Henry, Jr. M.C.B.A. "also went on record as favoring State Control at Cheltenham School for Boys and pledged to join hands with the medical association to urge the appointment of black nurses in charge and

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83. Id. This committee was designed to handle what ever programs M.C.B.A. put on throughout the year.

84. Id.

85. The Afro-American, 6, February 1937, p. 24.

86. The Afro-American, 6 February 1937, p. 24.

black physicians at the tubercular sanatorium at Henryton."[87]

On Tuesday, February 9, 1937, M.C.B.A. had a special meeting at the Banneker Building. During this meeting, appointments were made to seven committees, two of which were formed in order to make special investigations.[88] The following are the committees and the attorneys appointed to them:

Judiciary Committee - Henry M. Daniels, chairman; J. Howard Payne, Josiah F. Henry, Jr., Dallas F. Nicholas, and Gregory Hawkins.[89]

Amendment to the Laws Committee - Robert P. McGuinn, chairman; Warner T. McGuinn, William I. Gosnell, A.B. Koger and John Hampton.[90]

Grievance Committee - Josiah F. Henry, Jr., chairman; W.A.C. Hughes, Clarke L. Smith, Arthur E. Briscoe and Daniel Baynham.[91]

Co-ordination Committee - Linwood Koger, chairman; W. Norman Bishop, W.A.C. Hughes, Gobert E. McBeth, George W.F. McMechen and Thomas L. Knox.[92]

Program Committee - Roy S. Bond, chairman; E. Everett Lane, William Buckner, Peter L. Woodbury, W.L. Fitzgerald, Ephriam Jackson and William Thomas.[93]

Henryton Committee - Robert P. McGuinn, chairman; Linwood Koger, Roy S. Bond, Josiah F. Henry, Jr., and William L. Fitzgerald.[94]

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87. Id.

88. The Afro-American, 13 February 1937, p. 13.

89. Id.

90. Id.

91. Id.

92. Id.

93. Id.

94. Id. The purpose of this committee is to probe conditions at Henryton State Hospital.

Medical Association - W.A.C. Hughes, chairman; William L. Fitzgerald, W. Norman Bishop, Robert P. McGuinn, and Josiah F. Henry, Jr.[95]

On Tuesday, February 8, 1938, M.C.B.A. held its annual meeting where new officers were elected.[96] Linwood Koger was elected to the position of president while Robert P. McGuinn, vice president; Emory Cole, treasurer and Dallas Nicholas, secretary were all re-elected to their positions. That evening, all of the officers were installed by Roy S. Bond. In addition to the installation of new officers, the Speaker's Committee arranged for two representatives of the National Negro Congress, Miss Leola Derrick and Frank Scott, to address the body.[97]

During the week of February 4, 1939, M.C.B.A. held its annual meeting to elect new officers.[98] Linwood Koger was re-elected President.[99] It was during this meeting that a committee was appointed by the majority of M.C.B.A's members to investigate "the matter concerning the appointment of a black lawyer in the office of the State's attorney."[100] Dallas Nicholas was quoted

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95. Id. The purpose of this special committee is to investigate local health issues.

96. The Afro-American, 12 February 1938, p. 12.

97. Id.

98. The Afro-American, 4 February 1939, p. 13. Although this meeting was reported in The Afro-American, no reference was given as to who was elected to hold an office other than Dallas F. Nicholas, who was re-elected to the position of secretary.

99. The Afro-American, 11 February 1939, p. 10.

100. Id. A matter which M.C.B.A. had been looking into for several years without much success.

at the meeting stating that "not only was this action proper," but the "actions of those members opposing it was inopportune" because this was part of a long fight that M.C.B.A. had been making to have a black attorney appointed to this office.[101]

It was reported in The Afro-American that Secretary Nicholas gave the following transcript of the minutes of the meeting at which the committee was appointed:

> The association advises this committee that the percentage of litigants who pass through the State's attorney's office is higher within the colored group than in any other group of the city's population. Many of the appointments to the State's attorney's staff seem to have been made representing other smaller racial elements. No colored lawyer has ever been appointed to this office, while the colored lawyer is best qualified to discover, bring to trial, prosecute and prevent crime among colored citizens.[102]

Shortly following the meeting, "J. Howard Payne and others filed exceptions to the action of the association, and indicated that an effort would be made to have action rescinded."[103]

On Saturday, February 11, 1939, as members of The Monumental City Bar Association, Linwood G. Koger, Dallas F. Nicholas and W.A.C. Hughes, were part of a committee that assisted in entertaining Justice Ferdinand Pecora, a member of the New York Supreme Court and president of the National Lawyers' Guild,

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101. Id.

102. Id.

103. Id.

during his visit to Baltimore.[104] A special reception and informal meeting was held in Pecora's honor, thus allowing those who attended a chance to meet Pecora.

On Saturday, January 27, 1940, The Monumental City Bar Association met at the Sharp Street Community House for its annual meeting.[105] Robert P. McGuinn was elected president of M.C.B.A. after having had succeeding Linwood G. Koger, who held the office for two years. The other officers elected were: Dallas F. Nicholas, vice president; Emory Cole, treasurer and William I. Gosnell, secretary. All officers were installed by William L. Fitzgerald.[106]

On Saturday, February 20, 1943, M.C.B.A. held its annual meeting at the Sampson Brooks Elks' Home. W.A.C. Hughes, Jr., counsel for the NAACP, was elected President.[107] Other members elected to offices were: William L. Fitzgerald, vice president and Arthur Briscoe, treasurer. During this meeting, the following were elected committee chairmen: George W. Evans, Judiciary; Linwood G. Koger, Amendment to the Law, and Robert P.

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104. The Afro-American, 11 February 1939, p. 10. In 1937, The National Lawyers' Guild opened its doors for all to join. Several members of M.C.B.A. attended local chapter meetings and eventually joined. On February 16, 1946, Roy S. Bond was elected vice president of the Baltimore chapter, while I. Duke Avnet, a noted liberal, was elected president. The Afro-American, 16 February 1946, p. 6.

105. The Afro-American, 27 January 1940, p. 24.

106. Id.

107. The Afro-American, 27 February 1943, p. 3. Note that according to this article, Dallas F. Nicholas was president of M.C.B.A. in 1942.

the entire state would remedy the state's revenue situation. Cole ran for re-election in 1958 but was defeated by Verda F Welcome (D., 4th).

Emory Cole was a member of numerous civic, social and fraternal organizations. As assistant chairman of the American Legion, Department of Maryland, Cole broke another precedent by being the first black on its board of directors.

Emory R. Cole died at the age of 74 in 1968 after a short illness.

W. Ashbie Hawkins:1862-1941[116]

W. Ashbie Hawkins was born in Lynchburg, VA on August 2, 1862. Hawkins graduated from the Centenary Biblical Institute (now Morgan State University) in 1885. Upon finishing college, Hawkins taught in Cambridge, Hereford and Towson, Maryland. Shortly thereafter, Hawkins enrolled at the University of Maryland School of Law in 1890. After having had completed one year of school, Hawkins was forced to transfer to Howard University's Law School because the school refused to educate black students. In 1892, Hawkins received his LL.B. degree from Howard University.

W. Ashbie Hawkins was an accomplished journalist. Hawkins edited The Cambridge Advance from 1887-1889; The Baltimore Spokesman from 1893-1895; and The Baltimore Lancet from 1902-1905. These weekly periodicals were of great service in helping

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116. Interview with Solomon Baylor, former Circuit Court Judge for Baltimore City, Baltimore, Maryland, 4 April 1991.

to organize black people and in instructing them as to their rights as American citizens. Hawkins also made various contributions to other national periodicals and journals.

In 1910, Hawkins successfully contested the residential segregation laws of Baltimore City both in the local and Appellate courts. In 1920, Hawkins began his pursuit as an independent candidate for the United States Senate. During this period, he became renowned because of his ability as an orator. He campaigned throughout the entire state of Maryland and received a highly complimentary vote as a result of his effort

For thirty-seven years, Hawkins and George W.F. McMechen practiced law together in the firm of Hawkins and McMechen. During his legal career, Hawkins served as an attorney for the Most Worshipful Prince Hall Grand Lodge of the State of Maryland and the Baltimore chapter of the National Association for the Advancement of Colored People. Hawkins belonged to several civic, social and fraternal organizations. W. Ashbie Hawkins died on April 3, 1941.

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Interview with Patrick Roberson, current President of The Monumental City Bar Association, Baltimore, Maryland, 28 February 1991.

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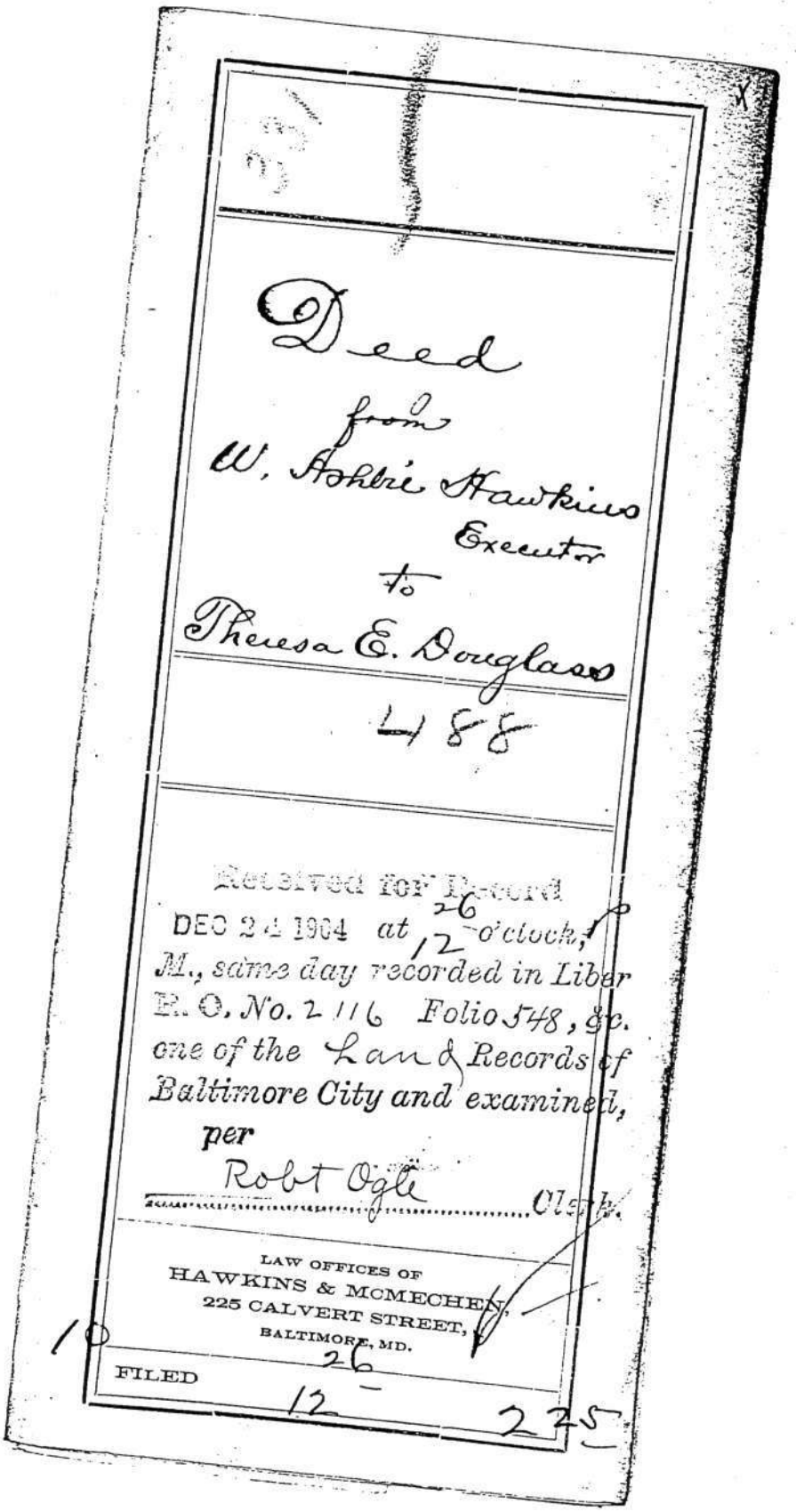

Deed
from
W. Hobbie Hawkins
Executor
to
Theresa E. Douglass
488

Received for Record
DEC 24 1964 at 26 o'clock, P
M., same day recorded in Liber
E. O. No. 2116 Folio 548, &c.
one of the Land Records of
Baltimore City and examined,
per
Robt Ogle
Clerk.

LAW OFFICES OF
HAWKINS & McMECHEN
225 CALVERT STREET,
BALTIMORE, MD.

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FILED 26 12 225

GOSNELL PAPERS : 3C1 (DOUGLASS MONROE FILE)

THIS DEED, Made this Twenty fourth day of December in the year one thousand nine hundred and four between W. Ashbie Hawkins, Executor of the Last Will and Testament of Frances Druett, late of Baltimore City, deceased as hereinafter mentioned, of the one part, and Theresa E. Douglass of Baltimore County and State of Maryland of the second part.

WITNESSETH, whereas by an order of the Orphan's Court of Baltimore City dated on the eighth day of November in the year one thousand nine hundred and four passed in the estate of Frances Druett, deceased, and by virtue of a power expressed and given in said Will the above named W. Ashbie Hawkins, Executor was authorized to sell the hereinafter described fee simple property; and after complying with all the previous requisites of said order, did, on or about the ~~seventh~~ eighth day of November in the year one thousand nine hundred and four sell unto the said Theresa E. Douglass at and for the sum of Twelve Hundred Dollars, the fee simple property, situate in Baltimore City and State of Maryland, thus described:-

BEGINNING for the same on the northwest side of Orchard Street southwesterly two hundred and fifty nine feet from the west intersection of Orchard Street and Druid Hill Avenue (formerly Ross Street) and running thence southwestwardly bounding on Orchard Street eighteen feet thence northwestwardly parallel with Druid Hill Avenue(formerly Ross Street) sixty feet thence northeastwardly at right angles to the said last mentioned line and parallel with Orchard Street eighteen feet until it interescts a line drawn from the beginning northwestwardly parallel with Druid Hill Avenue(formerly Ross Street) and thence reversing said line and bounding thereon southeastwardly sixty feet to the place of beginning.

BEING the same lot of ground which by Deed dated June 9th. 1888 and recorded among the Land Records of Baltimore City in Liber J. B. No. 1195 folio 469 was conveyed by Jos. R. Green and wife to the said Frances Druett.

AND WHEREAS, the aforesaid sale has been duly reported to, and ratified and confirmed by the said Orphans' Court of Baltimore City and whereas, the purchase money aforesaid has been fully paid and satisfied to the said W. Ashbie Hawkins, Executor therefore these presents are executed.

NOW THIS DEED WITNESSETH, that the said W. Ashbie Hawkins, Executor as aforesaid, for and in consideration of the premises, and of the sum of Twelve Hundred Dollars, to him in hand paid by the said Theresa E. Douglass at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, does grant unto the said Theresa E. Douglass all the aforesaid fee simple property hereinbefore described, with its appurtenances, and all the right, title, interest and estate of the said deceased in and to the same.

TO HAVE AND TO HOLD the aforesaid ~~leasehold~~ property with its appurtenances, unto the said Theresa E. Douglass, and her heirs in fee simple forever.

WITNESS the hand and seal of the said grantor:-

TEST:-

M. H. Harrison Jr.

W. Ashbie Hawkins (SEAL)
Executor.

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Broadway and Vicinity Business Association at luncheon meeting at the Broadway Hotel.

The association, composed of 170 business and professional people of the Broadway vicinity, was organized two years ago to improve business and civic conditions in the area. Improvement plans for the spring and summer were discussed at the meeting yesterday.

Other officers elected were Robert E. Hecht, first vice-president; Robert Marhenke, second vice-president; David Lakelin, secretary, and George Quast, treasurer. Elected to the board of governors were Charles Dimling, Paul Farb, E. Kovens, Harry Shapiro, Joseph Finkel, Meyer Rosenbaum, E. Caplan and Edward Milanicz.

One thousand children are expected to attend an Easter party to be given by the Association at a theater in the Broadway neighborhood on Easter Monday.

Local Negro Lawyer Dies

William Ashbie Hawkins, one of the oldest and most prominent Negro attorneys in Baltimore, died today at the Provident Hospital after an illness of seven months. He was 78 years old.

He was born in Lynchburg, Va., during the war between the States. He graduated from Morgan College and from the law department of Howard University in Washington and had practiced law here for the past fifty years. He was also a school teacher here for some time.

During his career he edited *The Lancet*, a Baltimore publication of some thirty years ago engaged in furthering the cause of the Negro, and on two occasions was a delegate to the General Conference of the Methodist Episcopal Church. The attorney also served as supreme chancellor of the Knights of Pythias of the Eastern and Western Hemispheres. He is survived by his wife and a daughter.

Funeral services will be held on Saturday afternoon at 2 o'clock from the Hawkins home, 929 Arlington avenue, Govans.

Police, Firemen Save Man From Elevator Shaft

[By the Associated Press]

the Bronx, toppled over a barrel in front of the open doors of the service elevator and fell down the shaft. He somersaulted twice and broke his fall just below the fourth floor when his right leg caught between the [illegible]

scream and called the police.

Sergt. Thomas Regan, the first to arrive, saw Pereira was wedged in a jackknife position and realized the necessity of relieving the pressure on

trolman William while Patrolm walked out o shaft.

Then Shevlin

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Coleman 1916-1917

liam F. Allen, Chaplain; James Kelly, Sergeant-at-Arms; Henry S. Trimbles, Chr. Executive Committee. The Association meets the second Saturday evening in each month at School No. 101, Jefferson St., near Caroline St.
H. M. Burkett, 307 St. Paul St.
Robert J. Young, 1100 Druid Hill Avenue.
Gross & Grant, 2031 Division St.
A. L. Johnson, 1415 Myrtle Avenue.
L. H. Davenport, 1006 Pennsylvania Avenue.
J. W. Fitzgerald, 1206 Druid Hill Avenue.
A. L. Gains, 1016 Linden Avenue.
Joseph Page, 411 West Biddle Street.
R. W. Stewart, 540 Dolphin Street.
Harry C. Wilson, Fayette and Pearl Streets.
Hunter G. Gregory, 21 Saratoga Street.

NOTARIES PUBLIC.

C. M. Dorsey, 1310 North Fremont Avenue.
Truly Hatchett, 21 East Saratoga Street.
Dr. J. H. Liverpoole, Eutaw and Fayette Sts., 2nd floor.
Mrs. Wm. Lewis, 1419 Argyle Avenue.

LAWYERS.

Harry S. Cummings, 219 Courtland St.
C. C. Fitzgerald, 215 Courtland St.
W. L. Fitzgerald, 1206 Druid Hill Avenue.
Hawkins & McMechen, 21 E. Saratoga St.
James Henry Hammond, 215 Courtland St.
Ephraim Jackson, 238 Courtland St.
Warner L. McGuinn, 215 Courtland St.
Wm. C. McCard, 21 East Saratoga St.
G. L. Pennington, 218 East Lexington St.
W. Grant Tyler, 21 East Saratoga St.
Roy S. Bond, 238 Courtland St.
J. Stewart Davis, 217-219 Courtland St.
Clarke L. Smith, 21 East Saratoga St.

National Association for the Advancement of Colored People.

Present Officers of Local Branch — Julius C. Johnson, President; Miss Ethel Lewis, Rec. Secretary; Miss Lucy D. Slowe, Asst. Secretary; Miss Margaret A. Flagg, Cor. Secretary; Dr. H. S. McCard, Treasurer; W. Ashbie Hawkins, Attorney.

Executive Committee—Mr. George B. Murphy, Chairman; Julius C. Johnson, Dr. A. O. Reid, Mr. D. O. W. Holmes, Warner T. McGuinn, Esq., Mr. E. B. Taylor.

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Total collections, $30,026.40. Amount paid Treasurer, $20,657.72; amount retained for fees and salaries, $4,542; total, $25,199.72; deficiency, $4,826.68. This, added to the $2,000 stolen in 1888 and the $5,000 stolen in 1889, makes his total defalcation over $12,700. Young cannot be found. His father, who died a few years ago, was a member of the old gas trust and left a handsome fortune. It is known that the young man has been a high liver and has led a fast life generally.

Health Officer Patterson said to-night: "I never heard of the defalcation by Young in 1888 until to-day. I was astonished to hear of it. I have decided to demand a complete investigation, and will make an affidavit to the effect that the former defalcation was concealed from me." As the City Controller's office is involved, the matter is likely to develop into a first-class sensation.

COLORED STUDENTS RULED OUT.

NO MORE WILL BE ADMITTED TO THE MARYLAND LAW SCHOOL.

BALTIMORE, Sept. 14.—The Maryland Law School has determined that it will admit no more colored students. Last year two colored students, Cummins and Johnson, the first who ever attended lectures there, were graduated with high honors. After their graduation two more colored students, W. Ashbie Hawkins and John L. Dozier, applied for admission and were received. They have been at the university one year, and have been notified by Mr. John P. Poe, on the part of the Regents, that they cannot return.

The white students of the Law, Medical, and Dental Departments of the university sent a petition to the Faculty protesting against the admission of any colored students to the Law School. Mr. Poe says that some time last Winter a petition against the admission or retention of colored students was laid before the Faculty, signed by nearly all of the ninety-nine students. The matter had been continously agitated since that time, and this Summer the Regents, in whose hands the question was left for adjudication, had held several meetings, and considered it very carefully in all its bearings. They had finally resolved that it would be unwise to endanger the school or jeopardize its interests in any way by any longer allowing colored students to attend the school in the face of such manifest opposition. A number of students had left the school and others had refused to enter because of the presence of the two colored men, and the school was continually liable to those losses so long as that state of affairs lasted. That was the chief consideration influencing the action of the Regents, and, in view of their exceedingly low record, they did not feel it incumbent upon them to force an issue on their account.

Hawkins is the Principal of a public school at Towson. Dozier will go to the Howard University in Washington. Hawkins states that the action of the Faculty practically shuts him out of all possibility of entering the legal profession. He is so placed, being a married man, that he cannot leave his present position to study elsewhere.

BOUND BROOK FRIGHTENED.

DYNAMITE THIEVES CREATE A GOOD DEAL OF EXCITEMENT.

PLAINFIELD, N. J., Sept. 14.—Bound Brook citizens are in a state of mind over a mysterious dynamite scare. Last night a freight car labeled "Powder!" but containing hundreds of pounds of the nitro-glycerine and Fuller's earth combination, standing on a side track, was broken

"I do not attribute it to the manipulations of Wall Street, though it may be that in some cases advantage has been taken of the conditions to intensify the stringency. Nor do I attribute the stringency to general speculations throughout the country, though it is doubtless true that they have contributed their full share by keeping our products from the market. It is certainly not in the remotest degree chargeable to an influx of money from customs duties or internal revenue taxes; for, as shown by a statement published in the papers, the outflow of money from the Treasury for payment of our bonded debt and other purposes during the last year has exceeded by $41,000,000 the entire receipts.

"The amount paid out during the last twenty-three days for bonds and interest is over $34,000,000 and for pensions $19,000,000.

"In my judgment it is attributable mainly to the remarkable activity in business of all kinds, in connection with the great advance in values during the last eighteen months.

"The increase in values on Sept. 1 of three products of agriculture, (wheat, corn, and oats,) based upon the crop and prices of 1889, amounted to over $700,000,000, and if to this be added the increased price of all other products of industry, the total increase for this year will doubtless largely exceed $1,000,000,000.

"This increase of values necessarily requires a much larger amount of money to handle the products, and hence the unusual demand from the South and West.

"Another cause may be found in the large increase of importations, requiring the shipment of gold abroad.

"I sent a notice to Washington last night, which will appear to-morrow morning, that the Treasury will receive offers for $16,000,000 4 per cent. bonds at 12 o'clock next Wednesday. I have also ordered the prepayment of interest on the 6 per cent. bonds. I have named $16,000,000 as the amount of fours to be purchased because, as shown by the statement published this morning, the entire available surplus is now $52,000,000, and the Treasury has outstanding offers for bonds and interest amounting to $30,000,000, and the amount of fours now asked for will require about $20,000,000. This, together with what will be required for the prepayment of the interest on the sixes, will consume the entire available surplus.

"I know of nothing more that I can do. The three propositions now pending exhaust the powers of the Secretary. There is no doubt that they will bring full and satisfactory relief if the holders of the bonds are disposed to co-operate with the Treasury Department.

"I do not think that there is great danger of serious financial troubles. If they come, it will not be the fault of the Treasury Department. This offer for 4 per cent. bonds is exceptional and made to meet exceptional conditions. It is not to be regarded as the policy of the Administration: for, with this purchase, (if it shall be made,) the Treasury would go out of the market for the purchase of that class and will hereafter apply the current surplus to the purchase of 4½ per cents."

After drawing up this statement the Secretary left his private secretary, C. M. Hendley, to answer any further inquiries upon the subject of the Treasury Department's policy in the present state of financial affairs. In reply to questions put to him, Mr. Hendley said the Collectors of Boston, Philadelphia, Baltimore, New-Orleans, San Francisco, and other large cities were engaged in drawing up statements of the estimated amount due on goods remaining in bonded warehouses up to Sept. 1, similar to those sent to the Treasury Department on Friday last by Special Deputy Collector Joseph J. Couch of the Custom House at this port, as published in THE TIMES yesterday. The payment of advance interest upon the sixes, it was understood, was decided upon as the result of complaints made by out-of-town banks (in no case by New-York City banks) that discrimination was being shown several of the smaller banks throughout the country.

In spite of the measures taken by the Secretary to try to relieve the money market, there is a strong feeling in business and other circles that the steps taken are not likely to have a decided beneficial effect so far as the merchants of the country are concerned. There are many who echo the sentiments expressed by a prominent bank President on Saturday, who said that while the fact remained clear that merchants would be under the necessity of raising a large sum of money in a short period, the im-

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[illegible] EDUCATION OF COLORED YOUTH IN BALTIMORE.

Mr. W. Ashbie Hawkins Writes of the System of Mental Training Prior to the Inauguration of Public Schools—Men and Women Who Devoted Their Lives to the Advancement of Their Fellows and Whose Good Works Still Follow Them.

Mr. W. Ashbie Hawkins, a prominent young colored attorney of this city, has prepared an interesting historical sketch upon the education of colored youth in Baltimore prior to the inauguration of the public school system. Mr. Hawkins is deeply interested in all questions pertaining to the advancement of his race, and is an earnest advocate of the thorough education of colored youth. He was born in Lynchburg, Va., August 2, 1862, the son of Rev. Robert and Mrs. Susan Hawkins. He was educated in the public schools of Lynchburg and Norfolk, and at Morgan College, this city. After graduating, he taught school for ten years,

ONE OF THE EARLIEST COLORED SCHOOLS, NEAR HANOVER MARKET.

for three years being principal of the High School at Cambridge, and four years principal of the public school at Towson. While at Towson, he studied law at the University of Maryland, and later at the Howard University. From the latter he received the degree of LL. B. in May, 1892. He was admitted to the bar of Baltimore county in June, 1892, being the first colored man admitted to that bar on examination. He has since practiced in this city. Mr. Hawkins was president for several years of the State Teachers' Association, and of the Monumental Literary and Scientific Association, the most prominent association of its kind the colored people have ever had here. Mr. Hawkins is a writer of some ability, and has been connected with several publications.

In taking up this subject, Mr. Hawkins says: In ante-bellum days Maryland was spoken of as a border state. It was on the highway from slavery to freedom, and many a weary soul, fleeing from the former, gave up the journey on the last stretch, and staked his fortunes with My Maryland. Its contiguity to free Pennsylvania had, doubtless, considerable to do with its large proportion of free negroes, which is said to have been larger than that of any other state

and for many years was the principal teacher the race had in this or in any city. He is described as being a man of great natural ability, of strength of character and integrity of purpose. He was recognized as one of the best teachers of his day, regardless of color. He was thorough in his teaching, accurate in his scholarship and a great disciplinarian. A year spent in his school was all the recommendation a boy or girl of that day needed. His school had regularly enrolled from forty-five to fifty pupils. The curriculum comprised everything, from the alphabet to rhetoric, natural philosophy and music. Nothing was attempted in mathematics beyond the rule of three. The charges for tuition were from $3 per quarter for the primary grades to $5 for the higher. He was assisted at various times by a number of colored teachers, most of whom had received their instruction from him. Among the number were such well-known persons as Mr. Francis E. W. Harper, the famous temperance lecturer; the Rev. George T. Watkins, a prominent divine of the A. M. E. Church, and Richard, John L., Henry Watkins and others of this famous family. Of the great number of schools held by individuals, his seems to have left the most lasting impressions and have accomplished the most good for its pupils, as many of them achieved signal success in life. The Rev. Dr. James H. Johnson, the late William E. Matthews, Mrs. Adele Jackson, Mrs. Francis E. W. Harper, Mr. John Henry Butler, Mr. George W. Lester were among his pupils.

Bishop Payne's School.

Rev. Daniel A. Payne, who became afterward a bishop in his church, and the founder of the principal seat of learning—Wilberforce—was sent to this city in 1845, and made pastor of Bethel Church. In his "Recollections of Seventy Years," he gives an account of a school which he conducted in this city. I will give it in his own words: "During my labors in Baltimore, I found myself teaching. *Within three months after I took charge of Bethel Church, I was requested by the* wife of one of the most intelligent local preachers to take charge of the education of her elder children. I felt that my duties as pastor did not permit me to be engaged as a school master, but she was so importunate that at last I consented to receive her children in my studio during the morning hours. As soon as this became known, I was besieged by other parishioners, and was finally constrained to yield to their request, so that within twelve months I found myself at the head of a school of about fifty. This school continued nearly two years beyond my pastoral term, and embraced all the English studies now taught in the best graded schools. I also added a Greek and Latin class. The influence of the daily religious exercises was manifest in that my school seldom needed the use of the rod, while many deleterious practices, common in the schools of that time, were unknown in my establishment. The incorrigible were dismissed, and law and order reigned supreme."

Taught in a Warehouse.

Mrs. Prudence Garner, who is still living at an advanced age, taught successfully before the war in a part of a warehouse of Mr. John Needles, near Hanover Market. Mr. Needles, who was a white man, had much to do with the maintenance of this school. Rev. John Fortie [illegible]

laws on this subject [illegible] gent, as by the mode [illegible] it was deemed unnecessary, in the case of orphaned free blacks, for the court to require their employers to teach them.

Little Known of Early Systems.

Of the system of instruction used in these schools, little can be said, for no authentic records are extant from which to gather the information. Of one thing we are assured—the teachers of that day believed in the Scriptural injunction, "Spare the rod and ruin the child." Corporal punishment meant something then. Those old teachers, many of them poorly equipped for their work, and whom we delight to call "fogies," were earnest: they had no over-weening vanity. The highest tribute I can pay them is in the words of Chaucer: "Gladly would they learn and gladly teach." They had other considerations in view than the money, and higher aspirations than to dress well. Methods of teaching were of less importance than what they taught. They had not heard of the "new education" which undertakes to administer knowledge in homeopathic doses. They made no attempt to do for a boy what he could be led to do for himself. They believed with Bayard Taylor that "strength is born of struggle." They taught that strength of intellect and nobility of character were to be acquired, not by the easy methods which some affect today, but by severe mental discipline, and self-sacrificing devotion to the work at hand.

The Lyceum as an Educator.

As an educator, second in its influence to no other agency, was the lyceum or debating society of that day. They flourished in every part of the city, and had on their rolls of membership many men who have since distinguished themselves in business, in law, in medicine and in the ministry. They offered opportunities to their members and the community for the improvement of their minds, by study, reflection and debate. One of the race's earliest representatives in Congress expressed his obligations for much of his success to one of these institutions. The most prominent of these organizations was the famous Galbraith Lyceum, named in honor of George Galbraith, one of the early pioneers of the A. M. E. Zion Church. It flourished for many years, and had accumulated the finest library then in the possession of any colored organization. It had on its roll of members such men as Dr. James H. A. Johnson, one of the brainiest men in the A. M. E. Church, Mr. John Henry Butler, one of our wealthiest and at the same time one of our most useful citizens, J. Willis Menard, Rev. William Williams, and the Rev. H. R. Revels, a prominent minister of the Methodist Church, and the first colored man to take a seat in the Senate of the United States, occupying the position once held by Jefferson Davis. Other organizations of like character which deserve mention were the King Solomon, Lone Star, and the Clinton. It is no disparagement of the work of these societies to say they were not learned, for at that time there was but little learning in the South among the whites. The questions they debated and the methods they pursued, would hardly suit us at the present day, but they served as mental stimulants for many of those whom we delight to honor today.

After the War Was Over.

With the close of the war, the emancipation of the slave and the coming from New England of many true-hearted men and women with the spelling books in their hands, sanctified intelligence in their heads, and the love of humanity in their hearts, the negroes' jubilee had come. "The spelling book was the key to the Bible, and knowledge the talisman of power." The schools were crowded. Old and young flocked to the fountains of knowledge. No schoolday too long, no night too dark for these searchers for the light. Hundreds of pious, cultured and self-denying teachers—mostly ladies—entered the field. A nobler band never accepted Christian duty. The American Missionary Association, the Freedmen's Bureau, the Quakers, the New England Association and other humanitarian organizations took up this work and prosecuted it with vigor until they were assured that the state would educate her recently emancipated children. The Freedmen's Bureau, under General O. O. Howard, is especially to be commended for the part it played in this work. Judge Hugh L. Bond, Messrs. John A. Needles, Joseph M. Cushing, Francis T. King and other white men in this state were foremost in the efforts made to rectify the wrongs which slavery had done.

The Howard Normal School, corner Saratoga and Courtland streets, was organized in 1867, and for a number of years was the only institution in the state which made any effort to give the negro the advantages of higher training. It was a flourishing institution, crowded with enthusiastic students, and superintended by patient, earnest and capable teachers. Many of those who are teaching in various parts of the state today, some of our lawyers, doctors, preachers and business men, received their training at this institution. It was the high school of that day. Students completing their studies in the numerous private schools of the city were transferred to the Normal. The tuition was $18 per year, part of which bright pupils, who intended to [illegible]

[illegible] fairest way [illegible] noblest specimen [illegible] Maryland, and [illegible] of it received their early training in these schools. Too much praise cannot be given the men and women who, in the darkest days of our history, used their scant knowledge in giving their less fortunate brothers the key to unlock the [illegible] earth holds dear to men. The Freedmen's Bureau, and the other agencies which had been educating the negro gave up the work to the state in 1866, in whose hands it still remains.

Our white friends in this city since the war have been very solicitous about our welfare, educationally, and they have hesitated about allowing [illegible] themselves to direct us in this matter. Until a few years ago, every teacher in our colored public schools was white, and now a vast majority still belongs to that race, so great is their interest in us, and their fear that the work will fall into the hands of improper persons, if they should give it up. We are coming, however. Many of our teachers are worthily wearing the mantles which fell from the shoulders of Fortie, Lively and Watkins, and they are striving nobly to wipe out the disgrace of slavery and the wrongs of freedom. It is a sad commentary upon Baltimore's system of public instruction that it took the white teachers in our colored public schools twenty-five years, with all the best appliances of modern times, to produce a score of teachers, when men like Watkins, Lively and Fortie, in their lowly way, and with the crudest appliances, produced nearly every prominent minister and layman in this city for the fifty years preceding the freedom and enfranchisement of the race. They were, however, men who knew our wants, sympathised with us in our efforts, ate at our tables, worshipped in our churches, mingled with us in our social gatherings and colored Baltimoreans will be laggards in the race till we return to our first love, till our children are taught by men like Watkins and women like Frances E. W. Harper—teachers whose souls are in their work, and who believe in the fatherhood of God and the brotherhood of man.

WORK MAKES WOMEN UGLY.

View of a Writer on the Subject—What Statistics Show.

"The problem of woman from a biosociological point of view" is treated by Signor G. Ferrero in the current number of the Monist. "The essential condition of feminine existence," which he desires to analyze in his paper, is that which he names "the Law of Non-Labor." "As it is a natural law that the man must labor and struggle to live, so it is a natural law that the woman should neither labor nor *struggle for her existence.* Biology clearly shows us that the physiological prosperity of species depends on the division of labor between the sexes, for in exact ratio to this is the duration of life." Marriage, as found among the higher animals is "a perfect form of the division of labor and mutual co-operation of the sexes." During hatching time the male bird does all the providing for his brooding mate. At other times her functions in *seeking food are merely auxiliary. Similarly with the lion and the hyena.* The fearful toil which falls to the savage woman, the writer pronounces to be "merely a passing phase a very dangerous aberration, produced by the excessive selfishness of man, which does not and cannot last long." He remarks that the races in which it is found "have remained in a savage state and have made scarcely any progress." In civilized nations female *toil is not necessary for the production of* the wealth needed for humanity. "Man alone could do this. Woman labor only tends to lower the marketable value of male labor, for while woman is working in the factories there are everywhere, and especially in Europe, crowds of men vainly seeking employment, to whom the cessation of work is an oft-recurrent and terrible evil. This shows that even from a sociological point of view, female labor is a pathological phenomenon.

"Statistics show an increase of mortality among women and children in countries where industrial life has pressed mothers into its ranks. A perfect woman should be a chef d'oeuvre of grace and refinement, and to this end she must be exempt from toil. The working woman grows ugly and loses her feminine characteristics. Womanly grace and the love which men bear a beautiful woman have perhaps been the origin of paternal love and of all the other sweet tender feelings of which the male is capable. Grace is the esthetic sign of weakness. Woman, [illegible] all the benefits of

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ONE OF THE EARLIEST COLORED SCHOOLS, NEAR HANOVER MARKET.

for three years being principal of the High School at Cambridge, and four years principal of the public school at Towson. While at Towson, he studied law at the University of Maryland, and later at the Howard University. From the latter he received the degree of LL. B. in May, 1892. He was admitted to the bar of Baltimore county in June, 1892, being the first colored man admitted to that bar on examination. He has since practiced in this city. Mr. Hawkins was president for several years of the State Teachers' Association, and of the Monumental Literary and Scientific Association, the most prominent association of its kind the colored people have ever had here. Mr. Hawkins is a writer of some ability, and has been connected with several publications.

In taking up this subject, Mr. Hawkins says: In ante-bellum days Maryland was spoken of as a border state. It was on the highway from slavery to freedom, and many a weary soul, fleeing from the former, gave up the journey on the last stretch, and staked his fortunes with My Maryland. Its contiguity to free Pennsylvania had, doubtless, considerable to do with its large proportion of free negroes, which is said to have been larger than that of any other state. Her statute books contained many laws making it a penalty for free negroes from any other state to come here, but for some reason they continued to come. Many of them, by dint of their untiring industry and sterling worth, acquired considerable fortunes, surrounding themselves with many of the comforts, if not the luxuries, of life, and giving their children the advantage of all that those times afforded for them and their oppressed race. Brackett, in his monogram on the "Negro in Maryland," says: "The education of free negroes and of slaves was not forbidden by law in Maryland, but the black was indebted for what he got to the interest of individuals, or of such societies as the Society of Friends."

An Early Effort.

As early as 1818 there were efforts made to give the youths of our race the opportunity of acquiring at least the rudiments of an education. The first teacher in this city to instruct our boys and girls is believed to have been the Rev. Daniel Coker. It is reported that having been sold into slavery, his freedom was purchased by the colored citizens of Baltimore as a testimonial of their gratitude to him for the valuable services he had rendered them. In the year 1818 an act was passed by the legislature empowering the Orphans' Court to bind out as apprentices those free black children who might be neglected or not usefully employed by their parents, provided that the courts might require as a condition in any indenture that the child should be taught to read or write, or in lieu thereof that a sum of not over $30 should be given in addition to the ordinary freedom due.

Maryland was a slave state, with many harsh and inhuman laws on her statute books, but, as we have seen, she never made it a crime to teach the slaves or the free negroes within her borders. To this singular liberality may be attributed the many private schools which flourished here in the darkest days of slavery, and which served in many ways to make the negro's burdens less hard to bear. While the state made no provision for the education of her colored population, it did not hesitate to tax the free blacks who had property, for the support of the common schools for the whites. Carroll, and possibly one other county, refused to do this.

Rev. William Watkins commenced teaching somewhere about the year 1835, in his own words: "During my labors in Baltimore, I found myself teaching. Within three months after I took charge of Bethel Church, I was requested by the wife of one of the most intelligent local preachers to take charge of the education of her elder children. I felt that my duties as pastor did not permit me to be engaged as a school master, but she was so importunate that at last I consented to receive her children in my studio during the morning hours. As soon as this became known, I was besieged by other parishioners, and was finally constrained to yield to their request, so that within twelve months I found myself at the head of a school of about fifty. This school continued nearly two years beyond my pastoral term, and embraced all the English studies now taught in the best graded schools. I also added a Greek and Latin class. The influence of the daily religious exercises was manifest in that my school seldom needed the use of the rod, while many deleterious practices, common in the schools of that time, were unknown in my establishment. The incorrigible were dismissed, and law and order reigned supreme."

Taught in a Warehouse.

Mrs. Prudence Garner, who is still living at an advanced age, taught successfully before the war in a part of a warehouse of Mr. John Needles, near Hanover Market. Mr. Needles, who was a white man, had much to do with the maintenance of this school. Rev. John Fortie occupied about the same relation to the eastern section of the city as Watkins did the western. He is said to have been an excellent teacher. Many prominent men in East Baltimore remember, with special gratitude, the interest he manifested in them. Contemporaneous with Watkins and Fortie was another humble worker in the cause of his race's advancement, by the name of Lively. He was also a good teacher, and what it appears every teacher of that day had to be—a good disciplinarian. A marble slab on the hall in the rear of Sharp Street M. E. Church reveals the fact that a free African school was taught there in '53.

Rev. Benjamin Brown taught a private school on Hamburg street, between Leadenhall and Hanover streets, which was afterwards removed to the basement of Ebenezer A. M. E. Church, and it continued there until the organization of the Washington Conference of the Methodist Episcopal Church, in 1864, when Rev. Brown resigned, and Mr. James H. Hill assumed the principalship. The school remained there some years, when it was removed to Ridgway's Hall, afterwards called Starr Hall, Montgomery street and Plum alley. At the same time a school was conducted in the basement of John Wesley M. E. Church by the Rev. Charles Green. Mrs. Adele Jackson was teaching at the same time in Sharp Street Hall, in the rear of Sharp Street Church. Rev. William T. Carr during his pastorate at Madison Street Presbyterian Church, 1865-1868, conducted a parochial school in the basement of the church. He was assisted by Miss Louisa Spriggs, who afterwards became Mrs. Carr. At various times and places there were schools taught by Rev. P. P. Bell, Mr. William Woods, Rev. Wesley Brown, Joseph Holland, George W. Parker, Rev. Harrison H. Webb, Mrs. Ellen Woods, Rev. Hiram R. Revels, Rev. Noah Davis, Mrs. Haley, Mrs. S. J. Vodery, John C. Fortie, John D. Brooks and others whose names even have long since been consigned to oblivion. Another striking testimonial of Maryland's liberality, as compared with other states, in the matter of educating the blacks is the disposition made of a petition to the legislature of '52 by thirty-two white citizens of Frederick county, asking that body to make it an offense for free blacks to teach school. It was referred to a committee which has yet to make its report. The census of 1860 shows that there were 1,356 free black children attending school in the state. The slavery agitation and the approach of the war had their effect in making the [illegible] ... Davis. O[illegible] ... King Solomon [illegible] It is not ... these societies ... learned, for at that time ... little learning ... whites. The questions they debated and the methods they pursued would hardly suit us at the present day, but they served as mental stimulants for many of those whom we delight to honor today.

After the War Was Over.

With the close of the war, the emancipation of the slave and the coming from New England of many true-hearted men and women with the spelling books in their hands, sanctified intelligence in their heads, and the love of humanity in their hearts, the negroes' jubilee had come. "The spelling book was the key to the Bible, and knowledge the talisman of power." The schools were crowded. Old and young flocked to the fountains of knowledge. No schoolday too long, no night too dark for these searchers for the light. Hundreds of pious, cultured and self-denying teachers—mostly ladies—entered the field. A nobler band never accepted Christian duty. The American Missionary Association, the Freedmen's Bureau, the Quakers, the New England Association and other humanitarian organizations took up this work and prosecuted it with vigor until they were assured that the state would educate her recently emancipated children. The Freedmen's Bureau, under General O. O. Howard, is especially to be commended for the part it played in this work. Judge Hugh L. Bond, Messrs. John A. Needles, Joseph M. Cushing, Francis T. King and other white men in this state were foremost in the efforts made to rectify the wrongs which slavery had done.

The Howard Normal School, corner Saratoga and Courtland streets, was organized in 1867, and for a number of years was the only institution in the state which made any effort to give the negro the advantages of higher training. It was a flourishing institution, crowded with enthusiastic students, and superintended by patient, earnest and capable teachers. Many of those who are teaching in various parts of the state today, some of our lawyers, doctors, preachers and business men, received their training at this institution. It was the high school of that day. Students completing their studies in the numerous private schools of the city were transferred to the Normal. The tuition was $18 per year, part of which bright pupils, who intended to teach, could pay by teaching in the Model School, which had been organized for this purpose. Henry T. Hartwell, a highly educated and cultured teacher from Massachusetts, was the first principal, and on the board of trustees appeared the names of three well-known colored men—Rev. Harrison T. Webb, Mr. John W. Locks and Mr. John Henry Butler, two of whom have long since been called from works to reward. Soon after the war the leading colored men of the city, under the guidance of John Henry Butler and others, bought a building on Lexington street, which they named Douglass Institute, in honor of the sage of Anacostia. It served for twenty years as a school, as a political forum and as a center of the literary activities of the negroes of the city of Baltimore.

Many of our leading men of today received all their literary training in the primary and high schools conducted at this institution. The teachers were mainly white men of culture and education, but who, by reason of their love for drink, had lost their places in the white schools. Despite their downfall, our people were glad to obtain their services. The universal testimony of those who profited by their instruction is that they did their work well, and in every way showed their gratitude to their employers. In addition to the active school work which was prosecuted by them, time and talent were found for the publication of a very creditable journal, known as the Communicator. It was edited by George T. Cook, of Massachusetts, who is said to have been a cultured scholar and able writer. When dissensions arose among the promoters of this enterprise there grew up another candidate for public favor, known as the True Communicator, edited by Rev. James H. A. Johnson. Both of these journals were worthy advocates of the rights of the race. They did us great service in moulding public sentiment in our favor and in inspiring our youths to worthy endeavors. It is lamentable that the promoters of these enterprises could not see the folly of dividing their energies, and negativing each other's influence by publishing two journals where one could more effectively have done the work. As is natural in such cases, both succumbed.

Conditions in Maryland.

To summarize: The free colored man in Maryland had peculiar educational advantages over his brothers in the other slave states. It was never a crime here,

[illegible] ... clearly ... prosperity ... sion of labor between ... set ratio to this ... Marriage ... male is a perfect ... labor and mutual co-operation ... sexes. During stoning ... bird does all the providing for ... ing mate. At other times her functions ... seeking food are merely auxiliary ... ilarly with the lion and the hyena ... fearful toil which falls to the savage woman, the writer pronounces to be "merely a passing phase, a very dangerous aberration, produced by the excessive selfishness of man, which does not and cannot last long." He remarks that the races in which it is found "have remained in a savage state and have made scarcely any progress." In civilized nations female toil is not necessary for the production of the wealth needed for humanity. "Man alone could do this. Woman labor only tends to lower the marketable value of male labor; for while woman is working in the factories there are everywhere, and especially in Europe, crowds of men vainly seeking employment, to whom the cessation of work is an oft-recurrent and terrible evil. This shows that even from a sociological point of view, female labor is a pathological phenomenon.

"Statistics show an increase of mortality among women and children in countries where industrial life has pressed mothers into its ranks. A perfect woman should be a chef d'oeuvre of grace and refinement, and to this end she must be exempt from toil. The working woman grows ugly and loses her feminine characteristics. Womanly grace and the love which men bear a beautiful woman have perhaps been the origin of paternal love and of all the other sweet tender feelings of which the male is capable. Grace is the esthetic side of weakness. Woman, more than man, enjoys all the benefits of civilization, which nevertheless have been in great part acquired by him alone. Man labors and toils today, just as he did of old, and there is nothing abnormal in this fact, for it is his positive duty. What advantage, then, can be gained by participating in man's struggle for existence, when woman has only to wait until he places these benefits at her feet? I cannot understand why the question of woman suffrage should so excite public opinion. It is entirely profitless to her. If her husband strains every nerve already to provide her with all the luxuries of life, he certainly will not be lax in defending those interests which are identical with those of his family."

TOLD OF PATTI AS A CHILD.

She Wanted a Doll With Open-and-shut Eyes and Got It.

[From the Doll's Dressmaker.]

One day I was sitting on our front stoop, with my big wax doll in my arms. I was only allowed to have her to play with when I had been very good indeed, and she was the biggest, most beautiful doll in the neighborhood, or that I had ever seen, even in the shop windows. As I sat there Adelina came towards me with her doll in her arms. She stopped and said: "Show me your dolly." I held her up and expatiated upon her beauties. I confess now that I felt a keen and wicked satisfaction that her doll had only a plaster head, and I knew, from sad experience, that it was the kind that got grimy and had to be washed off with sweet oil occasionally, and very often had a cracked head, and that she was altogether of an inferior class from my dolly. "She's pretty, isn't she?" said Adelina. "She's beautiful," I said, hugging my treasure; for she was my very own child to me. "How much did she cost?" said Adelina. "I don't know," I said; "a lady sent her to me from London. See her eyes open and shut," and I gave a vigorous yank to the long wire which was concealed under her petticoats. "Show me how her eyes go," Adelina said. And after opening and shutting those very inexpressive eyes several times, she handed her back to me and said: "I shall have one like her tonight." My own eyes opened wide at this, and I said: "How will you get her?" "Oh, if Max don't give her to me quick, I'll scream."

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11/29/00 DRAFT: NOT FOR QUOTATION WITHOUT AUTHOR'S PERMISSION

FROM *BUCHANAN* TO *BUTTON*: LEGAL ETHICS IN THE EARLY HISTORY OF THE NAACP, 1910-1920

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FROM *BUCHANAN* TO *BUTTON*:
LEGAL ETHICS AND THE EARLY NAACP, 1910-1920

FROM *BUCHANAN* TO *BUTTON*: LEGAL ETHICS AND THE EARLY NAACP (1910-1920)

In 1916, Charles Anderson Boston, one of the members of the first national Legal Redress Committee of the National Association for the Advancement of Colored People, spoke at the organization's board of directors meeting to endorse the use of new litigation strategies in the fight against racial segregation. The "proper presentation of the legal fight against segregation," Boston urged, should focus on gathering "facts, not law" to demonstrate to the courts the law's "actual operation."[1] Boston's emphasis on using facts to demonstrate the law's operation accorded with the NAACP's litigation strategy, which relied not only on gathering and presenting such facts, but also on *creating* facts by carefully staging scenarios that would present the right test cases to the courts for adjudication.

Boston's enthusiasm for the NAACP's litigation strategies is striking, because Boston sat on a number of bar association committees that promulgated and enforced legal ethics rules at odds with the NAACP's litigation plans. These associations' ethics committees adopted strict rules that forbade lawyers from "stirring up" litigation, advertising their services, or approaching prospective clients with offers of legal representation. Nevertheless, the NAACP engaged in many such activities, including staging confrontations to create facts for test cases, speaking before large audiences to recruit plaintiffs and raise money for cases, and writing letters to strangers to advertise its services and solicit clients. Indeed, not only Boston, but almost all of the lawyers who directed the NAACP's early national legal strategy, belonged to bar associations that enforced traditional legal ethics rules against errant practitioners.

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[1] Minutes of Board Meeting, 13 March 1916, Papers of the NAACP (Frederick, Md.: University Publications of America, 1982; 1996) [hereafter "NAACP Papers Microfilm Edition"], Part I, Reel 1, Frame 480.

Buchanan v. Warley[2] exemplifies the NAACP's early work. In *Buchanan*, the NAACP successfully challenged the constitutionality of a 1910 Louisville, Kentucky, residential segregation ordinance. To create the right circumstances for this test case, a national staff lawyer organized a new Louisville NAACP chapter, spoke at public meetings to raise money and recruit a plaintiff, drafted test language for a real estate contract, and enlisted a local real estate agent who wished to contest the law to serve as the defendant.[3] When the case reached the U.S. Supreme Court, the city argued that the case should be dismissed because its facts had been "manufactured"; Justice Holmes initially agreed in an unpublished draft dissent.[4] In its unanimous published opinion, however, the Court in *Buchanan* ruled in the NAACP's favor without any mention of the "manufactured" nature of the underlying controversy.

In stark contrast to *Buchanan* stands the Court's difficulty in deciding *NAACP v. Button.*[5] *Button* arose in 1956 after Virginia enacted legislation barring the NAACP from soliciting clients. A majority of the U.S. Supreme Court first voted that the NAACP was liable to criminal sanction for some of its litigation techniques, but a fortuitous interim change in the Court's membership led to reargument in the case. In the end, a close majority of the Court decided, over a strong dissent by Justice Harlan, that the First Amendment protects lawyers working for social change through nonprofit organizations from certain legal ethics constraints.[6]

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[2] 245 U.S. 60 (1917).

[3] See pp. 46-50 below.

[4] See Benno C. Schmidt, Jr., "Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part I: The Heyday of Jim Crow," *Columbia Law Review* 82 (1982): 444, 511-12.

[5] 371 U.S. 415 (1963).

[6] 371 U.S. 440-45; see pp. 82-84 below. In more recent cases, the Court has continued to apply the *Button* dichotomy between permissible applications of legal ethics rules in nonprofit and for-profit cases. Compare *Ohralik*

The juxtaposition of *Buchanan* and *Button* raises puzzling questions. How was it possible for the NAACP to engage in its innovative litigation practices without significant legal ethics trouble for so many decades before the Court considered the issues in *Button?* Why, given the Court's nonchalance about charges of "manufacturing" a case in *Buchanan* in the 1910s, did it have so much greater difficulty with the NAACP's litigation practices in *Button,* almost half a century later? Even more puzzling, why were the elite lawyers who directed the NAACP's legal strategy in its first years--leaders of the very bar organizations that were making and enforcing traditional legal ethics rules--not concerned about the potential legal ethics violations involved in staging fictitious controversies, recruiting parties, and advertising legal services? And why, if these legal ethics matters were of such seeming unconcern to the lawyers involved in the NAACP in the 1910s, were its later lawyer-leaders, Charles Hamilton Houston and Thurgood Marshall, so concerned about these issues when they took over the organization's legal direction in the 1930s, as Mark Tushnet has described?[7]

In this Article I undertake to answer these questions. I do so by focusing on the lawyers who directed the NAACP's early legal operations as members of its first national legal committee. These lawyers were recruited from the conservative upper rungs of the New York City bar. Most of them were "white"[8] Protestants; one was Jewish; and one was African-

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v. Ohio State Bar Association, 436 U.S. 447, 468 (1978) (upholding state bar prosecution of a personal injury lawyer for soliciting clients), with *In re Primus*, 436 U.S. 412, 439 (1978) (invalidating state's prosecution of ACLU lawyer for soliciting client); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (applying doctrines affording lesser constitutional protection to "commercial speech" to reject constitutional challenge to state bar rules prohibiting solicitation of personal injury clients by mail).

[7] See Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (New York: Oxford University Press, 1994), 272-300.

American. Their involvement in the NAACP has thus far received very little scholarly attention, despite the vast and ever-burgeoning literature about the organization.[9] The reason for this lack of attention may

simply be that these early lawyers appear uninteresting when compared to later charismatic lawyer-leaders such as Charles Hamilton Houston and Thurgood Marshall. My claim here, however, is that investigating these lawyers can provide a significant contribution to our understanding of the NAACP, whose particular brand of public interest law practice remains key to American visions of how to achieve social change through law.

If little has been written generally on the activities of the NAACP's first national legal committee, nothing has been written on the interface between these lawyers' activities and the traditional legal ethics rules being enforced by the local bar associations to which these lawyers belonged. I show in this article that the NAACP's first national legal committee devised test case

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[8] The terms "African-American" and "white" will be used as shorthand in referring to race, with due regard to the historically contingent and socially constructed nature of any such terms. On account of his race, the African-American member of the legal committee was ineligible for membership in most bar organizations. See Richard L. Abel, *American Lawyers* (New York: Oxford University Press, 1989), 100 (ABA barred African-Americans from membership until 1943); J. Clay Smith, *Emancipation: The Making of the Black Lawyer, 1844-1944* (Philadelphia: University of Pennsylvania Press, 1993), 402 (Association of the Bar of the City of New York did not admit its first African-American member until 1929).

[9] The only discussions of the first NAACP national legal committee of which I am aware are contained in footnotes to August Meier and Elliott Rudwick, "Attorneys Black and White: A Case Study of Race Relations within the NAACP," in August Meier and Elliott Rudwick, *Along the Color Line: Explorations in the Black Experience* (Chicago: University of Illinois Press, 1976), 129 n. *, 159-60 nn. 22-25, 170 n. 104. Meier and Rudwick also discuss some of the white lawyers in various regions who served as local counsel. Ibid., 130-40. Charles Kellogg's classic general history of the NAACP contains a short discussion of some of the committee's early work. Charles Flint Kellogg, *NAACP: A History of the National Association for the Advancement of Colored People*, vol. 1: *1909-1920*, (Baltimore: Johns Hopkins University Press, 1967), 60-62. There are occasional references to the committee in B. Joyce Ross, *J.E. Spingarn and the Rise of the NAACP, 1911-1939* (New York: Atheneum, 1972), 21-22, 35. More comprehensive treatments of the internal workings of the NAACP's litigation operations begin with the mid-1920s. *See* Tushnet, *Making Civil Rights Law*; Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987); Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Alfred A. Knopf, Inc., 1975); Loren Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (New York: Panetheon, 1966). In short, none of the literature systematically examines the activities and world views of the

litigation strategies that were in tension with traditional legal ethics rules. I thus seek to understand the apparent disjunction between early NAACP lawyers activities' on behalf of the NAACP and their involvement in the bar associations that were enforcing legal ethics precepts against errant practitioners.

To solve this puzzle, I piece together shards of evidence--mostly found through extensive archival digging in the NAACP's voluminous paper collections and other primary sources, supplemented by secondary sources as indicated--about the identities, activities, and legal ethics views of the lawyers who sat on the NAACP's first national legal committee. I conclude that the historically and socially specific world view of these committee members allowed them to champion the NAACP's use of innovative litigation techniques while sitting on bar committees that penalized other practitioners for similar conduct. That world view was based on a universalist understanding of the public good, very different from contemporary understandings of pluralistic politics. The members of the legal committee saw their work for the NAACP as advancing this public good, and thus as exempt from legal ethics constraints. They drew a distinction between their motives, which they knew to be ethically pure, involving pro bono work for others, and the motives of those from a lower strata of the bar, who were engaging in comparable activities with pecuniary, self-interested intent.

This distinction was by no means clear in the language or history of the relevant legal ethics rules; indeed, it would not be until the *Button* decision, almost half a century later, that the idea would receive authoritative legal imprimatur. But this lack of authority did not trouble the members of the NAACP legal committee, I suggest, because they either sat on the bar

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lawyers who directed the NAACP's national legal strategy prior to the mid-1920s.

committees that enforced the rules, as Boston did, or belonged to the elite professional circle that dominated these committees. They enjoyed, in other words, a professional and social privilege that gave them freedom to maneuver around inconvenient legal ethics norms.

I develop my argument as follows: I first sketch some relevant background to the NAACP's founding; I then briefly explore the biographies of its legal committee members. I next describe some of the highlights of its work in the period between 1910 and 1920. In so doing, I focus on the internal, organizational aspects of the NAACP's early legal activities, documenting the planning, policymaking, staffing, and other behind-the-scenes work in which the NAACP's early legal actors engaged. This perspective allows me to trace the development of the NAACP's nontraditional litigation methods from early experiments through the organization's first Supreme Court victories.

I then compare the techniques used in these earliest NAACP litigation campaigns with New York City bar associations' interpretations of the canons of legal ethics and show that these bar committees were rendering opinions inconsistent with the NAACP's activities. Drawing on evidence of Charles Boston's thinking on these matters, I explore how the NAACP legal committee members reconciled the apparent disjunction between their activities and the bar associations' legal ethics positions. Finally, in an epilogue, I situate my research within the historiography of the NAACP, which focuses on the period after African-American lawyers assumed leadership over the organization's legal work and led the NAACP through bitterly fought litigation defending against legal ethics attacks.

BACKGROUND AND FOUNDING

Test cases

The key to the NAACP's litigation success was its use of "test cases," a term used to refer to a strategy in which an organization seeks to find or, if necessary, to create, a legal controversy to establish a point of law as precedent in future cases.[10] Today the term invokes images of the NAACP's 1954 victory in *Brown v. Board of Education*,[11] but in fact the strategy was central to the NAACP's objectives from its founding in 1909. The test case idea in turn had its roots in activism by civil rights campaigners and corporations stretching far back into the nineteenth century.[12]

By the late nineteenth century, African-American lawyers working in local communities had begun to experiment with the use of citizens' organizing committees to challenge racial injustice.[13] *Plessy v. Ferguson*[14] was such a case. African-American lawyer Louis Andre Martinet organized a Citizens Committee to oppose Louisiana's newly enacted "separate car" law which prohibited blacks from riding in train cars with whites and called for making a "test case" to challenge the law's constitutionality.[15] Martinet and his Citizens Committee carried out

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[10] See *Black's Law Dictionary*, 6th ed. (1990), s.v. "test case."

[11] 347 U.S. 483 (1954); see generally Miller, *The Petitioners;* and Kluger, *Simple Justice.*

[12] In 1839, for example, in *Prigg v. Commonwealth of Pennsylvania*, 41 U.S. 539, 558-59, 588 (1842), the states of Pennsylvania and Maryland negotiated a special act to test the constitutionality of Pennsylvania's fugitive slave law. By the 1870s, as Charles McCurdy has shown, large manufacturers in the sewing and beef industries had initiated expensive test case litigation campaigns to challenge state law impediments to growth of national product markets. Charles W. McCurdy, "American Law and the Marketing Structure of the Large Corporation, 1875-1890," *Journal of Economic History* 38 (1978): 631-49. In the civil rights arena, local work to challenge segregation through the courts had been going on since 1847, when Robert Morris, Sr., the nation's second African-American lawyer, challenged segregation in Boston schools. Smith, *Emancipation*, 96-97.

[13] For an exhaustive account of the extant evidence concerning these lawyers' biographies, see Smith, *Emancipation.*

[14] 163 U.S. 537 (1896).

[15] See Smith, *Emancipation*, 283-85; Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), 29-39; *Plessy v. Ferguson: A Brief History with Documents*, ed. Brook Thomas (Boston: Bedford Books, 1997), 4-5.

nationwide publicity and fund raising. Along with a white lawyer, Albion Tourgee[16] (who Smith points out has incorrectly been given all credit for the campaign), Martinet strategized about how to stage the right facts to present the legal issues involved. Martinet and Tourgee considered what skin tone the plaintiff should have, deciding on an "octoroon" (*i.e.*, a person with one African-American great grandparent) with skin as fair as many so-called "white" passengers,[17] and carefully orchestrated the arrest. They coordinated their plans with lawyers for the railroad, who also wanted to test the statute. These efforts resulted in a carefully planned confrontation presenting the facts underlying *Plessy v. Ferguson*, which may be the first example of a civil rights organization using the "test case" terminology to describe a litigation strategy leading to U.S. Supreme Court.[18]

By the turn of the century several civil rights organizations aspiring to national status had adopted the test case concept to describe their litigation agendas. In 1899, the Afro-American Council, controlled by civil rights accommodationist Booker T. Washington, created a legal bureau to challenge disenfranchisement provisions of the Louisiana Constitution.[19] In 1904, a conference called by Washington and bankrolled by financier Andrew Carnegie called for the institution of lawsuits to secure equal accommodations in transportation and public facilities. That same year a more militant interracial civil rights organization named the Constitution League--founded by industrialist John Milholland and staffed by African-American lawyer

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[16] Smith, *Emancipation*, 284-85.

[17] *See* Cheryl I. Harris, "Whiteness As Property," *Harvard Law Review* 106 (1993): 1709, 1745-50 (discussing implications of *Plessy* in establishing "whiteness" as a reputational property right).

[18] Conversation with J. Clay Smith, June 1996.

[19] August Meier, *Negro Thought in America, 1880-1915* (Ann Arbor: University of Michigan Press, 1963), 173, 177.

Gilchrist Stewart, both of whom would go on to play roles in the NAACP--likewise articulated plans to sponsor test cases in the courts.

The most impressive effort to organize a national civil rights organization to sponsor test cases prior to the founding of the NAACP was the Niagara Movement, an African-American group organized in 1905 at a meeting in Niagara Falls, New York.[20] Its founders included W.E.B. Du Bois, the brilliant but temperamental sociologist and writer who would later provide intellectual leadership within the NAACP during its first several decades.[21] Du Bois wanted the organization to reflect the "very best class" of African-Americans[22] and its membership roster was made up of prominent male African-American intellectuals, lawyers, and business owners. Seeking to take a more militant route to achieving African-American civil rights than Washington's accommodations policies, the Niagara Movement's platform demanded civil rights in strong and unqualified terms. The founding documents of the Niagara Movement, drafted primarily by Du Bois, articulated a plan to "push test cases in the courts" challenging Jim Crow cars and other practices.[23] To this end, the Niagara Movement's founders established a "legal

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[20] For a general history of the Niagara Movement, see Elliott M. Rudwick, "The Niagara Movement," *Journal of Negro History* 43 (1957): 177-200.

[21] Particularly good biographies of Du Bois that discuss his involvement in founding the Niagara Movement and the NAACP are August Meier, *W.E.B. Du Bois: A Study in Minority Group Leadership* (Philadelphia: University of Pennsylvania Press, 1960), 94-150, and David Levering Lewis, *W.E.B. Du Bois: Biography of a Race, 1868-1919* (1993), 297-342, 386-434.

One white woman, Mary Ovington, was also invited to and participated in the founding meeting and would later go on to play a key role in various staff capacities during the NAACP's early years. For Ovington's description of her participation in these events, see Mary White Ovington, *The Walls Came Tumbling Down* (New York: Arno Press, 1969), 100-46; Mary White Ovington, *Black and White Sat Down Together: The Reminiscences of an NAACP Founder* (New York: Feminist Press, 1995), 56-60, 66-71.

[22] Rudwick, "The Niagara Movement," 180. Thus the Niagara movement was for Du Bois the embodiment of his idea of "the talented tenth"--*i.e.*, the African-American elite who would lead the race to salvation from the "top downwards." See Lewis, *W.E.B. Du Bois*, 288-90, 316.

[23] See "Third Annual Meeting of the Niagara Movement, August 26-29, 1907," Joel Spingarn Papers,

department" to oversee nationally coordinated civil rights work.[24] Active in the department were lawyers such as W. Ashbie Hawkins, who would later play a key role at the local level in early NAACP litigation campaigns.[25] The Niagara Movement successfully challenged unequal accommodations in interstate carriers before the Interstate Commerce Commission and took part in other civil rights cases,[26] but raising funds to finance these and other initiatives proved difficult. By 1909, the Movement had collapsed, the victim of disputes among its leaders and opposition from Booker T. Washington.[27] Its demise left the idea for a national civil rights movement with a focus on a test case legal strategy very much alive, but without any organization to implement it.

Founding the NAACP

At the same time, racial conditions in the United States were hitting a post-Civil War nadir.[28] In the face of these worsening conditions, a new interracial group, calling itself the

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Manuscript Division, Moorland-Spingarn Research Center, Howard University, Box 95-14, Folder 554; "List of Legal Committee Members," ibid., Folder 557.

[24] See "Constitution and By-Laws of the Niagara Movement," in *Pamphlets and Leaflets by W.E.B. Du Bois,* ed. H. Aptheker (White Plains, NY: Kraus-Thomason Organization, Ltd., 1986), 59, 61.

[25] See Smith, *Emancipation*, 146-47, 179 n. 184, 181 n. 199; Garrett Power, "Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-13," *Maryland Law Review* 42 (1983): 289, 305-328.

[26] See *Edwards v. Nashville, Chattanooga & St. RR.*, June 24, 1907 (ICC); W.E.B. Du Bois, "Niagara Movement: Department of Civil Rights Supplement to the Department's Annual Report for 1906-07," in *Pamphlets and Leaflets by W.E.B. Du Bois*, 69-73; "The Niagara Movement" (1908), in *Pamphlets and Leaflets by W.E.B. Du Bois*, 77; "The Niagara Movement" (1909), in *Pamphlets and Leaflets by W.E.B. Du Bois*, 79; Rudwick, "The Niagara Movement," 190.

[27] For more detailed chronicles of these disputes, see Meier, *W.E.B. Du Bois*, 108-19; Lewis, *W.E.B. Du Bois*, 297-342.

[28] These conditions included a rise in violence against African-Americans, especially lynchings, which cost thousands of African-Americans their lives between 1885 and 1912. See Ida W. Barnett, "Our Country's Lynching Record," *Survey*, 1 February 1913, 574, reprinted in Mildred I. Thompson, *Ida B. Wells-Barnett* (Brooklyn: Carlson Publishing, 1990), 277-80; Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* (Philadelphia: Temple University Press, 1980), 5-8. Race riots were breaking out in cities in the North and South. Jim Crow laws sought to prevent African-Americans from exercising their rights to vote and to move freely on public transportation

committee on the Status of the Negro," emerged with the idea of organizing a new national civil rights organization to fill the hole left by the Niagara Movement's collapse. This group founded the National Association for the Advancement of Colored People in 1909.

The story of the NAACP's founding has been well told elsewhere[29]; I will sketch it here only as necessary to set the stage for my inquiry. Whites dominated the NAACP's founding committee, but some African-American leaders, including W.E.B. Du Bois, also took part. Most of the founding committee's white members were activists with ties to the civil rights cause through their involvement in other Progressive-Era movements such as the settlement house movement, muckraking journalism and socialism. Many came from families whose members had been active in the abolitionist movement. Oswald Garrison Villard, for example, the first Chair of the NAACP's Board of Directors, was the grandson of abolitionist William Lloyd Garrison.[30] Villard's father had made his fortune as the president of the Northern Pacific Railroad and had purchased *The New York Evening Post* and *The Nation* and installed his son as editor and owner in order to create an interesting career for him.[31] NAACP President Moorfield Storey likewise came from a family with abolitionist roots, as did Mary White Ovington, a

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and in other public places. See C. Vann Woodward, *The Strange Career of Jim Crow*, 3rd ed. (New York: Oxford University Press, 1974), 72-110. Disenfranchisement mechanisms included "grandfather" and "understanding" clauses that screened out African-American voters, poll taxes, and white primaries. Ibid., 84-85. Segregationist statutes established whites only sections in trains, railway waiting rooms, street cars, steamboats, workplaces, restrooms, hospitals, public parks, and entertainment halls. Ibid., 97-100.

Even many so-called "Progressive Era" activists remembered today for their civic reform activities were indifferent or even hostile to African-American rights. See Dewey W. Grantham, Jr., "The Progressive Movement and the Negro," in *Twentieth-Century America: Recent Interpretations*, ed. B. Bernstein and Allen Matuson, (New York: Harcourt Brace Jovanovich, 1972), 59; Gilbert Osofsky, "Progressivism and the Negro: New York, 1900-1915," *American Quarterly* (1964): 153-68.

[29] See, e.g., Kellogg, *NAACP*.

[30] See Kellogg, *NAACP*, 5.

[31] Ibid., 33 n. 13.

settlement house and social worker of independent family means who served at various points during the organization's first years as its Secretary, Acting Chair, and Chair.[32]

These early white leaders of the NAACP did not possess the indifferent or even hostile attitude towards the advancement of African-American civil rights many of their Progressive-Era contemporaries did. Viewing racial progress as a crucial way in which society had to reform, they donated significant time and energy to the NAACP, sometimes, as in the case of Ovington, making the organization their life's work. On the other hand, these white founders came from upper-class backgrounds and possessed a strong sense of social superiority. Other scholars have explored the nuances of these individuals' racial world view, a mix of race progressivism commendable for the times and thinking tinged by racial stereotyping.[33]

Nor were whites the only ones to hold these attitudes. Du Bois, usually a clear-sighted analyst on race issues, to some extent shared the NAACP leadership's views about the professional inferiority of African-American lawyers. Here, of course, it is difficult to sort out race prejudice from a realistic assessment of social conditions. Those conditions included two features that greatly impeded African-American lawyers. First, most elite educational

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[32] The backgrounds of the founding members of the NAACP are discussed in further detail in Glasberg, "The Emergence of White Liberalism," (Ph. D. diss., Harvard University, 1991) 76-106; James M. McPherson, *The Abolitionist Legacy: From Reconstruction to the NAACP* (Princeton, N.J. : Princeton University Press, 1975), 391-92.

[33] These complex views about race manifested themselves in a host of ways, as when Ovington waxed poetic about the superior aesthetics of blacks as a group; or when Villard bickered with Du Bois, which Du Bois and others attributed to Villard's sense of racial superiority; or when Villard's and Storey's wives, both southerners, refused to entertain African-Americans in their homes. For a discussion of the racial attitudes of these white founders see Glasberg, "Emergence of White Liberalism," 35-62; McPherson, *The Abolitionist Legacy*, 343, 376 n. 17, 389 & n. 44; William Stueck, "Progressivism and the Negro: White Liberals and the Early NAACP," *The Historian* 38 (1975): 58-78.

opportunities remained closed to them.[34] Second, the race prejudices of judges and other actors in the legal system put African-American lawyers at a disadvantage as advocates. Nevertheless, Du Bois, along with his white colleagues, sometimes perpetuated rather than objected to NAACP policies that deprived African-American lawyers of leadership roles within the organization.

Organizing the structure

The first tasks in which the NAACP's founders engaged were organizational. They decided to establish its national headquarters in New York City and adopted a structure ostensibly governed by a Board of Directors.[35] Most of Board members participated only rarely in its meetings, however, and day-to-day control rested with the national office staff. That staff included a secretary, who handled the organization's correspondence and ran the office; a field secretary, or organizer; and a publicity director, whose chief responsibility was to edit *The Crisis*, an NAACP-sponsored news magazine addressing topics related to African-American civil rights.

Du Bois served as Publicity Director and editor of *The Crisis*. The position of secretary was held first by a white woman, Alice Nearney, a former librarian and social worker, and then by John Shilliday, another white social worker. James Weldon Johnson, a distinguished African-American who had once been a lawyer[36] and was a renowned songwriter and poet of the Harlem

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[34] J. Clay Smith and Richard Stevens document the many obstacles faced by African-American lawyers seeking to obtain a legal education. See Smith, *Emancipation*, 33-39; Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 81, 96-97, 177-78, 195-96; see also Rudwick and Meier, "Attorneys Black and White," 132-33.

[35] Kellogg, *NAACP*, 104.

[36] Johnson was the first African-American admitted to the Florida bar following Reconstruction. Smith, *Emancipation*, 279; James Weldon Johnson, *Along This Way: The Autobiography of James Weldon Johnson* (New York: Viking Press, 1938), 141-44.

Renaissance, joined the NAACP's staff in 1916, first as its field secretary[37] and then as acting secretary in 1918. Johnson recruited another African-American, Walter White, as assistant secretary in 1918. White, an accomplished author in his own right, served as an investigator and representative for the NAACP in many of its most important legal matters. William Pickens, also an African-American, took over the position of associate field secretary in 1918. In 1920, Johnson officially assumed the position of national secretary, heralding the beginning of a new era of black leadership of the organization.[38]

White was not the only staff member to become deeply enmeshed in the organization's legal work. All of the staff just discussed, with the exception of Du Bois, played roles in the organization's legal operations. Operating out of the New York City office, many of these staff members, along with other NAACP representatives, traveled extensively, especially throughout the South, to help organize chapters, resolve local disputes and publicize the organization's legal and other work.

The other key feature of the NAACP's organizational structure was its system of committees, set up to handle a variety of objectives such as membership, finances, special projects, and local branches. These committees allowed the NAACP to generate a great deal of activity on a wide variety of fronts, even in its first years. Painting a complete picture of the organization's early work, even its early legal work, would require examining the work of many

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[37] Eugene D. Levy, *James Weldon Johnson: Black Leader, Black Voice* (Chicago: University of Chicago Press, 1973), 186; Robert E. Fleming, *James Weldon Johnson* (New York: Simon & Schuster, 1987) (assessing Johnson's contribution to African-American letters).

[38] See Meier and Rudwick, "The Rise of the Black Secretariat," 109-11.

of these committees,[39] but this study must confine itself to the activities of NAACP's first national legal committee.

THE NATIONAL LEGAL COMMITTEE

The charter of the NAACP's National Legal Committee defined it as being "of national scope, whose work shall be dealing with injustice in the courts as it affects the Negro."[40] Its charge was to function in an advisory capacity to the Board, reviewing and deciding on potential cases for the NAACP's involvement, helping to recruit prominent lawyers to handle these cases, and setting legal direction and policy.

Throughout the decade under study here, all of the lawyer members of the legal committee lived and practiced law in New York City. This is where the committee met and where it conducted its operations; truly national representation on this national committee would await a different organizing philosophy in later decades. Thus the legal ethics rules of New York State governed the conduct of all of the lawyers on the legal committee, both because they all held bar licenses there and because New York City provided the base for their legal activities on behalf of the NAACP. The committee members may also, of course, have been subject to the ethics rules of other states in which the NAACP was conducting legal ethics campaigns, but that will not be my focus here.[41] My interest is in exploring the apparent disjunction between the

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[39] These activities included fighting for anti-lynching legislation, opposing new Jim Crow initiatives at the state and federal levels, protesting various outrages such as the exclusion of blacks from the federal government during the Wilson Administration and the showing of the racist propaganda films and plays; and fighting for better treatment of African-American soldiers during the World War. See generally Kellogg, *NAACP*.

[40] Minutes of Executive Committee, 3 January 1911, NAACP Papers Microfilm Edition, Pt. 1, Reel 1, Frame 42.

[41] It is clear that civil rights activists and lawyers in many jurisdictions, especially in the south, faced hostile

national legal committee members' activities on behalf of the NAACP and their simultaneous activities on behalf of the legal ethics establishment in their home jurisdiction.

In its earliest years, the NAACP legal committee was the main source of legal direction for the NAACP's national legal operations. Strong national staff lawyers would take over this function in a later era, but in its infancy the NAACP lacked such lawyers on its paid staff. Instead, Arthur Spingarn, the legal committee chair, provided legal oversight, assisted in a variety of ways by others on the legal committee, including William Wherry, who lent the NAACP his firm's resources, including its associates; Charles Studin, who regularly carried out libel reviews for *The Crisis* and substituted for Arthur Spingarn when he was away; and Charles Boston, who took part in Board meetings and served as a consultant in an important residential segregation case litigated in his home town of Baltimore, as described further below.

Understanding the nature of these lawyers' commitment to the early NAACP is somewhat difficult, however, because, unlike most of the African-American and white non-lawyer activists involved in the NAACP in its earliest years, the members of this first national legal committee were not motivated either by first-hand experience with racial discrimination or by American radicalism. They instead appear to have lent themselves to the organization's work out of a combination of deeply traditional commitments to individual rights and a sense of *noblesse oblige* held by the elite lawyering class.[42]

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conditions, both in early years, see, e.g., incidents noted below in note 145, and later, as discussed in the epilogue. It is also clear that the invocation of legal ethics rules was one tactic used against these unpopular lawyers. In noting that contrast here and in the epilogue, I am not intending to make causal claims about what accounts for the difference between the NAACP's treatment in New York City in 1910s and its treatment in southern states in the 1950s--obviously a great many factors are involved. My argument is simply that the NAACP's national legal committee members thought about their activities on behalf of the NAACP differently than they thought about the similar activities of other practitioners in New York City at the same time.

[42] See Robert W. Gordon, "The Ideal and the Actual in the Law:' Fantasies and Practices of New York City

The first legal committee members

As first constituted, the NAACP legal committee was composed of five white men. Four were lawyers; one was a former university professor. All of the lawyers had Wall Street addresses and practiced corporate law; none had previously distinguished himself in the field of civil rights. To give a sampling of their biographies: The group's chair, Thomas Ewing, Jr., received his undergraduate degree from Columbia University and his law degree from Georgetown University.[43] Ewing's grandfather had been a United States Senator and U.S. Secretary of the Treasury; his father served in Congress. Ewing started his legal career working in his father's law offices and then took over the practice with his brother.[44]

Another committee member, William Wherry, Jr., had a similar class background. Wherry served as counsel to Villard's *Evening Post*. Wherry's Wall Street law firm had two partners and three associates, two of whom (C. Ames Brooks and Chapin Brinsmade) were involved in the NAACP. Educated at the University of Michigan and Columbia Law School, Wherry was a member of the exclusive Association of the Bar of the City of New York (ABCNY), which served as the primary enforcer of legal ethics rules in New York City.[45] Wherry also served as Chair of the Committee on Professional Ethics of the New York State Bar

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Lawyers, 1870-1910," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, Connecticut: Greenwood Press, 1984), 51-58.

[43] *Who Was Who in America: A Companion Biographical Reference Work to Who's Who in America*, vol. 2, 1943-1950 (Chicago: The A.N. Marquis Company, 1950), 180, s.v. "Ewing, Thomas"; *National Cyclopaedia of American Biography*, vol. 31 (New York: James T. White and Co. 1944), 367.

[44] *National Cyclopaedia of American Biography*, vol. 31, 367. When he was appointed U.S. Commissioner of Patents by Woodrow Wilson in 1913, Ewing left New York and resigned from the legal committee.

[45] *Who Was Who in America*, v. 4, 1961-1968 (1968), 1002, s.v. "Wherry, William Mackey, Jr." On the role of the ABCNY in enforcing legal ethics law, see pp. 53, 51, 56, 59, 60 below.

Association and as chair of various committees of the New York County Lawyers' Association (NYCLA).[46]

Another lawyer on the committee was Charles Anderson Boston. Boston's background was a shade less elite than that of his fellow committee members. Having been "educated privately" in Baltimore, Boston started his adult years with "somewhat distasteful experiments in the fertilizer business."[47] He obtained admission to the bar after taking some classes at the University of Maryland law school and serving as a law clerk apprentice. After moving to New York, Boston joined the legal staff of a title insurance company. He later became an associate and then a partner at a firm whose two named partners had been past presidents of the ABCNY.

Whatever Boston may have lacked in educational credentials, he made up for in his enthusiasm for joining and leading bar organizations. Boston's prodigious organizational energy was manifest in his service on a dozen bar committees. In the area of legal ethics alone, Boston's involvements included: Chair of the Committee on Professional Ethics of the NYCLA from 1912 to 1932, member of the Committee on Professional Ethics of the ABCNY, Chair of the ABA Standing Committee on Grievances, and Chair of the ABA Committee to Supplement the Canons of the Legal Ethics from 1924 to 1926. This only begins the list; Boston also served in many other positions and committees with local, state and national bar associations, including as

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[46] A third committee member was Wilson Marcy Powell, a Harvard-educated lawyer and Quaker who served as a trustee of various banks and universities and was involved in a variety of charitable causes in New York, including the Prison Association, the Colored Orphan Asylum, and the Association for the Benefit of Colored Children. *Who Was Who in America*, vol. 1, 1897-1942 (1942), s.v. "Powell, Wilson Marcy."

[47] Lyon Boston, "Memorial of Charles Anderson Boston," *The Association of the Bar of the City of New York Yearbook*, 1935 (New York: The Association of the Bar of the City of New York, 1935), 287-288.

ABA president in 1931-32, and NYCLA president in 1932-34.[48]

The only non-lawyer member of the national legal committee in 1912 was Joel Spingarn. Unlike the mostly Protestant membership of the national legal committee, Joel Spingarn and his lawyer-brother, Arthur, who became chair of the legal committee in 1914, were Jewish. The Spingarn family had emigrated from Austria to New York City in the 1840s.[49] Their father had prospered in the wholesale tobacco trade (before the Civil War, it might be noted), and this family wealth freed both brothers from the need to earn a living. Both brothers sought to combine a life of ideas and study with social justice activism and explicitly linked their lifelong involvements with the NAACP to their perception of their own heritage as members of a racial minority.[50] Joel Spingarn had began his career as a reputedly brilliant English professor at

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[48] According to a memorial Boston's son wrote on his father's death, Boston was a "mild-mannered 'lawyer of the old school'" whose "legal distinction was more that of a lawyer's lawyer than as an advocate." Ibid., 287-90. He had "no particular hobbies"; his interests instead "centered in the law." Ibid., 291. He was reputed to be kind to "obscure and unrecognized members of the profession," including a "colored lawyer, young, unknown and somewhat apprehensive of his welcome at the Bar Association," whom Boston reportedly befriended and made feel welcome. Ibid., 291. But Boston's prolific legal ethics commentary also reflects traces of xenophobia and antisemitism--very common in legal ethics writing at the time--as when he decried "the ambitious and intellectual capacity of Oriental immigrants, with no apparent conception of English or Teutonic ideals," or complained that the practice of law in New York City was passing "into the hands of those, who, if their names are significant, are not schooled by previous environment in the high traditions of the English and American Bar." Charles A. Boston, "A Code of Legal Ethics," *The Green Bag* 20 (1908): 224, 228; Charles A. Boston, "The Recent Movement Toward the Realization of High Ideals in the Legal Profession," in *Report of the Thirty-Fifth Annual Meeting of the American Bar Association*, 761, 784 (Baltimore: The Lord Baltimore Press, 1912).

Such antisemitism was common among the leaders of bar associations at the time. See John Austin Matzko, "The Early Years of the American Bar Association, 1878-1928" (Ph.D. diss., University of Virginia, 1984), 231, 234-46, 344-45, 449-50; Jerald Auerbach, *Unequal Justice; Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 102-29. Indeed, as Jerald Auerbach has persuasively argued, a generalized xenophobia contributed to bar associations' motivations in adopting and enforcing legal ethics rules that prohibited advertising, client solicitation, and other techniques newcomers used to obtain legal business. See Jerald Auerbach, *Unequal Justice*, 43-130. In economic terms, these rules created "barriers to entry," which helped preserve law practice as a monopoly for privileged Americans belonging to the right social clubs. This perspective on legal ethics rules is best articulated by Richard Abel, "Why Does the ABA Promulgate Ethical Rules?," *Texas Law Review* 59 (1981): 639-88; Richard L. Abel, *American Lawyers*, 142-57.

[49] See Ross, *J.E. Spingarn*, 3.

[50] Arthur Spingarn, "The Jew as a Racial Minority," n.d., Arthur Spingarn Papers, Manuscript Division, Moorland-Spingarn Research Center, Howard University [hereafter A.B. Spingarn Papers-HU], Box 94-11, Folder

Columbia University but resigned from this position to protest the unfair treatment of a colleague and never again held a paying job. His service to the NAACP included holding the positions of Chair of the Board of Directors from 1914 to 1919, Treasurer from 1919 to 1930, and President from 1930 to 1939.[51] As his biographer describes, Joel Spingarn's political philosophy was one of economic liberalism. He had strong reformist impulses in the areas of civil liberties, race relations, and foreign affairs, but was not interested in a fundamental redistribution of wealth and power.[52] His philosophy of economic liberalism mirrored the NAACP's underlying vision; this outlook remained deeply ingrained in the organization's vision long into its future, despite the more radical economic analysis advocated by figures such as Charles Hamilton Houston and W.E.B. Du Bois.[53]

An expanded committee

In 1913, the national legal committee merged with the legal advisory board of the New York Vigilance Committee, which functioned as the local NAACP branch in New York City. Arthur Spingarn joined the legal committee at this point and became its chair, a position he

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236; see also Hasia R. Diner, *In the Almost Promised Land: American Jews and Blacks, 1915-1935* (Baltimore: Johns Hopkins University Press, 1995; Westport, Connecticut: Greenwood Press, 1977), 119-33. The Spingarn brothers in a sense epitomize the historical alliance between African-American civil rights activists and progressive-minded Jews. Joel Spingarn's life has been thoughtfully examined by his biographer, Joyce Ross, but unfortunately no such biography exists of Arthur Spingarn, a fascinating character in his own right.

[51] *Dictionary of American Biography*, ed. R. Schuyler , vol. 22, supp. two (New York: Charles Scribner's Sons, 1958), 622-23, s.v. "Spingarn, Joel Elias"; *National Cyclopaedia of American Biography*, vol. 17 (1927), 438; Ross, *J.E. Spingarn*, 55, 59-60.

[52] Ross, *J.E. Spingarn*, 13-14.

[53] Despite their differing political philosophies, Joel Spingarn and Du Bois had a close intellectual friendship, based in their mutual respect as fellow holders of doctoral degrees. Du Bois described Joel Spingarn as having the largest influence on him of any white man, and proclaimed him, almost alone among the NAACP's white leaders and staff, as free of race prejudice. The friendship between these two men produced a powerful alliance and helped hold together the organization's leadership by keeping Du Bois within the fold through many turbulent internal disputes. Ross, *J.E. Spingarn*, 63-64.

retained until 1940. Arthur Spingarn had received his A.B., M.A., and LL.B. from Columbia University and belonged to both the ABCNY and NYCLA.[54] He maintained a successful Wall Street trusts and estates law practice, but his correspondence exhibits none of the worry about losing opportunities for paid legal work that other lawyers who were donating significant time to the NAACP, even Moorfield Storey, displayed. Spingarn's family wealth allowed him the luxury of being a true "gentleman" lawyer,[55] balancing his legal practice with a variety of artistic and pro bono interests. [56]

Spingarn's close colleague, Charles Studin, a 1897 Yale Law School graduate, was another member of the legal advisory board of the New York Vigilance Committee who transferred to the national legal committee in 1914. Like Spingarn, Studin was known as a close friend of writers and artists.[57] Studin played a dedicated but less visible role within the legal committee. Valued within the legal committee for his astute legal judgment, Studin performed behind-the-scenes advisory work and libel screening for *The Crisis*, and filled in as chair of the legal committee when Spingarn served as a captain in the Sanitary Corps during the World War.

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[54] *Who Was Who in America*, vol. 5, 1969-1973 (1973), 683, s.v. "Spingarn, Arthur B.".

[55] This image of a "gentleman lawyer" continues to have a strong hold on the imaginations of legal ethics scholars. See, e.g., Thomas L. Schaffer and Mary M. Shaffer, *American Lawyers and Their Communities* (Notre Dame: University of Notre Dame Press, 1991), 30-126; Anthony T. Kronman, *The Lost Lawyers: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993), 11-17.

[56] An avid collector of literature and art, Arthur Spingarn enjoyed strong literary friendships with James Weldon Johnson and Walter White. He liberally provided free legal assistance a number of Harlem Renaissance artists and members of the NAACP national staff. His service for the NAACP staff included providing advice on literary rights to Walter White and legal work on matters as diverse as libel, tax, financial planning, landlord/tenant, car accident, and contracts to W.E.B. Du Bois. Spingarn also drafted Du Bois' will. See various items in Box 94-2, Folders 19, 23, 24, 25, 26, 27, 28, 29, A.B. Spingarn Papers-HU. Spingarn's clients also included a number of financially unsuccessful theater organizations including the Negro Theater, Inc. Ibid., Folders 15, 16, 20, 21. And Spingarn helped Mary White Ovington and Florence Kelley find publishers for book manuscripts. Ibid., Box 94-3, Folder 135, 111.

[57] "Charles H. Studin," *Saturday Review of Literature* 33 (March 25, 1950): 21 (obituary).

The newly constituted legal committee had one African-American member, Deborcey Macon Webster.[58] Webster was unusual among African-American lawyers during the period in that he, like his fellow legal committee members who were white, had a Wall Street practice.[59] Webster's name appears as counsel in several divorce and estate cases,[60] and he reputedly counted among his clients Lord and Taylor and Tiffany and Company.[61]

The historical record on Webster is scant. Born in 1868, Webster attended Columbia Law School but did not graduate from there; he may have finished his degree elsewhere, or, more likely, applied for bar membership after apprenticing with a practitioner. By the early 1890s Webster was practicing law in New York City. In 1900, he joined in efforts to seek legal redress from the police following a race riot in New York City. In 1911, he accompanied Booker T. Washington to court after Washington was assaulted for allegedly propositioning a white woman.[62] That same year, he joined the staff of the state attorney general's office.[63] Webster

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[58] Rudwick and Meier report that another African-American lawyer, Philip M. Thorne, who held a law degree from Yale University, also sat on the national legal committee for a short time in 1914. Rudwick and Meier, "Attorneys Black and White," 159 n.22, 170 n. 104. Thorne agreed to handle local NAACP cases on a contingency basis, but his name does not appear on any of the official lists of committee members published in NAACP Annual Reports. See Arthur Spingarn to Alice Nearney, 1915, Papers of Arthur B. Spingarn (Library of Congress Manuscript Division) [hereafter A.B. Spingarn Papers-LOC].

[59] Smith, *Emancipation*, 400.

[60] See *Thurston v. Thurston*, 136 N.Y.S. 340, 341 (1911); *Cunningham v. Platt*, 144 N.Y.S. 51, 52, 82 Misc. 486 (1913).

[61] Smith, *Emancipation*, 400, 421, 440 n. 291.

[62] Smith, *Emancipation* 421; *The Booker T. Washington Papers*, ed. Louis R. Harlan and Raymond W. Smock (Urbana: University of Illinois Press, 1980), 7: 139, 141; *The Booker T. Washington Papers*, 11: 29. The assault took place while Washington was waiting outside an apartment house in a neighborhood of dubious repute and caused great embarrassment to Washington, who had an otherwise unassailable personal reputation. Washington was still further humiliated when his assailant was acquitted of assault charges despite strong evidence against him. For a comprehensive account of the incident, which may have marked the beginning of the decline in Washington's political influence, see Louis R. Harlan, *Booker T. Washington: The Wizard of Tuskegee, 1901-1915* (New York: Oxford University Press, 1983), 379-404.

does not appear to have played a primary role in litigating civil rights cases, however; he probably spent most of his energies on his paying law practice.

Many of the lawyers who were pioneering creative public impact litigation techniques in civil rights cases at the time were African-Americans, as we have seen, but none of them was on the NAACP legal committee. These lawyers included not only prominent activists such as McGhee and Hawkins, formerly of the Niagara Movement, but also African-Americans who were staff members at the NAACP's New York offices, such as C. Ames Brooks, an associate at William Wherry's law firm, who served for a short time as "general attorney" for the NAACP in its national office.[64]

Another prominent African-American lawyer and civil rights activist, Gilchrist Stewart, had served on the New York City Vigilance Committee but was not among the lawyers transferred to the national committee.[65] Stewart practiced immigration law in New York City, and had been the head of the New York Vigilance Committee before its merger with the national committee. Active in organizing the Constitution League,[66] Stewart had been employed as an organizer and lawyer for this group with funding provided by John Milholland, the wealthy

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[63] Meier and Rudwick, "Attorneys Black and White," 159 n.22 (citing *New York Age*, 11 September 1911).

[64] Minutes of the Meeting of the Board of Directors, June 1911, NAACP Papers Microfilm Edition, Pt. 1, Reel 1, Frame 88.

[65] Several other lawyers on the advisory board of the New York Committee, some African-American and some white, likewise were not included in the transfer. These included African-American lawyer John William Smith, about whom I have found very little information, and Melville Cane, a well-known copyright lawyer and poet who had graduated from Columbia University law school and was an ABCNY member. See *Who Was Who in America*, vol. 7, 1977-1981 (1981), 95-96, s.v. "Cane, Melville H."; "Melville H. Cane, 100, a Lawyer Who Wrote Poetry and Essays," *New York Times*, March 11, 1980, D19 (obituary).

[66] *Booker T. Washington Papers*, vol. 3, 455-56.

manufacturer who later served on the NAACP's Board of Directors.[67] Stewart had also been allied with the Niagara Movement[68] and was active in progressive Republican politics in New York City.[69]

The reasons for Stewart's exclusion from the newly constituted NAACP legal committee are not clear, but surviving records give several clues. First, Stewart had been a "dairying" student at Booker T. Washington's Tuskegee Institute early in his life, and he maintained occasional communications with Washington. Although Stewart was far more militant than Washington, and eventually allied with Washington's critics, the national office may have harbored some mistrust of Stewart because of his Washington connections. Second, Stewart had received compensation for the legal work he performed for the New York Committee on a piecework basis and it appears that some tension arose about Stewart's accountability for disbursements.[70] Finally, Stewart did not receive the political backing needed to obtain a seat on the national committee: Du Bois, when consulted about Stewart's status, thought that, while Stewart was "an excellent man," the organization would get "the best results" if he were "employed by piece work."[71]

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[67] *Booker T. Washington Papers*, vol. 9, 124, 359, 224, 487-89; Meier, *Negro Thought in America*, 181.

[68] See Meier, *W.E.B. Du Bois*, 102-103, 108.

[69] Stewart had helped to organize a campaign critical of Theodore Roosevelt's handling of a riot involving African-American soldiers in Brownsville, Texas, and opposed Roosevelt's successor-designate William Howard Taft, both stances that flew in the face of Booker T. Washington's accomodationist policies. For discussions of the difficult relationship between the NAACP and Booker T. Washington see Lewis, *W.E.B. Du Bois*, 297-342, and August Meier, Booker T. Washington and the Rise of the NAACP," in *Along the Color Line*, 75-93.

[70] See, e.g., Arthur Spingarn to Joel Spingarn, 10 July 1913 (questioning whether certain disbursements Stewart made should have been incurred), A.B. Spingarn Papers-LOC, Box 1, Folder entitled "Joel Spingarn--to and from Arthur Spingarn, 1912-18."

[71] Ibid.

Whatever the reasons, the resolution of the NAACP Board that authorized the merger of the New York and national committees provided "that the New York Vigilance Committee be completely reorganized with a new body of officers, who are to be regarded as the active agency in this vicinity for increasing the funds of the Association and . . . further that the legal work formerly handled by the Vigilance Committee be referred to the National office."[72]

Stewart's removal from the legal operation he had helped build left him bitter. From Stewart's perspective, the issue concerned philosophies of legal representation. In an angry letter to Joel Spingarn, Stewart argued, "for work among colored people, it is necessary that colored agencies should be in control."[73] Stewart asserted the illegitimacy of providing only token representation of African-Americans on a committee seeking to represent African-American causes. The moral authority of Stewart's complaint would eventually hold sway within the NAACP, but at the time Stewart's voice appeared to be lonely one, not even supported by Du Bois.

In short, the roster of the expanded national legal committee made it clear that the national NAACP was not seeking African-American civil rights lawyer-activists to direct its legal strategy. Instead, its legal committee members' credentials served to signal the elite professional status of the NAACP's legal representatives. Race, along with ancestry, social and economic class, educational credentials, and professional success (as measured by a corporate client base and a Wall Street address), was a part of this symbolic code. At this point in its history the NAACP sought not to challenge that code but to use it to gain the most traditional

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[72] Minutes of the Meeting of the Board of Directors, 1 July 1913, NAACP Papers Microfilm Edition, Part I-A, Reel 1, Frame 999.

[73] Gilchrist Stewart to Joel Spingarn, 1 December 1913, Joel E. Spingarn Papers, Box 95-10, Folder 427.

legitimacy possible for its nontraditional plans.

The public face

Moorfield Storey, the first president of the NAACP and its chief Supreme Court advocate for many years, epitomized the public face the NAACP sought to give its legal activities. While not an official member of the legal committee, Storey frequently served as a consultant to it. His biography has been well researched by others, but is worth briefly summarizing here in order to fill out our picture of the NAACP's early public image.

Born in 1845 to one of the oldest Puritan families in New England, Storey's grandfather had made money in trade with South America, but he later lost it. The family was thus of the social elite but not rich. Storey's father, a Harvard Law School-educated lawyer, was not particularly ambitious or successful in his legal career, but he had an engaging personality and was well connected socially.[74] Storey's father had also been active in the abolitionist cause, and the values and acquaintances Storey acquired during his childhood stayed with him, eventually propelling him into the presidency of the NAACP.

Like his father and grandfather before him, Storey attended Harvard College, from which he graduated in 1866. He enrolled in Harvard Law School that same year, a few years prior to Christopher Langdell's introduction of his new rigorous "case method" of study at the school. According to Storey, the law school functioned as little more than a social club for young men who could afford to spend additional years in school. There he "drifted pleasantly" through law school, where "[s]tudy . . . was optional" and his routine consisted of "Boston parties . . . from

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[74] William B. Hixson, *Moorfield Storey and the Abolitionist Tradition* (New York: Oxford University Press, 1972), 6-16.

half-past nine [at night] to about three," with the remainder of his time "largely devoted to sleep."[75]

Bored with what law school had to offer, Storey left during his second year of study to assume a position, arranged by his father, as private secretary to the abolitionist senator Charles Sumner.[76] In later years Storey would use Sumner's and his father's connections to build a highly successful law firm, where he represented clients including railroads, brokerage firms and mortgage trust companies.[77]

Storey's law practice allowed him to provide comfortably for his family despite his lack of inherited wealth, but Storey was far from single-minded about his pursuit of economic success. He devoted considerable time to Independent politics and other civic matters. Storey was elected to the Harvard Board of Overseers,[78] and, if his account is true, found himself elected ABA president in 1885 after delivering a well-received speech, even though, according to Storey, "I had never attended any of the meetings or taken my membership seriously."[79] This professional honor gave him still higher standing and visibility at the bar.[80]

Storey was a traditional legal thinker, and it was his very traditionalism that motivated his

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[75] Mark DeWolfe Howe, *Portrait of an Independent: Moorfield Storey, 1845-1929* (Boston: Houghton Mifflin, 1932), 36-37.

[76] Hixson, *Moorfield Storey*, 11.

[77] Howe, *Portrait of an Independent*, 183-86. On the special position of Boston "gentlemen" lawyers of impeccable credentials in the field of independent bond counseling, see Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1970-1920," in *Professions and Professional Ideologies in America*, ed. Gerald L. Geison (Chapel Hill: University of North Carolina Press, 1983), 71, 79, 131 n. 40.

[78] Howe, *Portrait of an Independent*, 165.

[79] Quoted in Howe, *Portrait of an Independent*, 187.

[80] Howe, *Portrait of an Independent*, 188.

civil rights activism. He deeply believed in the principles of due process and individual rights and, following the example of his family's activism in the abolitionist movement, gave life to these beliefs through his own activism. Early in his career Storey earned a reputation as an outspoken critic of the rising wave of violence, segregation and disenfranchisement directed against African-Americans.[81] That reputation, along with the Storey family's long friendships with William Lloyd Garrison and his grandson NAACP Board Chair Villard, propelled Storey into the NAACP presidency at an early organizing session, again a meeting he did not attend. Storey held this position for almost twenty years, until his death in 1929 at the age of eighty-four.

Storey's contributions to the NAACP included financial support, both in personal funds in the early years and in lending his name to a major fundraising drive, and his use of his personal connections to help the NAACP's causes, such as in brokering efforts to oppose the exclusion of African-American attorneys from the ABA and using his power as a member of the Harvard Board of Overseers to halt the introduction of segregation in Harvard's dormitories.[82] Storey also recruited other prominent white lawyers to assist in the NAACP's legal work and, most importantly, acted as the NAACP's first chief Supreme Court advocate, arguing and winning several major cases in the first decade of the organization's existence.

THE NAACP'S EARLY LEGAL WORK

Scholars have written about the NAACP's first Supreme Court cases, but none has

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[81] See *Boston Herald* article, [n.d.] 1903, Moorfield Storey Scrapbook, vol. 2, Papers of Moorfield Storey (Library of Congress Manuscript Division), Box 22. Storey was also passionately opposed to United States imperialism in the Philippines, see Hixson, *Moorfield Storey*, 36-97; Howe, *Portrait of an Independent*, 196-229--a cause to which he devoted a great deal of time, perhaps even more than to the NAACP if his personal scrapbooks are taken as the measure. On the relationship between the rise of domestic racism and American imperialism overseas, see Woodward, *Strange Career of Jim Crow*, 72-73.

[82] See Papers of Moorfield Storey, Box 4, Folder "Antilynching Speeches-Articles."

focused on the internal, institutional aspects of the NAACP's early national legal work. I take that perspective here, seeking to paint an historical picture that is not disembodied from the actors whose activities produced "the law."[83] This perspective in turn will allow me to trace the connections between the NAACP's early legal activities and its legal committee members' involvement with legal ethics initiatives seemingly at odds with the NAACP's activities.

Early experiments

The national legal committee as of 1914, as already noted, grew out of the merger between a smaller national committee, composed of five staid Wall Street practitioners, and the more vibrant and diverse legal advisory board of the New York Vigilance Committee. It was, not surprisingly, the New York committee that had pioneered the NAACP's earliest test case litigation experiments. That committee, as Joel Spingarn explained, had found itself "under a peculiar difficulty, because, unlike the national office, it has no violent outrages confronting it," but recognized that African-Americans "are confronted every day of their lives with the most galling conditions; . . . . subjected to insult . . . refused service and courteous treatment . . . even in places where they are guaranteed absolute equality with their white brethren by legal statutes."[84] The Committee thus defined its goal as "to make an organized attack on the whole system of discrimination in places of public accommodation."[85]

To this end, the committee prosecuted and won under New York civil rights law a case

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[83] In so doing, I am motivated by Robert Gordon's insights in "Legal Thought and Legal Practice," 70-72.

[84] "The NAACP," *The Crisis*, 3 (February 1912): 159.

[85] Ibid.

against a Manhattan theater that had refused to allow a black man to occupy an orchestra seat.[86] With this victory in hand, the committee undertook a more ambitious plan: to stage a series of encounters between city theaters and mixed groups of black and white patrons. These groups of "testers" met on a designated evening and fanned out to visit a list of city theaters to test compliance with New York law prohibiting discrimination in places of public accommodation.[87] The committee promptly filed suit against theaters that barred the racially mixed parties from being seated.

Enthused by these experiences, Joel Spingarn wrote to his brother Arthur to propose that Joel "or some other white man who has the time and inclination shall go down to Oklahoma, and with a reputable and trustworthy colored man tour the state, for the purpose of showing that the white man can get sleeping and dining accommodations on the railroads and the black man cannot."[88] He envisioned taking an investigator with a camera along to document the conditions on trains for African-American travelers and holding an NAACP rally at the end of the railroad line to disclose the results of the testing and generate publicity for a lawsuit. Joel suggested that his brother should assemble the "best legal talent" available to suggest the details for such a test case strategy "indicating exactly what evidence must be obtained and what pitfalls must be avoided."[89]

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[86] See "The NAACP Begins," *The Crisis*, 3 (March 1912): 205.

[87] Joel Spingarn Papers, Box 94-15, Folder 548; see also Kellogg, *NAACP*, 123. In even more lively direct action, Arthur Spingarn reported visiting pubs in mixed-race groups and banging glasses loudly on the tables to demand service if it was denied. See "Arthur Spingarn of N.A.A.C.P. Is Dead," *New York Times*, 2 December 1971, 51, col. 1.

[88] Joel E. Spingarn to Arthur B. Spingarn, 16 December 1914, A.B. Spingarn Papers-LOC, Box 1, Folder "Joel Spingarn--to and from Arthur Spingarn, 1912-18."

[89] Ibid.

To his disappointment, Spingarn's plan did not produce the results he expected. Joel and an African-American traveling companion, Scott Brown, took a trip, but Brown was not denied sleeping car accommodations, so they arrived at the designated meeting site without the sought-for evidence.[90] The pair eventually did gather the evidence for a test case but that case was dismissed when Spingarn enlisted in the Army after outbreak of the World War.[91]

These test case experiments were not novel--they were, after all, elaborations on the strategy pioneered two decades before in *Plessy*. Their significance instead lay in their effect in instilling in the minds of the New York committee members an awareness of the power of test case litigation as a multifaceted strategy to achieve publicity, organization-building, and litigation goals.

In the meantime, the five-person national legal committee had its own success. It won its first case in the U.S. Supreme Court, *Guinn v. United States*.[92] *Guinn* invalidated the use of "grandfather clauses" which sought to disenfranchise African-Americans by barring from voting all citizens whose ancestors were not permitted to vote before the civil war. Storey had filed an *amicus* brief for the NAACP in the Court to great acclaim. The results, at a time when civil rights victories were few and far between, instantly gave the NAACP national visibility and stature. The victory also proved enormously helpful in fundraising and membership growth. *Guinn,* in short, launched the NAACP as the leading national civil rights organization of the

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[90] Ibid.; Joel E. Spingarn to Arthur B. Spingarn, 23 March 1915; Joel Spingarn to Arthur B. Spingarn, 31 December 1914, A.B. Spingarn Papers-LOC, Box 1, Folder "Joel Spingarn--to and from others with notes to Arthur Spingarn, 1912-38."

[91] Ross, *J.E. Spingarn*, 40.

[92] 238 U.S. 347 (1915).

period, with which all other aspiring civil rights activists would have to contend.

Refining the strategy

The 1913 merger infused the NAACP's legal operations with the best lessons learned by both its predecessor committees. From the New York committee the national group gained experience in decisive, creative direct action; from the first players on the national committee it learned the immense payoffs of achieving Supreme Court victories. It was clear, however, that a national committee would have to shed some of the philosophies that had guided these earlier efforts. A national committee, for example, could not aspire to provide representation in "*all* cases of outrage, discrimination or injustice because of race or color," as the New York committee had.[93] Nor, as we have seen, was the national committee interested in providing legal representation of African-Americans *by* African-Americans, as Stewart, the original African-American leader of the New York group, had intended. Instead, the national committee adopted stringent policies about both these matters that would shape the organization's direction for years to come.

It had been clear from the outset that, at the national level at least, the NAACP's small budget would permit it to sponsor only a handful of cases each year. The national committee had thus adopted a policy at its founding that it would accept only cases presenting civil right issues; all other cases would be referred to legal-aid bureaus.[94] In 1916, the committee further restricted its criteria: It passed a resolution stating that it not only would restrict its involvement to cases "which show actual discrimination because of color," but would choose from among such cases

[93] Letterhead of New York Committee, found in A.B. Spingarn Papers-LOC, Box 5, Folder "General Correspondence, 1912-13" (emphasis added).

[94] "First Annual Meeting of the Corporation," *The Crisis*, 3 (February 1912): 158.

only those that "test broad principles, such as the grandfather clause" and other cases.[95] As Spingarn explained, "[t]he pressing problems that present themselves continually to our Association necessitate our restricting our work to establishing precedents and testing new laws."[96]

This policy decision, mandated by the NAACP's severe resource limitations, laid the foundation for the NAACP's public impact litigation strategy. The idea of sponsoring carefully chosen cases with hopes of reaching the U.S. Supreme Court would be refined in the following decades, but by 1914 the legal committee had already articulated the core of this strategy.

Funding the high-profile litigation the NAACP envisioned proved a huge drain on the organization's budget. Nevertheless, the NAACP's leadership firmly supported this resource allocation decision from the outset. As Du Bois ally Mary White Ovington explained, the NAACP's leadership decided that a "legal accomplishment now will mean many thousands more members than if all the thought and power of the office goes into the [membership] drive itself."[97] This decision to focus on producing legal results rather than on building a membership base directly proved well considered. As the organization repeatedly learned during its first decade, high profile legal campaigns leading to Supreme Court victories were the NAACP's best tool for raising money and gaining members. Of course, this strategy also created the potential for conflicts between the NAACP's organization-building goals and its role as counsel for

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[95] Report of Chair of Board of Directors, Minutes of Annual Meeting, 3 January 1916, NAACP Papers Microfilm Edition, Part I, Reel 1, Frame 438

[96] Arthur Spingarn to H. Williamson, 18 February 1916, A.B. Spingarn Papers-LOC, Box 5, Folder "1916."

[97] Mary W. Ovington to Arthur B. Spingarn, 2 April 1912, Arthur Spingarn Papers-LOC, Box 6, Folder "April-Dec. 1921."

particular plaintiffs in civil rights cases.

Race within the NAACP

Another aspect of the NAACP's early policy on case representation reflected its enforcement of a color line within its own operations. Just as the racial composition of the legal committee reflected the NAACP's elitism, as already discussed, the legal committee's policy on which outside lawyers it would approach about handling NAACP cases embodied a two-tiered system. Indeed, the Board stated such a policy explicitly, resolving in 1916 that the high profile national test cases it wanted to sponsor should be handled by the most elite lawyers available--by definition, the white "blue bloods" at the top of the bar's hierarchy. Local New York City cases would be "referred to colored lawyers who are willing to take them on contingency."[98]

Another racially charged aspect of the Committee's policies on case representation involved the matter of money. Here the Committee did not have an explicit race-based policy, but a preference for lawyers who could handle cases pro bono, which had the impact of disadvantaging African-American attorneys. Although the NAACP was willing to enter into representation arrangements with local counsel that involved paying fees (and, indeed, often did so), at bottom it completely trusted only those lawyers willing to donate their legal services. Such caution with the organization's treasury was prudent. In the words of Field Secretary Pickens, it was necessary

> to block the way against the grafters and legal sharks who wanted to prey upon the dire needs of the client and the treasury of the Association. And those who wanted to exploit the victim and raid the treasury were sometimes white and sometimes black. Arthur Spingarn was the power behind the scenes in most of these cases, and was giving of himself in defending the meager resources of the

[98] Minutes of Annual Meeting, 3 January 1916, NAACP Papers Microfilm Edition, Pt. 1, Reel 1, Frame 438.

Association.[99]

Spingarn can hardly be faulted for his efforts in negotiating with lawyers about their fees; his correspondence files amply reveal his diligence at this thankless work. But the NAACP's wariness about compensating for legal services further widened the racial division in the lawyers it chose to handle cases, since few African-American lawyers had the financial security to handle protracted legal work without pay.

Still another difficult task facing the legal committee involved screening cases for NAACP participation. To select the cases with the greatest national potential, the legal committee had to follow promising legal developments throughout the country. Not only did it have to monitor pending litigation in the lower courts, but it also had to stay abreast of legislative initiatives that might result in new laws for constitutional challenge and assess the relative merits of potential litigation forums. The committee soon realized that this work required full-time attention, and the Board agreed at the end of 1913 to hire a full-time attorney to staff the national office.[100]

The first staff lawyer

The Board's choice for the position was a young white lawyer named Chapin Brinsmade. At first glance, it is not obvious what commended this particular attorney to the Board. He was young--28 years old--and inexperienced, having graduated from law school in 1910. Nor had he distinguished himself in prior work for the NAACP or the cause of civil rights in general, as had

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[99] William Pickens, Speech to Association of Negro Press, 23 January 1935, A.B. Spingarn Papers-HU, Box 94-6, Folder 135.

[100] Minutes of the Meeting of the Board of Directors, 7 October 1913, NAACP Papers Microfilm Edition, Pt. I, Reel 1, Frame 216.

the far more experienced African-American lawyer Gilchrist Stewart who was handling the national and New York offices' legal work on a piecework basis.

What Brinsmade did have going for him in winning the coveted staff lawyer position were his ties to the Board and the legal committee. Brinsmade was a junior associate at Wherry's law firm; that firm did the legal work for Board Chair Villard's publications. In addition, Brinsmade was a graduate of Harvard College and Harvard Law School.[101] Like many of the members of the legal committee, Brinsmade's family traced its lineage in America back to the 1600s.[102]

Put to work under the general direction of the legal committee and the specific direction of Arthur Spingarn, Brinsmade displayed enormous energy and enthusiasm, which in some ways made up for his lack of experience. Much of his activity, however, drew the NAACP away from its carefully defined litigation goals.[103] Brinsmade's reports reflect a flurry of efforts in many directions, from returning a woman's repossessed furniture, probing allegedly fraudulent "Back to Africa" schemes, and planning an attack on bankers' discriminatory lending practices in Harlem, to investigating possible test cases for a Supreme Court challenge to residential segregation ordinances being enacted around the country and to a Florida law prohibiting white teachers from teaching in black schools.[104] Brinsmade also wanted to expand the organization's

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[101] *National Cyclopaedia of American Biography (1885-1928)*, vol. 22 (1932), 156.

[102] The Brinsmades claimed an ancestor present at the Connecticut state convention at which the U.S. Constitution was ratified. Brinsmade's grandmother founded the Gunnery School in Connecticut, where Brinsmade obtained his primary education and where his father taught. Ibid.

[103] Minutes of the Meeting of the Board of Directors, 7 October 1913, NAACP Papers Microfilm Edition, Pt. I, Reel 1, Frame 228.

[104] Minutes of the Meeting of the Board of Directors, 6 January 1914, NAACP Papers Microfilm Edition, Pt. I, Reel 1, Frame 261; Minutes of the Meeting of the Board of Directors, 3 March 1914, ibid., Frame 273; Minutes of

legal work to problems that had not produced justiciable cases, urging the NAACP to establish a mortgage company for African-Americans, investigating companies' methods of writing life insurance, and approaching public service commissions to lobby against discriminatory public transportation policies. In January 1914, Brinsmade reported on eleven active cases to the Board; by the end of the year his reports began to take up so much of the Directors' meetings that there was not time to finish them.

As Brinsmade soon began to complain, however, the number of cases in which the NAACP could become involved was huge, and each one required careful investigation and analysis.[105] It quickly became evident that one person could not carry out all of these tasks, even working full time at a frantic pace. The Association's first Secretary, Alice Nearney, began to assist Brinsmade with investigations and briefings to the legal committee. She and other members of the NAACP staff and leadership most involved in building its legal agenda (especially Joel and Arthur Spingarn and, later, assistant secretary Walter White) became deeply involved in this work.

Nontraditional approaches

Having a nontraditional legal agenda, Brinsmade and his NAACP colleagues conducted themselves in nontraditional ways. For example, in carrying out on-site investigations of situations that might merit the NAACP's involvement, Brinsmade and other NAACP representatives frequently traveled around the country. This in itself did not necessarily deviate from a traditional lawyer's role. But Brinsmade sometimes combined or followed up such

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the Meeting of the Board of Directors, 7 July 1914, ibid., Frame 300.

[105] NAACP, *Annual Report for 1913* (New York: NAACP, 1914), 28-29 (Brinsmade's discussion of undertaking long investigations only to conclude that the cases were not within the NAACP's defined scope).

investigative tours with the holding of large meetings in local communities to generate enthusiasm and raise memberships and funds to support the NAACP's litigation. Other NAACP representatives appeared before audiences to explain potential litigation or litigation already underway and to ask for financial and other support. Legal committee member Joel Spingarn, for example, reported completing a sixteen-city tour, making as many as three stops a day, in 1915, and enlisted his brother Arthur to fill in for him at meetings he could not attend.[106] Even Storey appeared at public meetings on occasion, though he worried whether his reputation would be tarnished in doing so.[107] Appearing before audiences to promote litigation contravened then-prevailing interpretations of legal ethics strictures, but that fact did not deter the NAACP's legal representatives from this work.

Brinsmade proudly described another non-traditional practice in which he engaged in one of his first reports to the Board. In its efforts to monitor civil rights developments across the country, the NAACP had enlisted a clipping service to scan local newspapers for reports of incidents raising potential civil rights violations. Seeking to make the most of the information gained in this way, Brinsmade assigned Nearney the task of locating addresses and writing letters to the victims named in the newspaper reports to offer the NAACP's services for free in pursuing

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[106] See, e.g., Joel E. Spingarn to Arthur S. Spingarn, 21 January 1916, Joel E. Spingarn Papers, Manuscript Division, Moorland-Spingarn Research Center, Howard University, Box 95-14, Folder 542 (asking his brother to fill in for him at an out-of-town appearance and further warning him to be "careful what you say in writing" because of "ticklish work" ahead); cf. Ross, *J.E. Spingarn*, 32, 34 (describing Spingarn's travels "to arouse blacks to more militant stance for their rights").

[107] After receiving one invitation to preside at a protest action in Washington, D.C., Storey wrote to his good friend, Board Chair Oswald Villard, worrying that "there will probably be some violent speaking there, and if you think I can retain my influence better by not taking a prominent part in it, I will not go." Moorfield Storey to Oswald Villard, 8 October 1913, NAACP Papers Microfilm Edition, Pt. 1, Reel 24, Frame 12.

a lawsuit.[108] This practice plainly violated legal ethics rules prohibiting the solicitation of potential clients. In this instance, a more experienced legal mind within the NAACP appears to have intervened. In a cryptic memorandum to Nearney, Spingarn reminded her of meetings he had called on the need to let interested plaintiffs or their counsel initiate contact with the NAACP.[109]

Thus one of the tasks Arthur Spingarn assumed as chair of the legal committee was to keep an eye on the capers of its exuberant but inexperienced staff attorney. Another was to monitor the activities of civil rights lawyers not affiliated with the NAACP. This was an important job, since civil rights precedents set in litigation the NAACP did not control could greatly affect the NAACP's litigation strategy. The NAACP did not want to shut down all competing civil rights litigation, however; such local experiments were a source of new ideas that the NAACP might appropriate for its national campaigns. On the other hand, the NAACP wanted sufficient involvement to allow it to take credit for as many civil rights victories as possible. Even more importantly, the NAACP wanted to be able to halt local efforts that appeared headed for disaster, since adverse decisions could damage the rapidly developing body of civil rights case law. Spingarn's papers and other legal files are rife with correspondence in which he tried to play this difficult role in exerting the NAACP's influence over non-affiliated lawyers.

Spingarn sometimes was successful in these efforts, but sometimes he was not. An example of a case in which Spingarn failed was *McCabe v. Atchison, Topeka and Santa Fe*

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[108] See *NAACP Annual Report for 1913*, 27 (describing Brinsmade's practice of writing with "requests for information and offers of help" to individuals identified in newspaper reports as possible victims of discrimination).

[109] Arthur Spingarn to Alice Nearney, 13 June 1914, Arthur Spingarn Papers-LOC, Box 94-11, Folder 99.

Railway Company.[110] This case arose in Oklahoma after that state enacted legislation mandating separate seating for black and white passengers but allowing railway companies to provide sleeping and dining facilities for one race only if limited demand so warranted. Arthur Spingarn learned that a group of local African-American lawyers planned to challenge the statute, and wrote to them asking that they "take no action" in the case because the NAACP wanted to prosecute it.[111] The local lawyers failed to heed Spingarn's request and filed a complaint as soon as the statute took effect. The lower courts rejected the challenge, ruling both that the statute was constitutional and that the plaintiffs lacked standing because they had not personally suffered discrimination under the new statute.[112] At this point, the local lawyers, William Henry Harrison, Edwin O. Tyler and Ethelbert T. Barbour, approached the NAACP for assistance.

After evaluating the case, the national legal committee decided that it should accept this invitation to take over the case.[113] With the decision made, the NAACP paid for the costs of printing the record and approached Storey about preparing the brief and arguing the case before the U.S. Supreme Court.[114] But Storey balked, complaining that the case had not been "properly drawn" because no one had yet been denied accommodations so as to present a case of personal injury.[115] Lacking its promised Supreme Court advocate, the NAACP had no choice but to

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[110] 235 U.S. 151 (1914).

[111] Arthur Spingarn to Ethelbert T. Barbour, 26 January 1915, A.B. Spingarn Papers-LOC, Box 5, Folder "1915."

[112] See *McCabe*, 159-60.

[113] See *NAACP Annual Report for 1913*, 21 (annual report of the attorney).

[114] Ibid.

[115] Moorfield Storey to Alice Nearney, 15 February, 1915, A.B. Spingarn Papers-LOC, Box 5.

revoke its offer of representation.[116] Plaintiffs' original counsel, Harrison, with assistance from Tyler and Barbour, argued the case before the Court.

The decision in *McCabe* proved Storey's assessment technically correct: the Supreme Court refused to reverse the lower court on the grounds that the plaintiffs had failed to show sufficient personal injury.[117] Plaintiffs' counsel received criticism in many quarters for mishandling the lawsuit--including from Du Bois, who castigated McCabe's lawyers in *The Crisis* for failing to recognize their lack of experience imposed by the "color line in the legal profession." [118]

At the time, *McCabe* appeared to the NAACP to be an unmitigated defeat, but scholars today, writing with the advantage of hindsight, have a different assessment. In dicta, the Court had noted that the lower courts' constitutional reasoning was plainly infirm because "if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."[119] As constitutional law scholar Benno Schmidt and others have argued, *McCabe* signaled an important shift in the court's civil rights jurisprudence: "McCabe was the first time the Court gave weight to the equality side of the separate but equal equation."[120] Moreover, the decision in the case was unanimous, and later decisions cited this dictum as if it established a precedent. Schmidt has argued that *McCabe* provided the best results possible, because the

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[116] See *NAACP Annual Report for 1913*, 21.

[117] *McCabe*, 163-64.

[118] See Meier and Rudwick, "Attorneys Black and White," 135-36, 164 n. 34; see also Smith, *Emancipation*, 536 n. 234 (further discussing criticisms of McCabe's lawyers).

[119] *McCabe*, 161.

[120] Benno C. Schmidt, Jr., "Principle and Prejudice," 485, 492-493.

decision most likely would have come out the other way if the Court had been required to concentrate on the merits.

Buchanan v. Warley

The other effect of *McCabe* was, somewhat ironically, to highlight the need to "stage" the facts for test case litigation to ensure the requisite showing of personal standing.[121] The national legal committee instantly took this aspect of *McCabe* to heart; it was right after *McCabe* came down that Joel Spingarn urged Arthur to assemble the best legal talent available to test the enforcement of the separate cars law in Oklahoma. *McCabe* thus further reinforced the NAACP's focus on carefully controlling the scenario presented to the court. It found the right circumstances for such a test case not long afterwards, in a plan that culminated in its second major U.S. Supreme Court victory of the decade, in *Buchanan v. Warley*.[122]

Buchanan v. Warley brought to a halt the spread of residential segregation ordinances directed at African-Americans that had began in southern and border states in the 1910s.[123] As was often the case, an African-American lawyer working at the local level had done the initial work in formulating the arguments to challenge these residential segregation ordinances. That lawyer was William Ashbie Hawkins, formerly of the Niagara Movement, who subsequently

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[121] Part of the problem was the unavailability of declaratory judgment as a form of relief prior to passage of the Declaratory Judgment Act in 1934. See Donald L. Doernberg and Michael B. Mushlin, "The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking," *UCLA Law Review* 36 (1989): 529, 547-61 (describing Supreme Court's rigid application of case-or-controversy requirements prior to Act's passage).

[122] 245 U.S. 60 (1917).

[123] In the nineteenth century, similar statutes had been enacted against Asians. See, e.g., *In Re Lee Sing*, 43 F. 359, 362 (C.C.N.D. California, 1890) (invalidating San Francisco residential segregation ordinance directed at Chinese people); see generally Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994): 223-33. Indeed, the NAACP cited *In re Lee Sing* in its briefs in *Buchanan v. Warley*, though the Court did not cite it in its opinion.

built an NAACP branch in Baltimore. Hawkins had briefly attended the University of Maryland law school but had been forced out for race-related reasons.[124] He graduated from Howard University law school in 1892, and became the ninth African-American lawyer admitted to the Maryland state bar. Hawkins formed a law partnership with another African-American attorney in Baltimore, George W.F. McMechan, a Yale Law School graduate, and the two used their ties to national African-American fraternal organizations to build a successful practice.[125] At the same time Hawkins pursued several important civil rights cases in Baltimore, including one that unsuccessfully challenged the constitutionality of a private mechanical arts school's exclusion of black youth,[126] and his successful challenge to Baltimore's residential segregation ordinance in *State v. Gurry*.[127]

In an article he wrote for *The Crisis*, Hawkins told the story of his involvement in *Gurry*. As Hawkins explained, shifts in the city's residential patterns leading to the movement of African-Americans into previously white neighborhoods gave rise to some racial tension, including vandalism and other minor incidents of violence. But a legislative initiative got underway only after the African-American law partner of Hawkins, George W.F. McMechen, and his wife, a school teacher, further tested the waters by moving into prime real estate in a

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Ibid., 233.

[124] Smith, *Emancipation*, 38.

[125] Ibid., 146.

[126] Ibid., 38, 146-47, 179-81 nn. 181, 184, 193, 199. This case was *Clark v. The Maryland Institute for the Promotion of the Mechanic Arts*, 87 Md. 643, 41 A. 126 (1898). As Smith points out, Hawkins' theory in this case--that race-based exclusion by private parties using public property is unconstitutional--was not "wrong," but simply decades before its time. Smith, *Emancipation*, 147, 181 nn. 196, 197. The U.S. Supreme Court accepted this theory in 1961 in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

[127] 121 Md. 534, 88 A. 546 (1913).

previously all-white neighborhood. In a furor, the city council hastily drafted a residential segregation ordinance, which it sought to fit within the *Plessy* framework by prohibiting African-Americans from moving into residences in predominately white blocks and whites from moving into homes in blocks that had become predominately African-American. The city asserted as its state interest its right to exercise its police powers to preserve peace and prevent racial conflict. Hawkins filed and quickly won "a test case" to challenge the sloppily drafted ordinance.[128] His victory prompted the city to enact another ordinance in 1911, which he again successfully challenged in 1913.[129]

Following Hawkins' victories, the NAACP national committee became interested in carrying a similar challenge to the U. S. Supreme Court. In its 1913 Annual Report the national committee reported on passage of such a segregation ordinance in Winston-Salem, North Carolina. The national committee reported that it had "promptly offered our services and urged that this be made a test case," but the prospective plaintiffs, two African-American brothers who had purchased an option to acquire real estate, had been afraid to press their suit due to intense local prejudice.[130] Brinsmade and others began communicating with other local groups in communities where residential segregation laws were being proposed, not only offering to help these communities to oppose such initiatives but also thinking about handling future litigation if

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[128] See W. Ashbie Hawkins, "A Year of Segregation in Baltimore," *The Crisis* 3 (November 1911): 27-30. Hawkins' 1910 case was not reported. See also Minutes of Meeting of NAACP Board of Directors, 7 October 1913 (reporting on Hawkins' plans to file a "test case" with help from the national office).

[129] *Gurry*, 121 Md. 534, 88 A. 546, 553 (distinguishing *Plessy* and invalidating segregation ordinance on grounds that it imposed too great a burden on individuals' property rights). A final case resolved yet another challenge following the U.S. Supreme Court's decision in *Buchanan v. Warley*. See *Jackson v. State*, 123 Md. 311, 103 A. 910 (1918).

[130] *NAACP Annual Report for 1913*, 7.

the bill passed and presented a good case for a court challenge.[131]

The NAACP soon found more suitable conditions for creating a test case in Louisville, Kentucky. The Louisville City Council had enacted a segregation ordinance in 1914 that purported to "prevent conflict and ill-feeling between the white and colored races" by requiring that whites and black live on separate blocks. As in Baltimore, the ordinance attempted to appear "race neutral" under the separate but equal doctrine of *Plessy*. African-Americans in Louisville had been organizing unsuccessfully to defeat the ordinance legislatively. The NAACP saw the opportunity to build on these efforts to create a local chapter that could challenge the law in the courts. Soon after the ordinance's passage, the NAACP's national organizing staff began working to form an NAACP branch in the city. National staffers Alice Nearney and William Pickens, along with Board Chair Joel Spingarn, visited the city to grant official status to a local chapter.

Not long afterwards, staff attorney Brinsmade traveled to Louisville and began to organize the test case. Brinsmade started his visit with a mass meeting, at which he spoke to raise money to fund a legal fight against the ordinance.[132] Brinsmade's other chief task in Louisville was to organize the cast of players necessary to stage a successful test case. Brinsmade achieved quick success in this goal: one of the new local branch leaders, an African-American named William Warley, agreed to be the plaintiff (an act of courage that would later

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[131] See *NAACP Annual Report for 1913*, 23.

[132] Minutes of Board Meeting, 7 July 1914, NAACP Papers Microfilm Edition, Part I, Reel 1, Frames 300, 305 (reporting on funds raised at mass meetings at which Brinsmade and Joel Spingarn spoke); George C. Wright, "The NAACP and Residential Segregation in Louisville, Kentucky, 1914-1917," *Register of the Kentucky Historical Society*, 78 (1980): 46-54.

cost Warley his employment at the local post office).[133]

The strategy for the test case soon emerged. The plan was that Warley would purchase a housing lot located in a predominantly white block from Charles Buchanan, a white real estate dealer who opposed the ordinance because of the impediments it posed to his business. The NAACP's lawyers carefully drafted the wording of this contract so that its validity was contingent on Warley's ability to reside at the property, thus squarely presenting the legal principle at issue for determination. A lawyer representing Buchanan--whom the NAACP paid--filed suit to challenge the ordinance. Warley in turn requested and was granted representation by the City Attorney's office, which argued that Warley did not owe money to Buchanan because the contract he had signed was invalid under the ordinance, which was a constitutional exercise of the city's police powers.

The case went through the Kentucky court system, which upheld the ordinance's validity as expected. As soon as the state's highest court released its decision, legal committee Chair Arthur Spingarn announced that the NAACP planned to take an appeal to the U.S. Supreme Court and that Moorfield Storey would argue the case on behalf of the NAACP.[134] Storey's brief for the national office expanded on Hawkins' winning argument in the Baltimore case. Storey emphasized that the Louisville legislation constituted an undue interference with property rights,

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[133] Wright, "The NAACP and Residential Segregation," 47 n. 16.

[134] Hawkins had asked to participate in briefing the case before the Supreme Court but the legal committee refused his request. Despite his victory in *Gurry*, Hawkins was branded with the same reputation as the lawyers in *McCabe*, as having failed to show sufficient deference to the "superior" abilities of white lawyers. He had reportedly at some time in the past "refused to have a white lawyer associate with the case or to take advantage of their [sic] knowledge until he was in a hole." Mary Nearney to Arthur Spingarn, 2 July 1915, A.B. Spingarn Papers-LOC, Box 5, Folder "July-Dec. 1915." Hawkins ended up filing a separate amicus brief in *Buchanan v. Warley* on behalf of the Baltimore NAACP branch.

most specifically, with the rights of the white seller Buchanan, who had been deprived of the ability to transfer his property as he wished. After two rounds of oral argument, Storey won his case, in an apparently unanimous decision. The Court reasoned that, while prohibiting African-Americans from sitting in white railroad cars did not pose an undue infringement on the personal rights of this class of citizens, depriving individuals of the right to live in property they owned created a property right deprivation of a higher unconstitutional order.[135]

The city of Louisville had argued that the case before the Supreme Court should be dismissed for lack of standing. The City, at this point no longer pursuing Warley's asserted interests, observed that the posture of the case presented strong evidence of collusion between the purported plaintiff and the defendant. Storey had given some attention to these potential standing problems in preparing his arguments, but simply gave them short shrift before the Court.[136] This strategy appeared to have the desired results as measured by the Court's published opinion, which failed to make any mention of the City's allegations.

Although the decision in *Buchanan v. Warley* appeared to be unanimous, constitutional scholars have uncovered an unpublished dissent. In it, Justice Holmes maintained that he would have thrown the case out without reaching the merits, as the city had urged. Holmes wrote, "I cannot but feel a doubt whether the suit should be entertained without some evidence that it is not a manufactured case."[137]

Buchanan v. Warley had all the elements of the NAACP's early test case strategy:

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[135] *Buchanan*, 245 U.S. at 80-82.

[136] See Brief For Plaintiff in Error on Rehearing, Buchanan v. Warley, 245 U.S. 60 (1917) (No. 231).

[137] A photocopy of this document is duplicated in Schmidt, "Principle and Prejudice," 512.

national office control, invocation of the patrician Moorfield Storey to gain legitimacy before the high court and, most tellingly, the engineering of a factual situation that presented the legal issues at stake in the best light possible. Scholars still debate the significance of *Buchanan v. Warley* in stemming residential segregation in the United States.[138] Whatever its practical significance, the decision was a symbolic watershed, showing that civil rights progress could be made through the courts.[139] It was also important as a motivator, producing many new members for the NAACP and reinforcing the organization's commitment to a test case litigation strategy.

A war intervenes

The coming of the First World War slowed the NAACP's ability to file new test cases to follow up on its victory in *Buchanan*. The organization's legal fund was depleted and fundraising proved difficult.[140] The war diffused the legal committee's focus in other ways as well: its hardworking chair, Arthur Spingarn, took a two-year leave to serve in the Army Sanitation Corps (the precursor to the Red Cross) and Joel Spingarn left for Army service.[141]

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[138] Scholars have traced how residential segregationists simply switched tactics, channeling their energies into "private law" restrictive covenant strategies. See, e.g., Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1959). But Benno Schmidt and others have argued that state-imposed residential apartheid might have gained far more momentum without the check imposed by *Buchanan v. Warley*. See Schmidt, "Principle and Prejudice," 456, 517-23; William Fischel, "Why Judicial Reversal of Apartheid Made a Difference," *Vanderbilt Law Review* 51 (1998): 975-91.

[139] A provocative treatment of the significance of *Buchanan* for the Court's civil rights jurisprudence is David E. Bernstein, "Philip Sober Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective," *Vanderbilt Law Review* 51 (1998): 797-879. Bernstein argues that application of individual-rights based Lochner-era jurisprudence led to victory in *Buchanan*. Bernstein compiles the Progressive-era commentary, inspired by sociological jurisprudence, that argued that cities' exercise of the police power in enacting segregation ordinances should be upheld. Bernstein exaggerates his point beyond what supporting evidence will allow--master sociological jurisprude Brandeis voted with the *Buchanan* majority, for example--but he is certainly correct in pointing out that sociological jurisprudence did not have a leg up on traditional rights analysis on civil rights questions.

[140] Minutes of Board Meeting, 13 March 1916, NAACP Papers Microfilm Edition, Part 1, Reel 1, Frame 524.

[141] Joel Spingarn devoted his political efforts during this period to the establishment of an officers' training camp for African-American soldiers, which, because of the political tenor of the times, he accepted would have to be segregated from white officers' training. Spingarn's work in this regard was extremely controversial within the

The legal committee's activities tapered off even more when, ostensibly as means of "retrenching financially due to the war," the Board decided to give up its new "legal department" and Brinsmade as its staff. [142] NAACP Secretary Nearney complained bitterly that the lack of legal resources caused "many splendid test cases to slip through [our] fingers" and called for engaging a "first class lawyer" who could spend a good deal of time "in the field" to coordinate the legal work of the branches.[143] But no such staff lawyer would join the office again until the 1930s.

Brinsmade's job duties were instead spread among the remaining staff and leaders. Nearney took over many of Brinsmade's duties, including traveling to conduct case investigations, but resigned after squabbling with Du Bois, who denounced her for harboring race prejudice. In 1918, after he was hired as assistant secretary, Walter White took over many of the duties Brinsmade and Nearney had performed.[144] White, a very fair skinned African-American,

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NAACP and in the African-American community in general. Spingarn believed that the establishment of such a camp, even though segregated, was crucial to African-Americans' career advancement in the military services, but many, including Gilchrist Stewart, criticized Spingarn's initiative as reflecting a tacit endorsement of segregation. The NAACP eventually passed a resolution favoring the creation of such camps over providing no training opportunities for African-American officers, and memories of this controversy contributed to suspicions about the NAACP by more radical African-American activists. See generally Ross, *J.E. Spingarn*, 81-102; Kellogg, *NAACP*, 250-55.

[142] NAACP Annual Meeting, 19 December 1914, NAACP Papers Microfilm Edition, Pt. I, Reel 1, Frame 340.

[143] Secretary's Report, 6 December 1915, NAACP Papers Microfilm Edition, Pt. I, Reel 1, Frame unnumbered.

[144] White also screened all requests for legal aid and wrote lengthy, detailed memoranda to the legal committee analyzing these requests and making preliminary recommendations. Before long, White began handling the legal committee's routine business and negotiations with local lawyers with a great deal of autonomy. Although White never held himself out to be a lawyer or represented any client before a tribunal, the amount of discretion and independence he exerted in the organization's legal affairs led him to function much like a junior lawyer under Spingarn's supervision, a delegation of legal authority to a non-lawyer that might have created problems in light of the legal ethics strictures prohibiting unauthorized practice, had anyone wanted to make an issue of it.

The level of legal responsibility White shouldered belied the legal committee's assumptions that African-American lawyers could not be trusted with control over the NAACP's most important legal matters, and signaled an early step in the gradual shift of the organization's legal leadership to African-American attorneys that began in earnest in the 1920s, see Meier and Rudwick, "The Rise of the Black Secretariat," 113, culminating in Charles Hamilton Houston's appointment as staff attorney in 1934, as discussed below.

traveled throughout the South "passing" as a white man in order to investigate lynchings and other civil rights violations--often placing himself at great personal risk. The NAACP thus had its hands full in the late 1910s assisting in cases in which defendants were treated unfairly because of race,[145] but its efforts in proactively engineering test litigation waned until the start of new campaigns in the mid-1920s, which are well described in the existing historiography on the NAACP.

THE BAR COMMITTEES

As we have seen, the NAACP was, in its earliest years, pursuing ambitious litigation strategies that differed markedly from traditional notions about how the litigation process should work. Whereas traditional notions assumed that legal disputes arose separate from and prior to the initiation of litigation, the NAACP's test case strategy depended on staging the best possible

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[145] One such case, *Moore v. Dempsey*, 261 U.S. 86 (1923), vividly highlights the contrast between the experiences of the NAACP's national staff and that of local lawyer-activists in the south. *See generally* Richard C. Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (Middletown, Connecticut: Weslyan University Press, 1988). The case arose when a group of African-American tenant farmers in rural Arkansas held a meeting in a church to raise money to start a tenants' association. The group invited the son of a white lawyer, U.S. Bratton, to the meeting to consult about their legal rights. A group of whites stormed the church and a shoot-out ensued, in which a white man was killed. The confrontation quickly escalated into a county-wide rampage that left more than 200 African-Americans and several whites dead. Nearly 90 African-Americans--but no whites--were indicted on murder charges. The lawyers involved in advising the tenant's organization nearly lost their lives. Bratton, Bratton's son, and Bratton's law partner (all whites) were indicted for the crime of "barratry" and barely escaped lynching by a white mob. When Walter White traveled to the scene to investigate the situation for the NAACP, he, too, barely escaped with his life after his identity as an NAACP staff person was discovered.

Thus, in stark contrast to conditions in New York City, where the national legal committee planned case strategies comfortable in its members' elite standing within the local bar, in rural Arkansas advising African-Americans of their legal rights was not only an indictable offense under the laws regulating lawyers' conduct, but also a cause for mob persecution, even for white attorneys.

White was not the only NAACP staff person to face this situation in the South in the final years of the decade. In 1919, in a move that foreshadowed tactics southern states would use against the NAACP after *Brown*, the state of Texas subpoenaed the records of the Austin NAACP branch and threatened to close down the organization, apparently because state officials had come across NAACP literature urging an end to public transit segregation. Kellogg, *NAACP*, 239-41. John Shillady, the white social worker who served as the NAACP's second national secretary, traveled to the state to meet with state officials in an attempt to head off such steps. There he was attacked and beaten unconscious by a group of men that included a judge and constable, who freely admitted their involvement. The NAACP was unable to find a local lawyer of high repute to file suit to seek redress for the assault, and Shilliday resigned soon afterwards, writing "'I am less confident than heretofore of the speedy success of the

facts for the purpose of *creating* litigation. Whereas traditional models envisioned lawyers sitting in their offices waiting for clients to bring legal matters to their attention (or, more realistically, bringing in business by networking within circles of acquaintances), the NAACP wanted to widely proselytize new causes of action, in order to reach potential plaintiffs who were strangers to the legal world and would not otherwise have been aware of their rights. Finally, whereas traditional models viewed litigation as resulting in judgments that would primarily affect the rights of parties before the court in the present and short-term future, the NAACP designed its litigation to try to affect the legal rights of all African-Americans, far into the future.

The traditional notions of litigation were embedded in the prevailing canons of legal ethics and related law. Some of the assumptions were apparent in the silences in the canons, the topics they did not address. The canons, for example, reflected almost no recognition that a lawyer's handling of a legal matter might have broad effects far into the future on persons or interests other than the immediate parties. The canons also failed to discuss the difficulties of reconciling competing interests among client groups. Other traditional assumptions were embedded in legal ethics prohibitions, including rules that barred lawyers from engaging in practices on which the NAACP's litigation model depended. These rules could have caused enormous difficulties for the NAACP's nontraditional litigation experiments. But its national legal committee did not balk at this problem because, I argue, its members had sufficient power within the local legal ethics enforcement community to adopt their own alternative interpretation of these rules without fear of censure.

Ethics enforcement

Association's full program.'" Ibid., 241 n. 130 (quoting "Opinion," *The Crisis* 20 (June 1920): 72).

The legal ethics rules applying to lawyers practicing in New York City in 1910 had their origins in the national model canons of legal ethics the ABA adopted in 1908.[146] The New York State Bar Association adopted these canons almost verbatim in 1909. In New York City, two bar associations vied for prominence in enforcing and interpreting legal ethics rules: the old-line Association of the Bar of the City of New York (ABCNY), founded in 1870, and the newly organized New York County Lawyers' Association (NYCLA), established in 1908.

The bar elite had organized the ABCNY in response to the Tammany Hall scandals that had implicated prominent corporate attorneys working for powerful clients in political corruption schemes.[147] The ABCNY defined its mission as catering to the uppermost strata of the bar; it had correspondingly exclusive, exclusionary membership policies. The NYCLA, in contrast, had an open membership policy. It had been founded for the same purposes of improving the profession as had the ABCNY, but sought memberships from any of the 12,000 members of the New York County bar. Four years after its founding, the NYCLA had a membership of 2,900, already surpassing that of the ABCNY, which had only 2,142 members in 1912.[148]

The two organizations split the jobs of enforcing and interpreting the state's 1909 canons of legal ethics. The ABCNY had a firm monopoly on enforcement. At its founding, the ABCNY

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[146] For general background on the 1908 canons, see Susan Carle, "Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons," *Law & Social Inquiry* 24 (1999): 1, 6-9.

[147] See generally George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870-1970* (1970; reprint, New York: Fordham University Press, 1997); Michael J. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* (New York: Russell Sage Foundation 1988); Alden Chester, *Courts and Lawyers of New York: A History, 1609-1925*, vol. 3 (New York: American Historical Society, Inc., 1925).

[148] Boston, "The Recent Movement Towards the Realization of High Ideals in the Legal Profession," in Report of the 35th Annual Meeting of the American Bar Association, Milwaukee, Wisc., August 27, 28, 29, 1912 (Baltimore: Lord Baltimore Press, 1912), 770-771.

had established grievance committees to hear complaints against its members. In the 1880s, these grievance committees began to assert jurisdiction to hear such complaints against all New York City lawyers, not only the ABCNY's members, and the New York courts had granted de facto recognition to the ABCNY's jurisdiction. The ABCNY thus accepted and investigated complaints from any source about any lawyer practicing New York City.[149] When it encountered cases it thought were well founded, it held internal hearings and recommended discipline. Although it had no formal authority to institute such discipline, it petitioned the New York courts to act and provided the court with a member of its grievance committee to prosecute the charges.

The membership of the ABCNY's grievance committee reflected the organization's elitist orientation. Its members' social class and educational credentials read very much like those of the first NAACP legal committee members, except that the grievance committee members were even more upper-class and homogeneous in their backgrounds.[150]

Even with committee members as volunteer prosecutors, the ABCNY's legal ethics enforcement operation was a significant drain on the organization's finances, but one its wealthy membership was willing to support.[151] By 1906, the grievance committee had hired a full-time attorney to oversee its ethics enforcement function; by 1912 it had expanded its staff to five full-time attorneys and several support staff, costing it $16,000 annually, approximately one quarter

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[149] On the process by which the ABCNY became the primary enforcer of legal ethics rules in New York City, see Martin, *Causes and Conflicts*, 352-61.

[150] For example, Howard Townsend, chair of the committee from 1901 to 1925, traced his first paternal American ancestor to 1643. Graduating from Harvard College in 1880 and from Harvard Law School two years later, Townsend had engaged in general practice in a variety of small-firm configurations. Townsend, an Episcopalian, served on a number of corporate boards and was active in a variety of philanthropic organizations.

[151] See *Addresses Delivered February 17th, 1920, and Historical Sketch Prepared to Commemorate the Semi-Centenary of the Association of the Bar of the City of New York* (New York: Association of the Bar of the City of New York, 1920), 22-23, 74-75.

of its yearly budget.[152]

At its founding, the NYCLA had aspirations of building a disciplinary operation much like the ABCNY's.[153] The newer, poorer organization quickly realized, however, that it could not penetrate the ABCNY's monopoly in this area.[154] It decided instead to devote most of its energies to "prevention rather than correction and penalizing."[155] To this end, the NYCLA established a committee to draft advisory answers to ethics questions submitted to it anonymously by members of the bar. Charles Boston chaired this NYCLA committee.

In theory, the difference in the membership bases of the ABCNY and the NYCLA should have given rise to significant differences in their legal ethics ideologies. Especially on the issues of solicitation and advertising, the less advantaged membership of the NYCLA could have been expected to support policies that permitted affirmative efforts to attract strangers as clients. Indeed, NYCLA members did engage in some grumbling on these matters, as will be discussed below. But in their formal, publicly issued opinions, the two organizations had remarkably similar approaches to all legal ethics questions--a fact probably attributable to the organizations' overlapping memberships, ABCNY members' dominance in NYCLA leadership positions, and NYCLA members' inability to arrive at sufficient consensus to give institutional voice to views

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[152] Powell, *From Patrician to Professional Elite*, 20-21; Boston, "The Recent Movement Towards the Realization of High Ideals in the Legal Profession," 768-69.

[153] See Charles Boston, *Address of Charles A. Boston, Esq. before New York County Lawyers' Association on the Proposed Code of Professional Ethics*, October 6, 1910 (New York: Chambers Printing Co., 1910), 63, 69-83 (proposing draft legislation to establish new legal ethics disciplinary boards).

[154] Charles Boston explained that, as "the younger and poorer of the two associations," lacking "the resources for vigorous prosecution," the NYCLA decided to turn "its attention largely to the ethical education of the Bar." Charles A. Boston, *Practical Activities in Legal Ethics: An Address before the Law Association of Philadelphia, November 14, 1913* (Philadelphia: The Law Association of Philadelphia, 1913), 5.

[155] Ibid.

dissenting from the ABCNY.

Thus, in their formal interpretations of the canons, both the ABCNY and the NYCLA held restrictive views about the scope of permissible practices on matters such as "stirring up" litigation, advertising, and solicitation. And both organizations rendered legal ethics opinions that might have posed difficulties for the NAACP.

Problematic precedents

The most problematic canon for the NAACP's litigation strategy was Canon 28, entitled "Stirring Up Litigation." Canon 28 defined it as "unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so."[156] Canon 28 had common law and criminal counterparts. These rules fell generally under the rubric of statutes prohibiting "barratry"[157] and took many forms, all aimed at

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[156] The full text of Canon 28 read as follows:

28. Stirring Up Litigation, Directly or Through Agents

> It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

American Bar Association Canons of Professional Ethics, Canon 28 (1908) (italics in original), reprinted in *Opinions of the Committee on Professional Ethics and Grievances with the Canons of Professional Ethics Annotated and the Canons of Judicial Ethics Annotated* (Chicago: American Bar Association, 1957), 25.

[157] See *Black's Law Dictionary*, 6th ed., s.v. "barratry," (defined as "[v]exatious incitement to litigation, esp. by soliciting potential legal clients"); see also Max Radin, "Maintenance by Champerty," *California Law Review* 24 (1935): 48-78.

prohibiting lawyers from "inciting" or encouraging litigation.

Other common law doctrines potentially of trouble to the NAACP included prohibitions against "maintenance" or "champerty," which were conceived of as offenses involving the "intermeddling" by a third party in a lawsuit by supporting or assisting a litigant in pursuing a legal claim.[158] Still other legal ethics norms derived from the common law included prohibitions against intermediaries becoming involved in legal relationships and prohibitions against non-lawyers practicing law. These doctrines were not yet codified in 1908 canons,[159] but were well accepted and cited as grounds for attorney discipline.

Such prohibitions against "stirring up" litigation, volunteering advice to bring a lawsuit, or acting as a third-party intermediary between a client and lawyer could have caused problems for the NAACP's test case litigation techniques. For example, organizing pairs of testers to descend on New York City's theaters to test compliance with anti-discrimination laws certainly gave rise to litigation where none would have existed otherwise. Similarly, the NAACP "created" a case when it sought out plaintiffs, planned a transaction, and then coordinated with the opposing side to orchestrate the facts leading to *Buchanan v. Warley*, as Holmes' unpublished dissent in that case complained. In these and many other instances, the NAACP's legal representatives conceived of and championed a dispute in order to bring about a lawsuit, conduct that at least technically ran afoul of rules prohibiting the encouragement or inciting of litigation. Similarly, the NAACP's national office's direction of lawyers in the field could have been

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[158] See generally Radin, "Maintenance by Champerty."

[159] As discussed in note 191 below, the ABA added a related set of such prohibitions to the ABA Model Canons in 1927, under Charles Boston's watch as the chair of a special ABA committee to recommend supplements to the canons.

viewed as intermeddling by a third party.

Canon 28 and related doctrines were not the only rules that could have caused problems for the NAACP's litigation experiments. Another was Canon 27, which sharply restricted lawyer advertising by providing that "solicitation of business by circulars or advertisements, or by personal communications, or interview, not warranted by personal relations, is unprofessional." This rule could have posed problems for the NAACP's many activities aimed at soliciting plaintiffs for its cases, including not only Brinsmade's and Nearney's practice of writing to strangers to offer the NAACP's legal services, but also NAACP legal representatives' practice of recruiting plaintiffs for test cases and speaking before groups to urge involvement with pending or anticipated litigation.

The ethics committees of both ABCNY and the NYCLA had considered cases arising under Canons 27 and 28 and related rules, and had strictly interpreted these ethical strictures. Such cases ran the gamut from straightforward "ambulance chaser" cases[160] to ones presenting scenarios analogous to the activities of the NAACP. One such case involved the ABCNY's successful initiation of disciplinary proceedings against a lawyer who had advertised his services in part as follows:

> Samuel E. Neuman, a white lawyer, who is a colored man's friend . . . accident, criminal, and matrimonial actions a specialty . . .

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[160] Prosecuting ambulance chasing was a major preoccupation of the New York bar associations in the period between 1900 and 1920, though the number of such cases remains unclear. Randolph E. Bergstrom, *Courting Danger: Injury and Law in New York City, 1870-1910* (Ithaca: Cornell University Press, 1993), 93. More reliable figures start with the late 1920's. In 1928, seventy-four lawyers were prosecuted for ambulance chasing, as the result of a special report into the practice filed with the New York courts. See Sidney Handler, *The Results of the Ambulance Chasing Disbarment Proceedings in the Appellate Division, First Department* (New York, n.d.) (listing cases and dispositions).

The ABCNY had Mr. Neuman suspended from practice for this advertisement.[161] On its view, advertising oneself to be a white lawyer who would take on cases for African-Americans violated both the Canons of Ethics and New York criminal law provisions barring advertisements to procure divorces.

In a similar case, the NYCLA disapproved of a lawyer placing such an advertisement in the program book for an event "given by citizens who are members of a single race to honor a distinguished man of their number."[162] The NYCLA reached a similar conclusion about lawyers advertising that they were willing to do legal work pro bono, disapproving the practice of a lawyer advertising that he would "handle a few deserving cases without a fee."

In opinion 199, an anonymous member asked the NYCLA committee whether "it [is] professionally improper for an attorney, voluntarily and unsolicited, to communicate to strange persons apparently ignorant of facts upon which claims of substantial right might be urged or prosecuted by them . . . without soliciting employment to prosecute such rights?"[163] The hypothetical further suggested that this might occur in a context in which "the government is about to collect an illegal tax--conceded by government officials to be illegal--simply because the tax payer did not know how to state his case."[164] NYCLA responded that, "for an attorney voluntarily and unsolicited to communicate to a stranger . . . facts within the knowledge of the

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[161] See *In re Neuman*, 255 N.Y.S. 438, 169 A.D. 638 (1915). Newman subsequently resigned from the bar after being charged with ambulance chasing as a result of the 1928 bar investigation mentioned in footnote160 above. See Handler, *Results of Ambulance Chasing Disbarment Proceedings*, 5.

[162] New York County Lawyers' Association Opinion [hereinafter NYCLA Op.] No. 50 (1914), in *Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers' Association* (New York: Columbia University Press, 1956), 540.

[163] NYCLA Op. No. 199 (1922), *Opinions of the Committees on Professional Ethics*, 632, 633-34.

[164] Ibid., 633.

attorney, upon which claims of substantial right might be urged or prosecuted, is tantamount to volunteering advice to bring a law suit and is comprehended within the condemnation of Canon 28."[165]

NYCLA similarly rejected a request that it approve a "not uncommon" practice by certain real estate lawyers "to notify property owners of their rights and to seek employment upon a contingent basis to enforce them."[166] The lawyers who submitted the question for advice had argued that this practice better served the interests of the property owners by allowing them to share expenses and achieve a "speedy and just termination of necessary litigation," and thus should not fall within the principles of Canons 27 and 28. But the NYCLA committee disapproved, finding the asserted reasons "insufficient to take the case out of the condemnation of solicitation by Canon 27."[167]

In still another case, the NYCLA was asked if it would be ethical for a lawyer to agree to serve as counsel for a company organized to investigate the rates charged by public service corporations. This lawyer's anticipated duties would be to advise patrons of overcharges and pursue their claims for adjustment or litigation.[168] The NYCLA responded that the lawyer's participation in this activity would be improper, reasoning that it would "constitute a device for systematically obtaining business for a lawyer, and for stirring up litigation for profit."[169]

In the early 1920s, both the ABCNY and the ABA followed the NYCLA in establishing

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[165] Ibid, 634.

[166] NYCLA Op. No. 244 (1926), *Opinions of the Committees on Professional Ethics*, 664-65.

[167] Ibid.

[168] NYCLA Op. No. 140 (1918), *Opinions of the Committees on Professional Ethics*, 592.

committees with jurisdiction to issue advisory opinions on matters of professional conduct. The first opinions of these committees read very much like those already discussed. The ABCNY opined that it would be "improper professional conduct" for an attorney retained by a stockholder to bring suit against a company to advertise for other stockholders similarly situated and request them to join with the client and contribute to the expense of such action.[170] When asked whether it would be "professionally proper for an attorney who has been consulted by several members of a club as to their legal rights" to address other members of the club who had not sought such consultations and to offer to represent them professionally, the ABCNY replied that "the proposed solicitation constitutes a breach of Canons 27 and 28."[171]

The ABA also decided that it would be unethical for an association of lawyers to write letters to men in the armed services advising them of a potential claim to back pay and offering to represent them on a contingency basis in recovering the monies owed them.[172] Another ABA advisory opinion found it "unprofessional" for lawyers employed by an automobile club to hold a meeting to speak to the club's membership to organize support and raise funds for litigation to challenge a new state licensing fee that would have adversely affected some of the club's

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[169] Ibid.

[170] Association of the Bar of the City of New York, Committee on Professional Ethics, ABCNY, *Questions as to Proper Professional Conduct Submitted to and Answered by the Committee from May 1925 to June 1926*, Pamphlet No. 2 (New York: Association of the Bar of the City of New York, 1925).

[171] Association of the Bar of the City of New York Opinion [hereinafter ABCNY Op.] No. 13, 30 January 1925, in *Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers' Association* (New York: Columbia University Press, 1956), 8.

[172] American Bar Association, Advisory Opinion [hereinafter ABA Op.] No. 4, 7 July 1924, in *Opinions of the Committee on Professional Ethics and Grievances with the Canons of Professional Ethics Annotated and the Canons of Judicial Ethics* (Chicago: ABA, 1931), 6-7.

members.[173] The same opinion also found fault with the club offering to its members legal services on ground that this might violate rules against intermediary associations practicing law.

In short, the NYCLA, the ABCNY, and the ABA all disapproved of practices in which lawyers served as advisors to groups or organizations established for the purpose of promoting individuals' abilities to pursue potential causes of legal action. The work of the NAACP's legal representatives was not so different from that of lawyers involved in organizations that were to advise utility rate payers of their rights and seek rebates for them for overcharges, or lawyers advising service members of the existence of a cause of action for back pay, or lawyers representing the members of an automobile club who wished to challenge legislation that adversely affected their interests. In all of these cases, the plan was that lawyers would work through an organization to help a group of individuals with a common interest or purpose seek redress for legitimate claims from the courts. In light of these precedents, the NAACP's similar strategies in finding and pursuing plaintiffs' claims in the civil rights arena could have presented substantial legal ethics difficulties.

Reconciling the rules and the NAACP's work

These considerations, however, did not stop the NAACP national legal committee from forging ahead with its litigation agenda. This fact gives rise to the question of what legal committee members such as Charles Boston were thinking about the application of traditional legal ethics strictures to the activities of NAACP. All evidence suggests that the legal committee members were enthusiastic about the NAACP's litigation strategies; it does not appear that these members simply failed to realize what the NAACP was doing. It is also clear that the NAACP's

[173] Ibid., ABA Op. No. 8, 28 April 1925, 17-21.

early lawyers were not oblivious to legal ethics issues. Hints such as Arthur's Spingarn's memo to Brinsmade and Nearney cautioning them against making first contacts to prospective plaintiffs suggest that the legal committee was aware of the ethics pitfalls the organization could face.[174] If the committee was not oblivious to legal ethics issues, how can we account for its members' seeming lack of concern about potential inconsistencies between the NAACP's litigation techniques and the legal ethics precedents discussed above?

Some indirect answers can be gleaned from Charles Boston's writings. Boston, we may recall, was the legal committee member who had started his law career as an in-house lawyer for a title insurance company. Boston was also the legal committee member most deeply involved in legal ethics enforcement in New York City, serving as chair of chair of the NCYLA's ethics committee and sitting on the ABCNY's Committee on Professional Ethics and ABA ethics committees as well.

Boston's abundant energies on the legal ethics front seem to have flowed from a sincere belief that the development of legal ethics codes would halt what he saw as the profession's increasing immorality. No legal realist on matters of legal ethics generally, Boston's writings give every indication that he was a moderate, conventional thinker of his times, who thought of legal and moral dictates as closely intertwined. Given his ardent loyalty to his ethics projects, it seems unlikely that Boston would have counseled an organization to disobey legal ethics dictates simply because it could probably get away with doing so. Some other explanation must account for his enthusiastic endorsement of the NAACP's litigation agenda.

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[174] Although there is little other material of this type in the NAACP's manuscript collections for the period at issue here, its absence may simply indicate that the organization's legal advisors were exercising appropriate caution in what they preserved for posterity.

That explanation can be found, I believe, through a close scrutiny of Boston's ethics writings in the 1910s. In that period, at least, Boston shows himself to have been surprisingly liberal, as compared with his contemporaries, on the very ethics issues that might have posed problems for the NAACP. Boston's positions on these issues in turn can be traced to his early professional background.

Boston revealed these positions in the course of a debate within the NYCLA over the 1909 canons' no-solicitation precepts. In 1910, the NYCLA had tried to draft its own proposed canons of legal ethics, and the indefatigable Boston had led the effort. The effort had broken down, however, in large part because the organization could not arrive at a majority position on the solicitation issue.[175] Although Boston tried to broker a pragmatic compromise among several schools of thought within the NYCLA on this issue, he failed in this mission.

In a report to the NYCLA, Boston summarized the positions that had been articulated within the organization. One member argued that all solicitation should be reprehended, a position Boston characterized as an "extreme view."[176] Another disapproved the condemnation of the practice of solicitation on the grounds that this practice was necessary to "every lawyer except a favored few."[177] Still another distinguished between "inducing a plaintiff to begin speculative litigation and the solicitation of those oppressed or attacked; but he thinks legal aid

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[175] See Charles Boston, "The Recent Movement Towards the Realization of High Ideals in the Legal Profession," 772 (explaining that his "proposed code now sleeps in a state of innocuous desuetude," opposed by those who, "in a commercial atmosphere, cannot yet accept the canons against the direct solicitation of business"); Charles A. Boston, *Address of Charles A. Boston, Esq. before New York County Lawyers' Association on the Proposed Code of Professional Ethics*, 15, 17-18.

[176] Boston, *Address of Charles A. Boston, Esq. before New York County Lawyers' Association on the Proposed Code of Professional Ethics*, 50.

[177] Ibid.

societies *solicit* . . . and . . . [that] the leading member of some firms make a practice of soliciting business, and that he is a mere runner."[178]

Boston was not one to see appeal in such logical analogies or extreme positions. Instead, he proposed a compromise to the NYCLA's membership. What he wanted was to break away from the blanket "no solicitation" rule of Canon 27 and instead to disapprove only the general "practice of solicitation."[179] Boston argued that Canon 27 was "aimed at the systematic solicitation of business, such a course as pursued by ambulance chasers," and that only this "systematized practice, akin to common barratry," should be condemned.[180] Thus, Boston suggested, the best course would be to "confine our condemnation to the employment of cappers or runners."[181]

In support of his proposal, Boston argued that "whether it is therefore necessary to condemn every act of solicitation, and even whether there is any *ethical* wrong in the *practice*, are different questions, yet to be disposed of."[182] This questioning of the "ethical wrong" in solicitation is surprising, because many legal ethics commentators of his generation conceived of the canons as manifestations of natural law.[183] It was thus unusual for someone in Boston's position to make a distinction between positive and moral law.

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[178] Ibid, 52 (emphasis in original).

[179] Ibid.

[180] Ibid., 51.

[181] Ibid. A runner "solicits business for an attorney from accident victims"; a capper is "a decoy or lure for purpose of swindling." *Black's Law Dictionary*, 6th ed., s. vv. "runner," "capper."

[182] Boston, *Address of Charles A. Boston, Esq. before New York County Lawyers' Association on the Proposed Code of Professional Ethics*, 50 (emphasis in original).

[183] See Carle, "Lawyers' Duty to Do Justice," 10-16.

Boston further revealed his open-mindedness in describing a situation presented by "one member of most excellent repute, who puts his own case before the Committee as not unethical, but a violation of the canon if adopted." This member, Boston reported, "makes a specialty of securing relief for those unjustly charged with public dues, and he diligently solicits that special employment. He confessedly violates the rules as stated, but argues that it is a just and proper practice, because it invariably results in the recovery of money unjustly collected."[184] Boston stated that he planned to submit this case to the committee for consideration, "for it raises the issue directly and presents a case which seems to be as free from objections as any of those condemned by the canon that could be suggested."[185]

Boston's position that the practice described was "as free from objection . . . as . . . could be suggested" appears not to have held sway with the full NYCLA ethics committee when it came to consider the question, however, as shown in its response to the similar query in Opinion 199, discussed at page 60 above. This opinion, indeed, is one of the only ones noted as not having been unanimous, and it is possible that, consistent with his earlier-stated opinion, Boston was a dissenting voice.

Boston also revealed himself to be a liberal on advertising issues, stating in his report that he thought that advertising "by general publication . . . that one does business at a specified place or devotes himself to a special line of practice or refers to work done or to people, is not in my opinion the solicitation of business, though it may bring business."[186] In this position Boston

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[184] Boston, *Address of Charles A. Boston, Esq. before New York County Lawyers' Association on the Proposed Code of Professional Ethics*, 53.

[185] Ibid.

[186] Ibid., 52.

again was out of step with the thinking of many of his peers.

These debates about advertising and other forms of solicitation had become tied to concerns that lawyers' monopoly on law practice was being encroached upon by intermediate "lay" organizations, including trust companies and title insurance companies, which advertised their services to potential customers.[187] Several members had made this connection in their comments, and these observations put Boston on the defensive. Boston had once had "been counsel for a Title Company and also for a Trust Company" himself.[188] He argued that, however much "some lawyers may resent their establishment," these types of organizations "supply an absolute need" and "it is no more improper to act as their counsel than as counsel for the veriest of the needy and oppressed."[189] Thus, Boston concluded, "I cannot agree that this canon [prohibiting advertising] condemns any one who is connected with them."

In short, the historical evidence reveals that, during the period of his service on the NAACP Legal Committee, Boston was unusually liberal on solicitation and related matters. He wanted to draw the line at stopping unseemly ambulance chasing but otherwise to refrain from condemning all acts that might be cast as solicitation. Boston's views on these matters were formed partly by his position as chair of the NYCLA legal ethics committee, in which capacity he was trying to broker a compromise among the different interests within the organization. His practice background, which included work for title and trust companies, also informed his position. Finally, although he does not say it, Boston's involvement with the NAACP may have

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[187] For a general analysis of the American bar's "turf wars" against "unauthorized practice of law" in response to encroachments by non-lawyers on lawyers' practice monopolies, see Abel, *American Lawyers*, 112-26.

[188] Boston, *Address of Charles A. Boston, Esq. before New York County Lawyers' Association*, 52.

[189] Ibid., 53.

influenced his perspective: during the same years in which he was unsuccessfully leading efforts to reform the NYCLA's rules on solicitation and advertising, Boston served as a consultant on Hawkins's test case challenge to the Baltimore residential segregation ordinance and urged the NAACP's Board of Directors to focus on the development of facts to show the law's "actual operation."[190] In any event, whatever his motivations, Boston's liberal positions were out of sync with those of his fellow committee members and his compromise was not adopted.[191]

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[190] See p. 1 above.

[191] Boston's involvement in legal ethics issues in the later years of the 1920s presents an interesting coda to the story just presented. In 1925, Boston became chair of a special ABA committee to consider amendments to the ABA's 1908 canons of legal ethics. That committee added several new canons, most importantly, one aimed at curtailing the practice of law by "lay intermediary" organizations. See American Bar Association, *Special Committee on Supplementing Canons of Professional Ethics, Annotated Canons* (Baltimore: Lord Baltimore Press, 1926). In Canon 35, which the ABA adopted in 1928, Boston's committee provided that the "professional services of a lawyer should not be controlled or exploited by any lay agency personal or corporate, which intervenes between the client and lawyer" and that the lawyer "should avoid all relations which direct the performance of his duties by or in the interest of such intermediary." Canon 35 further provided that "a lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs." The canon exempted charitable societies "rendering aid to the indigent" from these strictures, but otherwise drew no distinctions for public-minded representational activities.

Following adoption of Canon 35, the ABA added opinions to its existing interpretations disapproving of lawyers providing services to members of voluntary associations. In one such opinion, for example, the ABA decided that an attorney could not accept employment from a grange (*i.e.*, farmers) association to handle legal matters for its members. ABA Op. No. 56, 14 December 1931, *Opinions of the Committee on Professional Ethics*, 149.

The ABA did not reverse its position until 1935, when it found that a lawyer could properly offer over the radio to represent without compensation individuals who wished to join with a group of manufacturers, organized as "The American Liberty League," to challenge the constitutionality of the newly enacted National Labor Relations Act. The ABA concluded that this conduct fell within the exemption for charitable aid to the indigent, even though, as the committee recognized, some lawyers may not have been motivated "solely by altruistic motive," but most likely had business clients adversely affected by the legislation they sought to condemn. ABA Op. No. 148, 16 November 1935, *Opinions of the Committee on Professional Ethics*, 308-12. For a discussion of the background of this case, see Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995).

The 1928 Supplements cabined lawyers' practices in other ways as well. They provided, for example, that lawyers could not agree to bear the expenses of litigation for a client (Canon 42), and that lawyers' professional cards "may with propriety contain only a statement of his name . . profession, address, telephone number, and special branch of the profession practiced" (Canon 43). American Bar Association, Canons 42 and 43, reprinted in *Opinions of the Committee on Professional Ethics and Grievances*, 25.

There is no concrete evidence of Boston's views about these restrictive new additions to the ABA canons of legal ethics, which seem to contravene his earlier stated attitudes about advertising and organizational representation.

Boston's outlook in the 1910s on legal ethics matters of relevance to the NAACP provides an important clue in solving the puzzle as to why the members of the national legal committee did not object to the NAACP's litigation strategies on legal ethics grounds. The best answer to this puzzle, I believe, is that the inconsistency we perceive today between the NAACP's practices and traditional legal ethics rules had no meaning within the informal culture of the NAACP's first legal committee. Instead, Boston and his fellow committee members applied an interpretive gloss much like that which Boston had proposed, unsuccessfully, to the NYCLA: They regarded the conduct these rules sought to prohibit as only that having a pecuniary intent. Such a restriction on the scope of Canons 27 and 28 was not mentioned in the language of the rules and was not at the time supported by any authoritative legal ethics precedent. But it was arguably supported by the underlying purposes of those canons, which was to stop the "riff-raff" of the bar--*i.e.*, lower-class newcomers to the profession--from gaining entry into the profession, and to protect vulnerable clients from aggressive ambulance chasing as well.[192]

It is possible that the committee simply overrode his views, but in the flowery, 280-page treatise Boston wrote to accompany the proposed additions to the canons he makes no mention of disagreeing with the committee's positions. It is thus more likely that by the mid-1920s Boston's outlooks had become more conservative, in keeping with the general tenor of the legal profession and the nation as a whole.

It is also likely that Boston allowed himself to be influenced by his peers on the ABA Committee. On legal ethics and many other issues, the NYCLA had been a relatively liberal organization, but the ABA was a staunchly conservative organization. On the matter of race, for example, the ABA had displayed its reactionary tendencies in 1912, when it voted to revoke the memberships of three African-American attorneys after discovering their racial identity. As already mentioned, Moorfield Storey played a role in brokering an ineffectual compromise to this crisis, which allowed the three attorneys to retain their memberships but provided that all future applicants should be required to disclose their race. See Jerald Auerbach, *Unequal Justice*, 65-66; John Matzko, "The Early Years of the American Bar Association," 234-46. No African-American lawyer subsequently obtained admission to the ABA until the 1940s. In the 1920s the ABA was if anything even more reactionary. See John Matzko, "The Early Years of the American Bar Association," 435-94. In that setting, Boston's views may well have changed.

[192] On the monopoly-protecting purposes of these canons, see Auerbach, *Unequal Justice*; Abel, *American Lawyers*; Abel, "Why Does the ABA Promulgate Ethical Rules?"

This explanation accounts for why, for example, the ABCNY and NYCLA reacted so negatively to white lawyers of low professional prestige advertising their sympathies for "the colored man's" cause. Such an advertisement threatened to prey on the vulnerable position of African-Americans in the legal system, who often viewed white lawyers as better able to represent their interests before a judiciary tainted with racial bias but had difficulty finding white lawyers to represent them. Under these conditions, for a white lawyer to advertise for general business as a "friend of colored persons" suggested exploitative intent.

Similarly, concern with the potential for illegitimate profit clearly underlies at least some of the opinions applying rules against stirring up litigation. One of the NYCLA's early opinions specifically provides a gloss on Canon 28 as barring "stirring up litigation *for profit*."[193] On the other hand, it is less obvious that concerns about illegitimately profiting from case-generating activities drive the conclusions in other cases, such as that it would be illegal to advise persons of potential claims for back pay against the federal government. Moreover, the NAACP's activities in advising potential plaintiffs of civil rights claims or advertising their willingness to help African-Americans in civil rights cases could also have inured to the profit of certain lawyers. Thus, further explanation is needed to account for why the NAACP legal committee members did not concern themselves with Canons 27 and 28.

The further explanation required, I believe, is that Boston and his peers on the legal committee were comfortable in the face of these canons because the motives they were considering were their own, and they felt assured that these motives were beyond reproach. Equally important, they were confident that their peers in the bar associations charged with

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[193] NYCLA Op. No. 140 (1918) in *Opinions of the Committees on Professional Ethics*, 592 (emphasis added).

interpreting and enforcing legal ethics rules would reach the same conclusions. In these men's views, the NAACP's legal work was exempt from the legal ethics strictures enforced against others because the NAACP was acting solely in the "public interest"--their very presence on its legal committee vouched for this fact.

This world view was very much in keeping with the Progressive Era mentality that viewed the public good as unitary and consensual.[194] Absent from this mind set was our contemporary understanding of pluralistic politics--of "cause" litigation as a form of "representation enforcement."[195] To the optimistic Progressive Era mind set of the lawyers on the legal committee, legal solutions to social injustice were ascertainable through study and analysis--one's perspective did not vary depending on one's position in society. This universalist understanding of social justice translated into a sense of confidence about the reach of legal ethics rules. The purpose of these rules was to prohibit "bad" conduct, but not to interfere with "good," altruistically motivated endeavors. That there could be anything suspect about the legal committee members being the judge of these questions when their own conduct was at issue simply would not have occurred to them.

The implicit centrality of the distinction between pro bono legal activity and work for pecuniary gain also helps explain why the legal committee was so uncomfortable with lawyers

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[194] For classic literature examining the world view of Progressive Era reformers in this respect, see Arthur S. Link and Richard L. McCormick, *Progressivism* (Arlington Heights, Ill.: Harlan Davidson, Inc., 1983); Daniel Rodgers, "In Search of Progressivism," *Reviews in American History* 10 (1982): 10:113. See also Clyde Spillenger, "Elusive Advocate: Reconsidering Brandeis As People's Lawyer," *Yale Law Journal* 105 (1996): 1445, 1512 (discussing "characteristic Progressive confidence in defining the public good" and connection Brandeis drew between public interest work and not accepting fees); Carle, "Lawyers' Duty to Do Justice," 28 (discussing Progressive Era optimism in finding "right" answers to legal disputes of the drafters of first national model legal ethics canons).

[195] For a study analyzing the transition from a universalistic, rights-based to a pluralistic, representational conception of test case litigation, see Ernst, *Lawyers Against Labor*.

who sought to be paid for their legal work for the NAACP.[196] Using African-American activist-lawyers such as Gilchrist Stewart and Anthony Hawkins, lawyers whose economic circumstances made it difficult to undertake substantial legal involvements without financial remuneration, threatened to subject the organization to greater suspicion and scrutiny. In the minds of the legal committee's first members, preserving the NAACP's ethical purity was integrally tied, not only to associating itself with elite lawyers of impeccable credentials, but also to *dis*associating its agents from the prospect of pecuniary gain. In this respect, race and socioeconomic class reinforced each other as factors contributing to the exclusion of African-American lawyers from direction of the NAACP's legal strategy in its earliest years.

In other words, a picture of the NAACP's relationship to legal ethics enforcers in New York City in the first decades of the twentieth century captures the operation of social privilege, in this case, privilege along the axes of class, race, and professional standing. Just as Storey's reputation lent the NAACP social capital before the Supreme Court and in the public eye, the reputation of NAACP legal committee members such as Charles Boston, a leading legal ethicist of his time, lent the NAACP social capital in the legal ethics arena. While less elite white lawyers could be and were suspended for claiming to be "a colored man's friend,"[197] the NAACP legal committee members faced little concern about similar prosecutions. They instead went about experimenting with litigation techniques inconsistent with the legal ethics opinions of their local bar, comfortable in the protection provided by their elite professional standing.

In short, a micro analysis of the interaction of social power, practice norms, and freedom

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[196] See pp. 35, 36-36 above.

[197] See p. 60 above.

to engage in new forms of practice reveals the importance of power, operating around and outside formal rule-setting mechanisms, in setting the parameters for permissible legal practice. This observation in turn suggests a friendly critique to advocates of the "new legal process" approach to the study of ethics rules formation, which seeks to evaluate various institutions' comparative competence in regulating lawyer conduct.[198] This approach focuses on how the formal institutions that articulate and enforce legal ethics rules--government agencies, bar associations, courts, legislatures, and the like--drive lawyers' behavior. My study, in contrast, shows the way in which even the most informal institutions--here a scarcely articulated practice norm held by a tiny, localized elite practice culture--can modify or drive formally inscribed dictates, *if* held by practitioners possessing sufficient social and professional power.

My argument that the NAACP's national committee members enjoyed a privileged position vis-a-vis traditional legal ethics precepts in New York City in the 1910s is not intended to suggest any broader claim concerning the NAACP's relationship to legal ethics enforcement. To the contrary, it is clear, as described by Mark Tushnet and others, that the NAACP faced enormous legal ethics problems in other jurisdictions, especially in the South in the 1950s. In the epilogue below, I trace this subsequent history (drawing mostly from secondary sources, augmented in parts with primary research) in order to situate my work within the existing historiography of the NAACP.

EPILOGUE: THE 1930s AND AFTER

[198] The foundational article is David Wilkins, "Who Should Regulate Lawyers?," *Harvard Law Review* 105 (1992): 801-87. The application of new legal process methodologies to legal ethics is scholarship further explored in "Special Issue: Legal Process Scholarship and the Regulation of Lawyers," *Fordham Law Review* 65 (1996): 33-492. The general approach of new legal process analysis is described in Edward L. Rubin, "The New Legal Process, the Synthesis of Discourse, and the Micro analysis of Institutions," *Harvard Law Review* 109 (1996): 1393-1438.

Changing of the guard

By the 1920s, as August Meier and Elliott Rudwick have so eloquently documented, a shift in the racial balance of the NAACP's staff and legal committee was underway.[199] Growing numbers of expert African-American lawyers, such as James Cobb, a Washington, D.C., practitioner who was an authority in Supreme Court practice, debunked claims that African-American lawyers could not handle important constitutional law litigation. In 1922, Spingarn and Studin invited Cobb to join the national legal committee. Cobb accepted, becoming the second African-American lawyer to serve on that body.[200]

In the early 1930s, the Harvard-educated Charles Hamilton Houston began to impress the NAACP with his command of the courtroom.[201] In 1934, Houston joined the NAACP national staff as special counsel. From this point on, legal committee chair Arthur Spingarn became much less involved in the organization's legal affairs and control of the organization's legal work vested in Houston and later in Thurgood Marshall.[202]

This shift in the organization's legal leadership signaled an important change at the level of social power and symbolism. The difference can be illustrated by briefly comparing the biographies of Houston and Moorfield Storey. At one level, the two men appear similar: both held elite educational credentials, and both became known as the NAACP's foremost legal

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[199] See Meier and Rudwick, "Attorneys Black and White"; Meier and Rudwick, "The Rise of the Black Secretariat."

[200] Spingarn and Studin also tried, unsuccessfully, to convince Cobb to accept the position of staff counsel within the national office. Cobb declined because he did not want to leave Washington, D.C. Arthur Spingarn to James Cobb, 27 May 1922, A.B. Spingarn Papers-LOC, Box 6, Folder "Jan.-June 1922"; James Cobb to Arthur Spingarn, 14 June 1922, ibid.

[201] Meier and Rudwick, "Attorneys Black and White," 149-51.

[202] Mark Tushnet, *NAACP Legal Strategy*, 31-32.

advocates during their respective generations. But their lives in many ways stand in sharpest contrast. Although both attended Harvard Law School, their experiences there could not have been more different, a result not only of their class and race differences but also of the changing pedagogy and jurisprudence of the intervening fifty years. Whereas Storey "drifted pleasantly" through his two years of study there in 1866-67, engaged primarily in socializing at Boston high-society parties and clubs,[203] Houston was excluded on race grounds from the fraternities and clubs that provided the focus of law school social life. Storey spent almost no time on his studies; Houston, who carried the extra burden of having to disprove assumptions that his race would make him an inferior student, devoted almost all of his time to study.[204] Storey absorbed traditional jurisprudence with an emphasis on individual rights; Houston studied sociological jurisprudence with Roscoe Pound[205] and transformed its tenants into a vision of African-American lawyers as social engineers. This vision in turn motivated his work for both the NAACP and Howard University Law School as dean.[206]

Houston's early ethics encounters

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[203] Mark De Wolfe Howe, *Portrait of an Independent*, 36.

[204] Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*, 45-52.

[205] Houston's law school notebooks contain hundreds of pages of comprehensive notes, color-coded outlines, and abstracts of assigned articles and independent reading that would put any contemporary law student to shame. See Lecture Notes, Charles Hamilton Houston Papers, Box 163-5, folders 1, 3-5, 8-10, 16, 18, Moorfield-Spingarn Research Center, Howard University. Houston's notes from Roscoe Pound's courses reflect careful study of the professor's ideas, capturing Pound expounding, for example, on the "[j]urist's duty . . . to discover *the best means of conscious improvement*" of the law and to concern oneself "not with what law is but with what it does . . . with the legal order we are trying to achieve through law."

[206] Genna Rae McNeil, *Groundwork*, 217. After his graduation from Harvard Law School in 1923, Houston settled in Washington, D.C., going into practice with his father and teaching part-time at Howard, as his father had. Houston soon became Vice Dean at Howard, and began the efforts that would transform that law school from an unaccredited night school to a fully accredited institution dedicated to training African-American lawyers to become civil rights lawyers and social engineers. Ibid.

Houston's early legal experiences also contributed to his understanding of the NAACP's litigation challenges. One of Houston's first cases vividly demonstrated to him the potential consequences of being accused of legal ethics breaches as a lawyer for an unpopular cause. The case involved disciplinary proceedings the state of Maryland instituted against Bernard Ades, a white lawyer for the Industrial Labor Defense (ILD), an organization with strong Communist party sympathies that sought to combat racial and other forms of injustice in the courts by providing legal representation to defendants wrongly charged with crimes. Ades had allegedly pressed offers of legal services on several unwilling defendants, including Euel Lee, an African-American man who had been convicted of murder and sentenced to death. Another allegation was that Ades had convinced this client to bequeath his body to him and that Ades intended to give his client's body to the ILD to exhibit in a protest demonstration. The legal charges against Ades included improperly injecting himself into Lee's case for the purpose of asserting the views of the ILD rather than the interests of his client, stirring up litigation, solicitation of business, barratry, incitement of racial prejudice and making false statements about court officials to the media.[207]

The state of Maryland sought Ades's disbarment on these charges, but Houston, with assistance from Thurgood Marshall, then newly graduated from Howard Law School, successfully defended Ades from the charges that he had unlawfully solicited business and stirred up racial prejudice. Ades received only a reprimand for his conduct in connection with the disposal of his client's body and criticisms of the courts.[208] Houston later stated that he thought

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[207] See Complaint, *In re Ades*, Charles Hamilton Houston Papers, Box 163-36, Folder 15.

[208] See *In re Ades*, 6 F. Supp. 467, 482 (1934).

Ades was the best case he ever prepared.[209]

Although he could not have known it at the time, the precedent Houston set in *Ades* would become important when the NAACP clashed with legal ethics authorities in hostile southern states in the 1950s and 1960s. It was also important in demonstrating to Houston the NAACP's vulnerability to legal ethics charges in hostile jurisdictions. Indeed, Houston's correspondence reflects his concern with this matter from the time he took over the NAACP's legal operations.

Such concerns are reflected, for example, in 1937 correspondence between Houston and the chair of the Mobile, Alabama, branch of the NAACP. The branch had asked that the national office contact local school principals to urge "their cooperation in securing memberships and funds for promoting [a] proposed teachers' salary case here."[210] In his reply, Houston declined this request, explaining that it "is impossible for the National Office to do this because that would open us up to the charge of fomenting litigation." Houston further cautioned that "you, yourself, must be careful to see that whatever you do, you do not put down too much in writing"; it "is one thing to talk to the principals and an entirely different thing to write them." Houston suggested that the branch send the principals a copy of an article on teacher salary equalization from *The Crisis*, which would "give them the ways and means of going about the matter of protecting their rights but it will not be any solicitation to them." Houston ended by reiterating that his reaction did not reflect a "disposition to shirk on our part" but only concern that "we

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[209] Charles H. Houston to Walter White, 2 January 1940, Charles Hamilton Houston Papers, Box 163-25, Folder "Walter White 1940."

[210] Charles H. Houston to J.L. LeFlore, Mobile, Alabama, 14 October 1927, NAACP Records, Group I, Box 5-G, Folder "Mobile, Alabama, Oct.-Dec. 1937."

have got to watch out for every possibility of twisting the issues around so that we get ourselves in a jam."[211] Forwarding this reply to Thurgood Marshall, Houston attached a memo warning "[t]hese letters would be all that would be needed for an Alabama court to hold you in contempt or to cause you to be indicted for champerty."[212]

Attacks in the South

After Houston left his full-time position with the NAACP in 1938,[213] Thurgood Marshall, whom Houston had groomed to be his successor, assumed Houston's NAACP duties and turned his attention to the NAACP's school desegregation campaigns. Marshall brought to this job the same concern about the NAACP's vulnerability to legal ethics charges that Houston had displayed.[214]

In his compelling accounts of the NAACP's litigation against segregated schools, Tushnet documents the many ways in which Marshall sought to guard the NAACP from attacks on the legal ethics front.[215] Like Spingarn had many years before, Marshall strove to monitor the activities of local lawyers affiliated with the NAACP; like Spingarn, he sometimes succeeded and sometimes failed at this task. As Tushnet describes, the national NAACP ran into trouble at least once for supporting litigation when local counsel advanced living expenses to a plaintiff in

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[211] Ibid.

[212] Ibid.; see also Mark Tushnet, *NAACP's Legal Strategy*, 105 (describing Houston's concern that involvement in particular case might lead to charges of "trumped up" litigation).

[213] Houston left the NAACP to pursue advocacy on economic justice issues, a interest Houston found stifled at the NAACP. Houston litigation of civil rights issues against labor unions on behalf of African-American employees made foundational law on labor unions' duties of fair representation to the members. See, e.g., Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 193 (1944).

[214] Tushnet, *Making Civil Rights Law*, 274.

[215] Ibid., 153 (counseling branch office that it could not suggest that students initiate lawsuits).

a test case.[216] Indeed, fear about organizational liability for such possible legal breaches by its loosely controlled agents, especially cooperating lawyers in the field, was one factor in the NAACP's decision to split off its legal operations into a separate Legal Defense and Education Fund ("LDF") in 1939.

Despite Marshall's caution, the NAACP faced attack in Southern states for alleged violations of legal ethics strictures. These attacks began in earnest after the U.S. Supreme Court decided *Brown v. Board of Education* in 1954. The state of Texas sued the NAACP after local counsel sent out letters urging students to apply to segregated colleges and go to segregated parks in order to create the facts to file test cases.[217] In 1956, Texas had the NAACP Legal Defense and Education Fund enjoined against soliciting litigation anywhere in the state.[218] Five other southern states--Georgia, Mississippi, South Carolina, Tennessee, and Virginia--adopted stricter anti-barratry statutes aimed at curtailing the NAACP's activities within their borders.[219]

NAACP v. Button

The NAACP and LDF decided to challenge the stricter new anti-barratry statutes enacted by a number of southern states in the wake of *Brown* by filing declaratory judgment actions

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[216] Ibid., 372.

[217] Ibid., 272-73.

[218] Ibid., 372.

[219] Walter F. Murphy, "The South Counterattacks: The Anti-NAACP Laws," *Western Political Quarterly* 12 (1959): 371-90, 374; *Race Relations Law Reporter* 2 (1957): 892-94. These initiatives were part of a broad campaign to cripple the NAACP's post-*Brown* desegregation efforts, and included other legislative avenues as well, such as laws requiring political organizations to register and disclose their membership lists to the state, use of reporting and disclosure requirements under corporate and tax laws, and outright prohibitions against advocating school integration. See Murphy, "The South Counterattacks, 374-79: *Race Relations Law Reporter* 2 (1957), 892-94. Many of these statutes were struck down by federal courts on constitutional grounds. See, e.g., *NAACP v. Alabama,* 357 U.S. 449 (1958) (striking down a statute that required NAACP to turn over its membership lists to the state on grounds that this mandate violated members' constitutional right to "freedom of association").

against one such statute in federal district court in Virginia.[220] While the old Virginia law had forbidden only the solicitation of legal business by "runners and cappers,"[221] the new statute included a much wider criminal prohibition against such solicitation by any "agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability." Virginia's highest court upheld the constitutionality of this statute and concluded that certain of the NAACP's litigation activities violated this law and some ABA canons as well. In particular, the court said that the NAACP violated Canon 35, which restricted legal representation by lay intermediaries (and which Boston's ABA committee had added to the canons in 1928[222]), and Canon 47, a later addition that prohibited the "unauthorized practice of law."

The NAACP appealed the Virginia court's ruling to the U.S. Supreme Court and the Court twice held oral argument in the case. At the time, no one knew the reason for this unusual step, but Tushnet's research has revealed that the Court's decision would have come out the other way had it not been for the resignations of two justices--Charles Whittaker and Felix Frankfurter--between the 1961 and 1962 terms.[223] The first draft majority opinion, which Frankfurter wrote in 1961, concluded that "the state did not have to exempt the NAACP simply because its lawyers

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[220] See *NAACP v. Patty*, 159 F. Supp. 503 (E.D. Va. 1958). On the state's appeal to the U.S. Supreme Court, Justice Harlan wrote a majority opinion remanding the case to the district court with instructions to abstain from construing the contested portions of the Virginia's revised statutes until the state's courts had been given the opportunity to interpret them. See *Harrison v. NAACP*, 360 U.S. 167, 178-79 (1959). *Button* arose from the LDF's appeal from the state supreme court's unfavorable decision on remand. For greater detail on the procedural history of these cases, see Mark Tushnet, *Making Civil Rights Law*, 274-77.

[221] See note 67 above.

[222] See note 70 above.

[223] Tushnet, *Making Civil Rights Law*, 279.

were 'moved not by financial gain but by the public interest.'"[224] This would have been the outcome in the case had not the two new justices joining the Court in 1962, Byron White and Arthur Goldberg, altered the balance on the Court so that a majority voted in favor of striking down the statute.[225] Luckily for the NAACP, the new majority opinion came out the opposite way from Frankfurter's, adopting the very distinction between conduct engaged in for nonpecuniary interests versus pecuniary gain that LDF had advocated in its brief.

The Court's ruling in *Button* rested on the First Amendment, holding that "the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business."[226] Citing the ABA's advisory opinion in the Liberty League case,[227] the Court further held that "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of opponents of New Deal legislation during the 1930s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[228]

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[224] Ibid., 278 (quoting Draft opinion, January 1962, Frankfurter Papers, Harvard Law School, Box 164, Folder 4).

[225] White agreed with the majority that the state could not constitutionally prohibit "advising the employment of certain attorneys," but dissented in part because he agreed with some of Harlan's dissenting views about the dangers of control of litigation by lay intermediary organizations. See *Button*, 371 U.S. at 447 (White, J., concurring in part and dissenting in part).

[226] *Button*, 428-29.

[227] See note 191 above.

[228] *Button*, 429-30. The Court further acknowledged that its perspective was strongly influenced by a *realpolitik*

Closely tracking that brief and citing *Ades,* the legal ethics case Charles Houston had defended thirty years before, the Court announced that "regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest."[229] The Court reasoned that, since NAACP attorneys received very little compensation for their work, "there is no danger that the attorney will desert or subvert the paramount interest of his client to enrich himself or an outside sponsor."[230] Thus, the Court concluded, the NAACP's attorneys could not constitutionally be held to Virginia's antibarratry laws because the litigation activities in which they were engaged were being conducted for political, and not pecuniary, ends.

In a dissenting opinion, Justice Harlan, joined by Justices Clark and Stewart, accused the majority of ignoring a "formidable history" underlying rules against solicitation and intervention by lay intermediaries.[231] Harlan argued that, "although these professional standards may have been born in a desire to curb malice and self-aggrandizement by those who would use clients and the courts for their own pecuniary ends, they have acquired a far broader significance during their

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sense of the true purposes underlying Virginia's new statute, noting:

> We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens

Ibid., 435-36.

[229] *Button,* 440 (footnote omitted); cf. Brief for Petitioner, *NAACP v. Gray*, No. 61-44, 22-24, decided sub nom *NAACP v. Button*, 371 U.S. 415 (1963).

[230] *Button*, 443.

[231] *Button*, 456-57.

long development."[232] After citing ample case law in support of his point, Harlan concluded:

> underlying this impressive array of relevant precedent is the widely shared conviction that avoidance of improper pecuniary gain is not the only relevant factor in determining standards of professional conduct. Running perhaps even deeper is the desire of the profession, of courts, and of legislatures to prevent any interference with the uniquely personal relationship between lawyer and client and to maintain [it] untrammeled by outside influences.[233]

Post-*Button* cases

The *Button* distinction between protected attorney conduct, engaged in to further political interests worthy of First Amendment protection, and unprotected conduct of the same type engaged in for pecuniary aims, continues to drive the Supreme Court's legal ethics jurisprudence. In 1978, the Court reinforced the *Button* distinction in two companion cases decided on the same day. In *Ohralik v. Ohio State Bar Association*,[234] the Court upheld the state bar's prosecution of a personal injury lawyer for having engaged in unseemly behavior in aggressively soliciting two teenage clients involved in a car accident in violation of state bar rules prohibiting lawyers from soliciting clients. In *In re Primus*,[235] the Court invalidated South Carolina's prosecution, under disciplinary rules almost identical to those of Ohio, of an ACLU lawyer who had offered her services for free to a woman who had undergone involuntary sterilization. Distinguishing *Ohralik*, the Court in *Primus* explained, "This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance . . . [a]nd her actions

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[232] Ibid., 457.

[233] Ibid., 460.

[234] 436 U.S. 447, 468 (1978).

[235] 436 U.S. 412 (1978).

were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain."[236] The Court's analysis further relied on the parallels between the objectives, methods, and organizational structure of the ACLU and the NAACP, noting, for example, that in both cases the lawyers at issue were not expecting to obtain any personal financial reward from having taken the cases, but were instead "'organized as a staff and paid'" by the organization.[237]

Most recently, the Court has continued to adhere to this rationale in *Florida Bar v. Went For It, Inc.*,[238] in which it rejected a challenge to the constitutionality of state bar rules that prohibited lawyers from soliciting personal injury clients by mail within thirty days of an accident. Applying the standards applicable under its commercial speech doctrines, which accord lower levels of constitutional scrutiny to restrictions on commercial, as opposed to political, speech, the Court upheld the state bar rules on the ground that the harms the rules sought to prevent outweighed the infringement on attorneys' First Amendment rights.

In short, under the line of cases originating in *Button,* state bar rules against client solicitation cannot constitutionally be applied against lawyers organized into nonprofit "public interest" organizations pursuing social or political objectives, but continue to be enforceable against individual lawyers who represent clients--even, presumably, the same clients in the same cases--under contingency fee or fee for service arrangements. Thus, an informal practice norm adopted by a tiny group of elite lawyers in the 1910s became formally embodied in the law of the

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[236] *In re Primus*, 422.

[237] Ibid., 429 (quoting *Button*, 434 (Harlan, J. dissenting)).

[238] 515 U.S. 618, 635 (1995).

U.S. Supreme Court only after it was litigated half a century later.

From *Buchanan* to *Button*

Button generated some criticism, largely forgotten today. Most notably, civil rights commentator Derrick Bell, in his classic article, "Serving Two Masters," forcefully argued that the Court's exemption of public interest lawyers from certain legal ethics strictures harmed the purported beneficiaries of school desegregation litigation.[239] In words echoing Harlan's, Bell writes that "the 'divided allegiance' between client and employer which Justice Harlan feared would interfere with the civil rights lawyers' 'full compliance with his basic professional obligation' has developed in a far more idealistic and dangerous form," and that lawyers working for idealistic motives, rather than pecuniary ones, who most need ethical policing.[240] In Bell's words: "Idealism, though perhaps rarer than greed, is harder to control."[241]

Bell's article has in turn spawned an immensely thoughtful literature on the ethics of public interest practice.[242] That literature has lost sight, however, of Bell's identification of

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[239] Bell makes a persuasive case that civil rights lawyers took the wrong track in the post-*Brown* era in insisting on schools' racial balance over other goals related to improving African-American children's educational experiences. Bell claims that, if the "real" clients in these cases—the parents and children in whose names the cases were filed—had decided case strategy, they would have made very different decisions about remedial priorities than did the NAACP's national office, which directed a uniform, coordinated litigation plan insisting on full desegregation as the only permissible remedy. Derrick A. Bell, Jr., "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *Yale Law Journal* 85 (1976), 470, 504-505.

[240] Ibid., quoting *Button*, 460-62 (Harlan, J., dissenting).

[241] Bell, "Serving Two Masters," 504-05.

[242] Classics in this genre include Deborah L. Rhode, "Class Conflicts in Class Actions," *Stanford Law Review* 34 (1982): 1183-1262; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988), 341-57; Paul R. Tremblay, "Toward a Community-Based Ethics for Legal Services Practice," *UCLA Law Review* 37 (1990): 1101-56; Stephen Ellmann, "Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups," *Virginia Law Review* 78 (1992): 1103-73; Gerald P. Lopez, *Rebellious Lawyering* (Boulder: Westview Press, 1992); William H. Simon, "The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-modern, Post-Reagan Era, *University of Miami Law Review* 48 (1994): 1099-1114; Richard Delgado, "Rodrigo's Eleventh Chronicle: Empathy and False Empathy," *California Law Review* 84 (1996): 61-100; William B. Rubenstein, "Divided We Litigate:

Button as a juncture at which American conceptions of public interest law may have gotten on the wrong track. My research suggests a return to that question, especially with respect to the possible class and race implications of excluding all forms of fee-for-service representation from the definition of public interest practice. This is not the place to undertake a full examination of these issues,[243] but the questions one might ask include: Does the *Button* exclusion of all fee-for-service arrangements from the definition of public interest practice create a system dominated by those whose elite education, class, and other resources provide a safety net making employment at minimal compensation in nonprofit organizations feasible? Put otherwise, does the rigid distinction *Button* draws between public and private interest promote the practice of public interest law by the Moorfield Storeys of our profession but not by Gilchrist Stewarts and Anthony Hawkins? Finally, if client exploitation is the core concern underlying the *Button* line of Supreme Court cases, why not focus on that issue directly, rather than carving a distinction based on pecuniary versus nonpecuniary intent, yet another variant on the public/private distinction that has proved so unsatisfactory in other areas?[244] All of these are provocative,

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Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns," *Yale Law Journal* 106 (1997): 1623-81; Peter Margulies, "Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer," *Fordham Law Review* 67 (1999): 2339-76. A related literature on the ethics of individual client representation in the poverty law context has also emphasized the need for "collaborative" or "client-centered" lawyering that is sensitive to the expressed interests of clients and engages in a process of dialogue in lieu of lawyer domination. See, e.g., Robert D. Dinerstein, "Client-Centered Counseling: Reappraisal and Refinement," *Arizona Law. Journal* 32 (1990): 501-604; Binny Miller, "Give Them Back Their Lives: Recognizing Client Narrative in Case Theory," *Michigan Law Review* 93 (1994): 485-576; Lucie E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Meaning of Mrs. G.," *Buffalo Law Review* 38 (1990): 1-58.

[243] For a preliminary attempt at addressing some of these questions, see [author identity removed] (symposium essay forthcoming by author).

[244] Examples of the large literature deconstructing the public/private distinction include Adrienne D. Davis, "The Private Law of Race and Sex: An Antebellum Perspective" 51 *Stanford Law Review* (1999): 221- 88 (showing how private law played at least as significant a role as public law in defining race and sex relationships in antebellum period); Jody Freeman, "The Private Role in Public Governance," *New York University Law Review* 75 (2000): 543-

difficult questions raised by an examination of the ways in which legacies of class and professional power are embedded in our contemporary legal ethics norms, including conceptions of public interest law practice.

CONCLUSION

The NAACP's litigation campaigns on behalf of African-American civil rights are essential to understanding U.S. lawyers' use of the courts to achieve social justice aims. But that story has thus far been told with very little focus on what the NAACP's nontraditional litigation techniques meant to traditional views of the litigation process as embodied in formal legal ethics pronouncements. In this article I have taken that perspective by exploring the intersection between the NAACP's legal work and the traditional legal ethics rules being enforced by bar associations in the jurisdiction from which the NAACP's first national legal committee operated.

My account of how the Court moved from *Buchanan* to *Button* contributes a missing chapter to a far larger, complex story about the transformation of American jurisprudence and legal practice during the first decades of the twentieth century. That story includes the shift from the *a priori*, individualistic approach of late nineteenth century jurisprudence to the consequentialism and group orientation of Legal Realism, the lowering of rigid procedural and jurisdictional bars to class actions and other nontraditional forms of litigation, and the replacement of notions of a consensual "public interest" with ideas of interest group pluralism. Another aspect of these transformations, I have suggested, involved a rethinking of traditional

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675; Julius Getman, "Labor Law and Free Speech: The Curious Policy of Limited Expression," *Maryland Law Review* 43 (1984): 4-22 (criticizing use of public/distinction to curtail free speech rights in labor context); Frances Olson, "Constitutional Law: Feminist Critiques of the Public/Private Distinction," *Constitutional Commentary* 10 (1993): 319-27 (presenting basic feminist critique of public/private distinction); see generally "A Symposium: The Public/Private Distinction," *Pennsylvania Law Review* 130 (1982): 1289-1608.

legal ethics strictures--a process that began with a small group of elite practitioners' adoption of informal practice norms in the 1910s that exempted their own activities from ethics rules they were enforcing against others.

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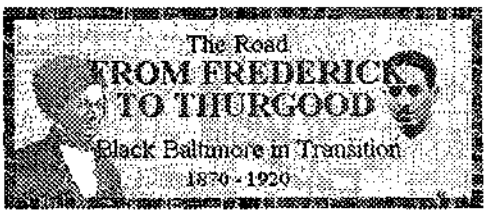

W. Ashbie Hawkins:

1861-1941

Hawkins led the fight against segregation in the 1910s

William Ashbie Hawkins exemplified the new Negro of the twentieth century. A beneficiary of higher education and a man of achievement, he ran straight up against the obstacles to advancement and did not give way.

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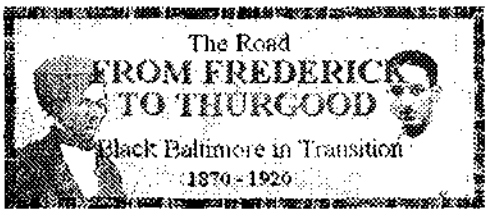

W. Ashbie Hawkins:

Obituaries

Ashbie Hawkins, Attorney for 50 Years, Dies at 78

BALTIMORE

William Ashbie Hawkins, 78, who has practiced law here for the past 50 years and was for many years one of the leading lawyers in the State, died early on Thursday morning in Provident Hospital where he had been confined for seven months.

Mr. Hawkins had been suffering from a kidney and heart ailment for the past four years. Funeral services were held on Saturday at 2 p.m., at his home, 929 Arlington Avenue, Govans.

Rev. Mr. Coates Officiates

The Rev. Hubert F. Coates, pastor of Sharp Street Memorial Methodist Church of which he was a lifelong member and where he served as trustee for the past 32 years, officiated, assisted by the Rev. C. Y. Trigg, pastor of Metropolitan Methodist Church. Interment followed in Mt. Auburn Cemetery.

Mr. Hawkins was born on August 2, 1862, in Lynchburg, Va., the son of the late Rev. Robert and Mrs. Susan Cobb Hawkins. He came to Baltimore while a young man and studied at Morgan College where he was graduated in 1885. The school conferred an honorary M.A. on him in 1918.

He took his law training at the Maryland University which later became the University of Maryland, graduating in 1891; taught in the public schools from 1885 to 1892, and at the same time he was doing further study at Howard University Law School, where he was awarded his bachelor of law in 1852.

Champion of Right

Mr. Hawkins took up his law practice in Baltimore the same year, and during his career was prominent in championing the cause of the colored people of the State.

For a number of years, Mr. Hawkins was counsel to the local branch of the NAACP, and he also served as counsel for the AFRO-AMERICAN Newspapers.

He was married twice, his first wife was the late Mrs. Ada M. McMechen Hawkins, whom he married in 1885. Of this union there were two children, Mrs. Alethia Haynes, who died last year and Mrs. Roberta M. B. West, who survives.

He was married to his second wife, Mrs. Mary E. Sorrell Hawkins who survives in 1921. There were no children of this union. Besides his wife, and daughter, he is survived by three sisters, Mrs. Susie Blythe of Jersey City, N.J., Mrs. Clara Johnson of Philadelphia, Mrs. Mamie Simms of Chicago and two grandchildren.

Baltimore *Afro-American*, April 12, 1941

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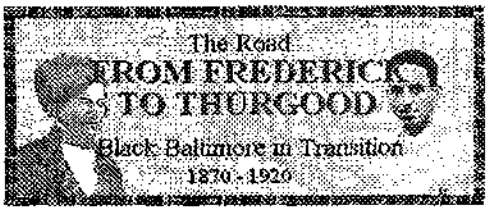

W. Ashbie Hawkins:

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Check census records

Smithsonian
National Museum of Natural History

Department of Anthropology

The Identity of Red Thunder Cloud

by Ives Goddard

[This article appeared in the April 2000 issue of the *Society for the Study of Indigenous Languages of the Americas Newsletter* and is reprinted here by courtesy of the Society.]

Dr. Ives Goddard (l.) of the Smithsonian Institution's Department of Anthropology interviews Red Thunder Cloud (r.) about his writings and Indian medicines on display at the Oktoberfest street fair on South Main Street, Providence, R.I., October, 1981.
(Photo by Moses Goddard)

Red Thunder Cloud, whose death on January 8, 1996, was widely noted as also being the death of the Catawba language, was one of the most colorful and enigmatic figures in American Indian linguistics in the twentieth century. His claim that he was a Catawba and a native speaker of the language, doubted by some and defended by others, can now be definitively evaluated. But while enough information is now available to give a good picture of who he was and where he came from, his life and his work still raise challenging and fascinating questions.

Red Thunder Cloud introduced himself to Frank G. Speck, Professor of Anthropology at the University of Pennsylvania, in a letter of May 14, 1938. He states that he is "a 16 year old Catawba Indian and a Junior at Southampton High School" on Long Island.[1] He guesses that he was a "little fellow" when Speck visited the Catawbas (whose reservation was in Rock Hill, South Carolina), but says that "as a very young boy I was brought up among the Narragansett Indians of Rhode Island. I have only been living with the Shinnecocks since July 27, 1937." He says that he has studied American Indians since he was in the fourth grade and has visited many eastern groups, including several in Virginia, "though I was a tot when I visited some of them." He reports plans to leave in August "for my home down on the Catawba Reservation" in South Carolina, and then to

travel to Haskell Indian Institute in Lawrence, Kansas. He mentions the interest of Shinnecock Indians on Long Island in learning about their language and his desire to help them in this, referring to a letter from Speck to a Shinnecock named Running Eagle replying to inquiries on this subject. He says that he intends to obtain a copy of Gatschet's Catawba sketch and inquires about the price of a "vocabulary" that he understands Speck has published.[2] "Fortunately for us the Catawbas our language is not entirely lost. Besides the lady you mentioned in your letter [*sc.* to Running Eagle] I think that there are two others of our tribe who still speak the language down to Catawba." He makes no claim that he knows any Catawba and does not refer to any member of his family. He signs himself "Chief Red Thunder Cloud."

When Frank T. Siebert, Jr., was doing fieldwork on Catawba in April, 1941, a local schoolteacher told him of receiving correspondence from Red Thunder Cloud, who claimed to know the language. A month later Siebert met him at the Gramercy Boys' Club in New York. Siebert often recalled his surprise on being approached by what appeared to be a young black man wrapped Indian-style in a blanket. In two or three hours of elicitation he obtained a couple of dozen Catawba words and somewhat fewer numbers, covering slightly more than three pages of a small exam book. His recollection years later was that Red Thunder Cloud knew considerably more than this, "between 100 and 250 words, ... numeral count up to ten, and occasional short expressions." Red Thunder Cloud also told him two traditions, one of tying buffalo hoofs to the feet to lure enemies into an ambush, and one of using rattlesnake venom on pine needles as booby traps. He said he had learned Catawba from his grandmother, Ada McMechen (Blue Moccasin), who had died about 1924. Siebert thought that he might have remembered some Catawba from his grandmother but had supplemented his recollections from published materials. He considered a Catawba-speaking black grandmother possible, since Sally Brown Gordon had reported once meeting in a market in Charlotte, North Carolina, a black woman who spoke good Catawba. But Siebert recognized the two war practices Red Thunder Cloud described as the same ones attributed to the Catawbas of the 1750's in James Smith's captivity narrative.[3]

Beginning in 1938, Red Thunder Cloud worked for Speck on small projects collecting ethnographic data and folklore among Long Island Indians, and he received from him some training in "field methods of recording notes etc." He also collected among the Montauk, Shinnecock, and Mashpee for George G. Heye (Museum of the American Indian) and for the American Museum of Natural History.[4] During this period he also published several papers on Long Island ethnography and folklore, and he amassed a large collection of photographs of Long Island Indians.[5] In December, 1943, he spent two weeks at Penn "furnishing information about the ... language of the Catawba tribe," recording songs, and aiding in ethnobotanical research. A statement that he "assisted Speck in informant courses" at Penn implies additional informant work, which a vita he prepared in 1973 refers to as "dictat[ing] ... Catawba Texts to Anthropology Classes," but Speck seems never to have published any linguistic data from him.[6] Also in 1943, he told Speck the tradition regarding the use of rattlesnake venom, crediting it to his grandmother Ada McMechen, who had "learned it from her grandmother, Mildred Harris, a woman who died sometime before 1900 at the age of 99. Both women were of Catawba descent."[7]

With a letter of introduction from Speck, Red Thunder Cloud made his first visit to the Catawbas, for about two weeks, in February, 1944. Later, most likely in 1945, he spent about six months studying the language intensively with Sam Blue and Sally Gordon, as recalled by Sam Blue's grandson, Chief Gilbert Blue. In defending Red Thunder Cloud's reliability as a fieldworker in 1946, Speck stated that "he speaks Catawba, as we know for a certainty."[8] When interviewed in 1957 by William C. Sturtevant (then of the Bureau of American Ethnology and now of the Dept. of Anthropology, Smithsonian Institution), Sam Blue and his daughter-in-law Lillian said that they doubted Red Thunder Cloud was an Indian. Sam Blue thought that he had learned the few words of Catawba that he knew from Speck's books. In a letter to Speck written after his return, Red Thunder Cloud defended himself against this suspicion.[9]

Red Thunder Cloud introduced himself to Sturtevant in a 1958 letter offering aid in contacting eastern Indian groups and survivors, including three speakers of Wampanoag: "My mother is a Catawba Indian and my father a native of Tegucigalpa, Honduras of Honduran and Puerto Rican parentage. I speak Catawba, Spanish and Pourtegeese and am able to find myself in Cayuga, Seneca, Mohawk, Narragansett, Micmac, Passamaquoddy, Penobscot, Creek and have some smattering of Choctaw, Sioux, Winnebago in addition to being able to recognize some of the other Indian languages when I hear them spoken."[10]

In 1964 and 1965 Red Thunder Cloud worked with G. Hubert Matthews, then at MIT, to document the Catawba language. Their 1967 publication of five texts (two dated to February, 1944) included information on Red Thunder Cloud's family history and a genealogy that indicates which relatives (all on his mother's side) were Catawbas and which of these spoke Catawba. His full name is given as Carlos Ashibie Hawk Westez. His father is Carlos Panchito Westez, and his mother is Roberta Hawk. His father's parents are Teodoro Sanchez (from Honduras) and Feliciana Mendoza (from Puerto Rico), and his mother's parents are William Ashibie Hawk (a Catawba speaker, son of Robert Hawk and Susan Scott Cobbs) and Ada McMechen (not a speaker, daughter of George McMechen and Mildred Harris). Earlier generations on his mother's side are also given. In defending the authenticity of Red Thunder Cloud's Catawba to C.F. Voegelin, the editor of the *International Journal of American Linguistics*, Matthews referred to the genealogy as one that Sam Blue and Red Thunder Cloud "were able to work out" and which "linked him with Catawba that Chief Blue knew." Red Thunder Cloud specifically claimed that he had learned Catawba from his mother's father, also called Strong Eagle, a lawyer who graduated from Yale Law School and died in 1941. He gave his mother's Indian name as Singing Dove.[11]

daughter of Ashibie + Ada

? McMechen graduated from Yale was related

Red Thunder Cloud was frequently mentioned in local media. He once sued the town of Southampton for $100,000 for "damages to the cultural development of Catawba Indian language" after the town dog warden destroyed nine of his dogs, which he had taught Catawba commands. Some of his activities, with further references, are described in the obituary and the note on media reports by Victor Golla in *SSILA Newsletter* 15.1:2, 4-5 (1996). He was a familiar figure at local fairs in New England, selling a line of herbal medicines under the name "Red Thunder Cloud's Accabonac Princess American Indian Teas" ("fresh from the American forest to you"). He also reported that he had "rescued

some Montauk vocabulary from oblivion," and sometimes claimed to speak Montauk.[12] He was married for a time to Jean Marilyn Miller (Pretty Pony), said to be a Blackfeet, who appeared with him at powwows and other presentations.

On his death certificate, based on information provided by his friend Leonor Peña of Central Falls, R.I., his name is given as Carlos Westez (with aliases Red Thunder Cloud and Namo S. Hatirire) and his occupation as "Shaman." He is described as having been born in Newport, R.I., May 30, 1919, the son of Cromwell West and Roberta (Hawk) West. In the subsequent probate documents, his sister, a retired member of the faculty of the University of Maryland at Baltimore, appears as administrator, and his name is given as Ashbie Hawkins West, the name under which he had been enrolled in high school (with a recorded birth date of May 30, 1922) in the year he wrote to Speck and by which he was first known to the Shinnecocks.[13] In fact, his full name at birth was Cromwell Ashbie Hawkins West. He was enumerated as Cromwell A. West in the 1920 census and used the name Cromwell West when he was employed at the Newport City Wharf, 1935-1937, as a watchman and later a chauffeur. His father was Cromwell Payne West, a drugstore proprietor in Newport 1917-1937, who is listed in the 1900 and 1920 censuses as a black man born in Pennsylvania in 1891. By 1894 his father's father, Theodore D. West (born in Virginia), and his father's mother, Elizabeth R. West (born in Pennsylvania), had moved with his father to Newport, where his grandfather worked as a barber (or "hairdresser").[14] From about 1929 to 1933 Roberta West was not listed as being in Newport, and Leonor Peña believes that during this time she lived with her children in North Carolina, near the Catawba Reservation.[15]

The name Carlos Ashibie Hawk Westez is a transparent modification of the name Cromwell Ashbie Hawkins West, given that the father's name in the 1967 genealogy is Carlos Panchito Westez instead of Cromwell Payne West. If everywhere in this genealogy Ashibie is changed to Ashbie, Hawk to Hawkins, and Westez to West, it becomes on the mother's side the genealogy of Roberta West, who was born Roberta M. Hawkins in Baltimore in 1891. (She also used the names Roberta M.B. West and Roberta C. West.) Roberta Hawkins' father was William Ashbie Hawkins (1862-1941; LL.B. Howard Law School, 1892), one of the first black lawyers in Baltimore and a prominent civic leader, born the son of the Rev. Robert Hawkins and Susan (Cobb) Hawkins in Lynchburg, Va. Her mother was born Ada M. McMechen (/məkmékən/), the daughter of George H. and Mildred McMechen of Wheeling, W. Va. George H. McMechen's occupation is given as "plasterer" and "mechanic." Ada McMechen Hawkins' younger brother, George William Frederick McMechen (1871-1961; B.A. Morgan College, 1895; LL.B. Yale Law School, 1897), Ashbie Hawkins' law partner, was another prominent member of Baltimore's black community; the business and economics building at Morgan State University in Baltimore is named for him.[16]

Red Thunder Cloud also mentioned that he had a cousin Gerald Brown (Running Beaver; d. 1952) who spoke Catawba, the son of his mother's sister, Hazel Hawk, and William Brown. Roberta West had a sister Aldina Haynes (d. 1940), who briefly lived in Newport under the name Aldina H. Brown in the 1930's, but W. Ashbie Hawkins' 1941 obituary mentions only two grandchildren, who were presumably Red Thunder Cloud and his sister.[17]

Cromwell Ashbie Hawkins West's life as Red Thunder Cloud confronts us with basic questions of race and identity that are emblematic of our age.[18] His successful life-long masquerade puts him in a class with the Englishman who was the Ojibway Grey Owl (1886-1936) and the African American who was the Blackfoot Buffalo Child Long Lance (d. 1932), both the subjects of films. But Red Thunder Cloud's accomplishment in becoming a speaker of Catawba puts him outside the class of ordinary impostors, and the not insignificant work he did on Catawba leaves us as linguists with challenging problems of interpretation and evaluation.

Sources:

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[5] "Surviving Folktales and Herbal Lore Among the Shinnecock Indians of Long Island," *Journal of American Folklore* 58, 1945; "A Study of the Long Island Indian Problem," *Bulletin of the Massachusetts Archaeological Society* 5(2):17-19, 1944; "An Ethnological Introduction to the Long Island Indians," *BMAS* 6(3):39-42, 1945; "A Selection of Montaukett Indian Photographs: Red Thunder Cloud Collection," *The History and Archaeology of the Montauk Indians*, Suffolk County Archaeological Association (Lexington, Mass., 1979), pp. 203-218.

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[9] W.C. Sturtevant fieldnotes, interviews with Sam Blue and Lillian Blue, July 30 and 31, 1957.

[10] Letter, Red Thunder Cloud to W.C. Sturtevant, October 25, 1958.

[11] "Indian Aids Linguist in Catawba Studies," *New York Times*, February 28, 1965; Matthews and Red Thunder Cloud, p. 7; letter, G.H. Matthews to C.F. Voegelin, April 12, 1966; "Field Chief Red Thunder Cloud," *The East Hampton Star*, March 25, 1971; Moses Goddard, slides taken October, 1981, Providence, R.I.

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[13] Worcester County, Mass., Probate Court; Worcester Vital Records Office; Faculty records, University of Maryland at Baltimore; Southampton High School student records; letter, John Strong to W.C. Sturtevant, November 23, 1993.

[14] Division of Vital Records, Rhode Island Department of Health; *Newport Directory*, 1899-1901, 1917-1937; Twelfth Census of the U.S., 1900; Fourteenth Census of the U.S., 1920. (When contacted, Red Thunder Cloud's sister declined to be interviewed about herself or brother, and none of the information in this note was obtained from her.)

[15] Leonor Peña, p.c.

[16] *Who's Who of the Colored Race* 1:132-33, 1915; "Ashbie Hawkins, Attorney for 50 Years, Dies at 78," *Baltimore Afro-American*, April 12, 1941; "Rites Set For McMechen, First Graduate of Morgan," *Baltimore Sun*, February 25, 1961; "George McMechen dies, rites held last Sunday," *Baltimore Afro-American*, March 4, 1961; Tenth Census of the U.S., 1880; Roger W. Tuttle, ed., *Biographies of Graduates of the Yale Law School, 1824-1899* (New Haven, 1911); "The Road from Frederick to Thurgood," on-line research project of the Maryland State Archives.

[17] Matthews and Red Thunder Cloud, pp. 7-8; *Newport Directory*, 1933-1934; n. 16.

[18] *E.g.*, U.S. Census 2000, questions 7 and 8.

(This report owes much to information from Edmund S. Carpenter and William C. Sturtevant, including extensive files, and was greatly facilitated by the assistance of Andrew Boisvert and other staff of the Rhode Island Historical Society; Phyllis Waters, University of Maryland Archives; Richard Behles, University of Maryland at Baltimore; Vivian Fisher, Morgan State University; Robert S. Cox, APS; Martin J. Hackett, University of Pennsylvania Archives; Thomas Blumer; Wes Taukchiray; and others acknowledged in the sources.)

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Cincinnati NAACP

92 years of m democracy

Cincinnati, Ohio Chapter of the NAACP 2500 Kemper Lane, Cincinnati, Ohio 45206 5 1900

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How the NAACP Began

By Mary White Ovington (As originally printed in 1914)

The National Association for the Advancement of Colored People is five years ol it is believed, to have a history; and I, who am perhaps, its first member, have be person to recite it. As its work since 1910 has been set forth in its annual reports. my task to show how it came into existence and to tell of its first months of work.

In the summer of 1908, the country was shocked by the account of the race riots Illinois. Here, in the home of Abraham Lincoln, a mob containing many of the tow citizens," raged for two days, killed and wounded scores of Negroes, and drove the city. Articles on the subject appeared in newspapers and magazines. Among the Independent of September 3d, by William English Walling, entitled "Race W. After describing the atrocities committed against the colored people, Mr. Wallin

> " Either the spirit of the abolitionists, of Lincoln and of Lovejoy must be re we must come to treat the Negro on a plane of absolute political and socia or Vardaman and Tillman will soon have transferred the race war to the N

And he ended with these words,"Yet who realizes the seriousness of the situatior and powerful body of citizens is ready to come to their aid?"

It so happened that one of Mr. Walling's readers accepted his question and answ years I had been studying the status of the Negro in New York. I had investigate conditions, his health, his opportunities for work. I had spent many months in the the time of Mr. Walling's article, I was living in a New York Negro tenement on a And my investigations and my surroundings led me to believe with the writer of "the spirit of the abolitionists must be revived."

THE NAACP IS BORN

So I wrote to Mr. Walling, and after some time, for he was in the West, we met in first week of the year of 1909. With us was Dr. Henry Moskowitz, now prominent administration of John Purroy Mitchell, Mayor of New York. It was then that the N Association for the Advancement of Colored People was born.

It was born in a little room of a New York apartment. It is to be regretted that the minutes of the first meeting, for they would make interesting if unparliamentary Walling had spent some years in Russia where his wife, working in the cause of t had suffered imprisonment; and he expressed his belief that the Negro was treat inhumanity in the United States that the Jew was treated in Russia. As Mr. Walling we listened with conviction. I knew something of the Negro's difficulty in securin employment in the North and of the insolent treatment awarded him at Northern restaurants, and I voiced my protest. Dr. Moskowitz, with his broad knowledge c among New York's helpless immigrants, aided us in properly interpreting our fa

talked and talked voicing our indignation.

LINCOLN'S BIRTHDAY

Of course, we wanted to do something at once that should move the country. It w not choose Lincoln's birthday, February 12, to open our campaign? We decided, wise, immediate action would be the issuing on Lincoln's birthday of a call for a r conference on the Negro question. At this conference we might discover the bec of that "large and powerful body of citizens" of which Mr. Walling had written.

And so the meeting adjourned. Something definite was determined upon, and ot to call others into our councils. We at once turned to Mr. Oswald Garrison Villar the N.Y. Evening Post Company. He received our suggestions with enthusiasm, a securing the co-operation of able and representative men and women. It was he Lincoln's birthday call and helped to give it wide publicity. I give the Call in its e signatures since it expresses, I think, better than anything else we have publishe those who are active in the Association's cause.

"The celebration of the Centennial of the birth of Abraham Lincoln, widespread a may be, will fail to justify itself if it takes no note of and makes no recognition of t and women for whom the great Emancipator labored to assure freedom. Besides rejoicing, Lincoln's birthday in 1909 should be one of taking stock of the nation's 1865.

"How far has it lived up to the obligations imposed upon it by the Emancipation P How far has it gone in assuring to each and every citizen, irrespective of color, th opportunity and equality before the law, which underlie our American institutior guaranteed by the Constitution?

DISFRANCHISEMENT

"If Mr. Lincoln could revisit this country in the flesh, he would be disheartened a He would learn that on January 1, 1909, Georgia had rounded out a new confede disfranchising the Negro, after the manner of all the other Southern States. He wo the Supreme Court of the United States, supposedly a bulwark of American liber every opportunity to pass squarely upon this disfranchisement of millions, by law discriminatory and openly enforced in such manner that the white men may vote men be without a vote in their government; he would discover, therefore, that ta representation is the lot of millions of wealth-producing American citizens, in wh the economic progress and welfare of an entire section of the country.

"He would learn that the Supreme Court, according to the official statement of or judges in the Berea College case, has laid down the principle that if an individua may 'make it a crime for white and colored persons to frequent the same market same time, or appear in an assemblage of citizens convened to consider questio political nature in which all citizens, without regard to race, are equally intereste

"In many states Lincoln would find justice enforced, it at all, by judges elected by a community to pass upon the liberties and lives of another. He would see the bl women, for whose freedom a hundred thousand of soldiers gave their lives set a which they pay first-class fares for third-class service, and segregated in railway places of entertainment; he would observe that State after state declines to do its in preparing the Negro through education for the best exercise of citizenship."

SILENCE...MEANS APPROVAL

""Added to this, the spread of lawless attacks upon the Negro, North, Southand W the Springfield made famous by Lincoln ... often accompanied hurrorizing brutal

the Springfield made famous by Lincoln -- often accompanied by revolting brutal neither sex nor age nor youth, could but shock the authorof the sentiment that 'g people, by the people, for the people; should notperish from the earth.'

"Silence under these conditions means tacit approval. The indifference of theNor responsible for more than one assault upon democracy, and every suchattack re unfavorably upon whites as upon blacks. Discrimination once permittedcannot b history in the South shows that in forging chains for theNegroes the white voters chains for themselves.

'A house divided against itself cannot stand'; this government cannot exist half-sl any better today than it could in 1861."

Hence we call upon all the believers in democracy to join in a national conferenc discussion of present evils, the voicing of protests, and the renewal of the strugg political liberty."

This call was signed by: Jane Adams, Chicago; Samuel Bowles (Springfield Repul L. Bulkley, New York; Harriet Stanton Blatch, New York; Ida Wells Barnett,Chicag Clement, Boston; Kate H. Claghorn, New York; Prof. John Dewey, New York;Dr. V Atlanta; Mary E. Dreier, Brooklyn; Dr. John L. Elliott, New York; Wm.Lloyd Garri Francis J. Grimke, Washington, D.C.; William Dean Howells, NewYork; Rabbi Em Chicago; Rev. John Haynes Holmes, New York; Prof. Thomas C.Hall, New York; F New York; Florence Kelley, New York; Rev. Frederick Lynch,New York; Helen M John E. Milholland, New York; Mary E. McDowell, Chicago;Prof. J. G. Merrill, Co Henry Moskowitz, New York; Leonora O'Reilly, NewYork; Mary W. Ovington, Ne Charles H. Parkhurst, New York; Louis F. Post,Chicago; Rev. Dr. John P. Peters, N Jane Robbins, New York; Charles EdwardRussell, New York; Joseph Smith, Bosto Spencer, New York; William M. Salter,Chicago; J. G. Phelps Stokes, New York; Ju Stafford, Washington; Helen Stokes,Boston; Lincoln Steffens, Boston; President C. Western Reserve University;Prof. Wi. I. Thomas, Chicago; Oswald Garrison Villa Evening Post; RabbiStephen S. Wise, New York; Bishop Alexander Walters, New William H. Ward, NewYork; Horace White, New York; William English Walling, M D. Wald, NewYork; Dr. J. Milton Waldron, Washington, D.C.; Mrs. Rodman Whar Philadelphia; Susan P.Wharton, Philadelphia; President Mary E. Wooley, Mt. Hol Prof. CharlesZueblin, Boston.*

CONFERENCE CALL

It was thus decided that we should hold a conference, and the next two months w arranging for it. Among the men and women who attended those first committee Bishop Alexander Walters, Mr. Ray Stannard Baker, Mr. Alexander Irvine, Dr.Ow Mr. Gaylord S. White, Miss Madeline Z. Doty, Miss Isabel Eaton, besidesmany of signers of the Call. It was agreed that the conference should be byinvitation only open meeting at Cooper Union. Over a thousand people wereinvited, the Charit Hall was secured, and, on the evening of May, 30th, theconference opened with reception at the Henry Street Settlement, given by MissLillian D. Wald, one of th first and oldest friends. The next morning ourdeliberations began.

We have had five conferences since 1909, but I doubt whether any have been so aquestioning surprise, amounting swiftly to enthusiasm, on the part of the white inattendance. These men and women, engaged in religious, social and educatio first time met the Negro who demands, not a pittance, but his full rights in thecor They received a stimulating shock and one which they enjoyed. They did notwa meeting. We conferred all the time, formally and informally, and theAssociation days many of the earnest and uncompromising men and women whohave since unfalteringly in its cause. Mr. William Hayes Ward, senior editor of theIndepend conference, and Mr. Charles Edward Russell, always the friend ofthose who stru opportunity, presided at the stormy session at the close. The fullproceedings ha

published by the Association.

MEMBERSHIP IN THE HUNDREDS

Out of this conference we formed a committee of forty and secured the services Blascoer, as secretary. We were greatly hampered by lack of funds. Importantne would present itself which we were unable to handle. But our secretary wasan ex organizer, and at the end of a year we had held four mass meetings, haddistribut pamphlets, and numbered our membership in the hundreds. In May,1910, we he conference in New York, and again our meetings were attended byearnest, inter was then that we organized a permanent body to be known asthe National Assoc Advancement of Colored People. Its officers were:NationalPresident, Moorfield S Chairman of the Executive Committee, William EnglishWalling; Treasurer, John Disbursing Treasurer, Oswald Garrison Villard;Executive Secretary, Frances Bla of Publicity and Research, Dr. W. E. B.DuBois.

THE ROLE FOR DR. DU BOIS

The securing of a sufficient financial support to warrant our calling Dr. DuBois fr University into an executive office in the Association was the most important wor conference.

When Dr. DuBois came to us we were brought closely in touch with an organizat people, formed in 1905 at Niagara and known as the Niagara Movement. Thisorg held important conferences at Niagara, Harpers Ferry, and Boston, and hadatten legal redress along very much the lines upon which the NationalAssociation for t of Colored People was working. Its platform, as presentedin a statement in 1906,

> Freedom of speech and criticism.An unfettered and unsubsidized press.M suffrage.The abolition of all caste distinctions based simply on race and co recognition of the principle of human brotherhood as a practical present c recognition of the highest and best training as the monopoly of no class or belief in the dignity of labor.United effort to realize these ideals under wis courageous leadership.

In 1910 it had conducted important civil rights cases and had in its membership colored lawyers in the country, with Mr. W. Ashbie Hawkins, who has sincework Association, on the Baltimore Segregation acts, as its treasurer.

The Niagara Movement, hampered as it was by lack of funds, and by a members one race only, continued to push slowly on, but when the larger possibilities of t Association were clear, the members of the Niagara Movement were advised to platforms were practically identical. Many of the most prominent members of th Movement thus brought their energy and ability into the service of theAssociatic now serving on its Board of Directors.

"THE PRESENT CRISIS"

Our history, after 1910, may be read in our annual reports, and in the numbers o opened two offices in the Evening Post building. With Dr. DuBois cam Mr. Frankl Wilberforce graduate, who has shown great efficiency in handling our books. In appeared the first number of The Crisis, with Dr. DuBois as editor, and MaryDun whose death has been the greatest loss the Association has known, asmanaging propaganda work was put on a national footing, our legal work waswell under w in truth, a National Association, pledged to a nation-wide workfor justice to the N

I remember the afternoon that The Crisis received its name. We were sitting aro theconventional table that seems a necessary adjunct to every Board, and were

aninformal talk regarding the new magazine. We touched the subject of poetry.

"There is a poem of Lowell's," I said, "that means more to me today thanany othei world -- 'The Present Crisis.'

"Mr. Walling looked up. "The Crisis," he said. "There is the namefor your magazi

And if we had a creed to which our members, black and white, our branches, No East and West, our college societies, our children's circle should allsubscribe, it lines of Lowell's noble verse, lines that are as true to-dayas when they were writt ago:

> "Once to every man and nation comes the moment to decide,In the strife c with Falsehood for the good or evil side;Some great Cause, God's New Me fering each the bloom or blight,Parts the goats upon the left hand, and the upon the right.And the choice goes by forever 'twixt darkness and that lig side with Truth is noble when we share her wretched crust.Ere her cause and profit, and 'tis properous to be just;Then it is the brave man chooses, coward stands aside,Doubting in his abject spirit, till his Lord is crucified, multitude make virtue of the faith they had denied."
> **JAMES RUSSELL LOWELL**

LIFT EV'RY VOICE AND SING

23

Primary Sources: Writing to the U.S. Attorney-General -- "Garvey Must Go"

The letter to the Attorney General:
2305 Seventh Ave, New York City, Jan.

Harry M. Daugherty, United States Attorney-General,
Department of Justice,
Washington, D. C.

Dear Sir:

(1) As the chief law enforcement officer of the nation, we wish to call your attention to a heretofore unconsidered menace to harmonious race relationships. There are in our midst certain Negro criminals and potential murderers, both foreign and American born, who are moved and actuated by intense hatred against the white race. These undesirables continually to proclaim that all white people are enemies to the Negro. They have become so fanatical that they have threatened and attempted the death of their opponents, actually assassinating in one instance.

(2) The movement known as the Universal Negro Improvement Association has done much to stimulate the violent temper of this dangerous element. Its president and moving spirit is one Marcus Garvey, an unscrupulous demagogue, who has ceaselessly and assiduously sought to spread among Negroes distrust and hatred of all white people.

(3) The official organ of the U. N. I. A., The Negro World, of which Marcus Garvey is managing editor, sedulously and continually seeks to arouse ill-feeling between the races. Evidence has also been presented of an apparent alliance of Garvey with the Ku Klux Klan.

(4) An erroneous conception held by many is that Negroes try to cloak and hide criminals. The truth is that the great majority of Negroes are bitterly opposed to all criminals, and especially to those of their own race, because they know that such criminals will cause increased discrimination against themselves.

(5) The U. N. I. A. is composed chiefly of the most primitive ignorant element of West Indian and American Negroes. The so-called respectable element of the movement are largely ministers without churches, physicians without patients, lawyers without clients and publishers without readers, who are usually in search of "easy money." In short, this organization is composed in the main of Negro sharks and ignorant Negro fanatics.

(6) This organization and its fundamental laws encourage violence. In its Constitution there is an article prohibiting office holding by a convicted criminal, EXCEPT SUCH CRIME IS COMMITTED IN THE INTEREST OF THE U.N.I.A. Marcus Garvey is intolerant of free speech when it is exercised in criticism of him and his movement, his followers seeking to prevent such by threats and violence. Striking proof of the truth of this assertion is found in the following cases:

(7) In 1920 Garvey's supporters rushed into a tent where a religious meeting was being conducted by Rev. A. Clayton Powell in New York City and sought to do bodily violence to Dr. Charles S. Morris, the speaker of the evening -- who they had heard was to make an address against Garveyism -- and were prevented only by action of the police. Shortly afterward members of the Baltimore branch of the U. N. I. A. attempted bodily injury to W. Ashbie Hawkins, one of the most distinguished colored attorneys in America, when he criticized

Garvey in a speech. During the same period an anti-Garvey meeting held by Cyril Briggs, then editor of a monthly magazine -- *The Crusader* -- in Rush Memorial Church, New York City, on a Sunday evening, was broken up by Garveyites turning out the lights.

(8) Several weeks ago the Garvey division in Philadelphia caused such a disturbance in the Salem Baptist Church, where Attorney J. Austin Norris, a graduate of Yale University, and the Rev. J. W. Eason were speaking against Garvey, that the police disbanded the meeting to prevent a riot of bloodshed. Reports state the street in front of the church was blocked by Garveyites, who insulted and knocked down pedestrians who were on their way to the meeting.

(9) In Los Angeles, Cal., Mr. Noah D. Thompson, a distinguished colored citizen of that city, employed in the editorial department of the *Los Angeles Daily Express*, reporting adversely on the Garvey movement as a result of his visit to the annual convention, was attacked by members of Garvey's Los Angeles division, who, it is alleged, had been incited to violence by Garvey himself, and only through the help of a large number of police officers was Thompson saved from bodily harm.

(10) A few months ago, when some persons in the Cleveland, Ohio. Division of the U. N. I. A. asked Dr. LeRoy Bundy, Garvey's chief assistant, for an accounting of funds a veritable riot took place, led, according to the *Pittsburgh America*, by Bundy himself.

(11) In Pittsburgh, Pa., on October 23 last, after seeking to disturb a meeting conducted by Chandler Owen, editor of the *Messenger Magazine*, Garveyites who had lurked around the corner in a body rushed on the street car after the meeting, seeking to assault him, but were prevented by the intervention of the police.

(12) When William Pickens, who had co-operated in the expose of Garvey frauds, was to deliver an address in Toronto, Canada, Garveyites met him on the steps of the church, with hands threateningly in their hip pockets, trying to intimidate him, lest he should further expose the movement.

(13) In Chicago, after seeking to break up an anti-Garvey meeting, a Garvey supporter shot a policeman who sought to prevent him from attacking the speaker as he left the building.

(14) In New York last August during a series of meetings conducted by the Friends of Negro Freedom to expose Garvey's schemes and methods, the speakers were threatened with death. Scores of Garveyites came into the meetings with the avowed intention of breaking them up. This they were prevented from doing by the stern determination on the part of the leaders, the activities of the New York police and the great mass of West Indians and Americans, who clearly showed that they would not permit any cowardly ruffians to break up their meetings.

(15) In fact, Marcus Garvey has created an organization which in its fundamental law condemns and invites to crime. This is evidenced by section 3 of Article V of the Constitution of the U.N.I.A., under the caption, "Court Reception at Home." It reads: "No one shall be received by the Potentate and his Consort who has been convicted of felony, EXCEPT SUCH CRIME OR FELONY WAS COMMITTED IN THE INTEREST OF THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION AND THE AFRICAN COMMUNITIES LEAGUE."

(16) Further proof of this is found in the public utterances of William Sherrill one of the chief officials in the organization and Garvey's envoy to the League of Nations Assembly at Geneva. Speaking at the Goldfield Theatre in Baltimore, Md., on August 18, 1922, he is quoted as saying: "BLACK FOLK AS WELL AS WHITE WHO TAMPER WITH THE U.N.I.A. ARE GOING TO DIE."

(17) What appears to be an attempt to carry out this threat is seen in the assault and slashing with a razor of one S. T. Saxon by Garveyites in Cincinnati, Ohio, when he spoke against the movement there last October.

(18) On January 1, this year, just after having made an address in New Orleans, the Rev. J. W. Eason, former "American Leader" of the Garvey movement, who had fallen out with Garvey

... Eason, former American Leader of the Garvey movement, who had fallen out with Garvey, and was to be the chief witness against him in the Federal Government's case, was waylaid and assassinated, it is reported in the press, by the Garveyites. Rev. Eason identified two of the men as Frederick Dyer, 42, a longshoreman, and William Shakespeare, 29, a painter. Both of them are prominent members of the U. N. I. A. in New Orleans, one wearing a badge as chief of police and the other as chief of the Fire Department of the "African Republic." Dr. Eason's dying words identifying the men whom he knew from long acquaintance in the movement, were:

(19) "I had been speaking at Bethany and was on my way home when three men rushed out at me from an alley. I saw their faces and (pointing at Dyer and Shakespeare) I am positive that these two men here are two of the three."

(20) The vicious inclination of these Garvey members is seen, in their comments in an interview:

(21) (The *N. Y. Amsterdam News* reports): "Both Dyer, and Shakespeare have denied the attack, but declared they were glad of it, as they said Eason richly deserved what he got. 'Eason,' said one of them, 'was a sorehead. The association made him what he was. When he was expelled because of misconduct he went up and down the country preaching again Marcus Garvey, who is doing great good for our race. Someone who evidently thought it was time to stop his lies took a crack at him. I don't blame the one that did it. Eason richly deserved what he got.'"

(22) Eason says he knew the men who shot him were directed to do so. In so much, however, as the assassination of Mr. Eason removes a Federal witness, we suggest that the Federal Government probe into the facts and ascertain whether Eason was assassinated as the result of an interstate conspiracy emanating from New York. It is significant that the U.N.I.A. has advertised in its organ, *The Negro World*, the raising of a defense fund for those indicted for the murder, seeming in accordance with its constitution.

(23) Not only has this movement created friction between Negroes and whites, but it has also increased the hostility between American and West Indian Negroes.

(24) Further, Garvey has built up an organization which has victimized hordes of ignorant and unsuspecting Negroes, the nature of which is clearly stated by Judge Jacob Panken of the New York Municipal Court, before whom Garvey's civil suit for fraud was tried: Judge Panken says: "It seems to me that you have been preying upon the gullibility of your own people, having kept no proper accounts of the money received for investments, being an organization of high finance in which the officers received outrageously high salaries and were permitted to have exorbitant expense accounts for pleasure jaunts throughout the country. I advise those dupes who have contributed to these organizations to go into court and ask for the appointment of a receiver."

(25) For the above reasons we advocate that the Attorney-General use his full influence completely to disband and extirpate this vicious movement, and that he vigorously and speedily push the government's case against Marcus Garvey for using the mails to defraud. This should be done in the interest of justice; even as a matter of practical expediency.

(26) The government should note that the Garvey followers are for the most part voteless -- being either largely unnaturalized or refraining from voting because Garvey teaches that they are citizens of an African republic. He has greatly exaggerated the actual membership of his organization, which is conservatively estimated to be much less than 20,000 in all countries, including the United States and Africa, the West Indies, Central and South America. (The analysis of Garvey's membership has been made by W.A. Domingo, a highly intelligent West Indian from Jamaica, Garvey's home, in the "The Crusader" magazine, New York City; also by Dr. We. E. Du Bois, a well-known social statistician, in the "The Century Magazine," February, 1922, New York City). On the other hand, hosts of citizen voters, native born and naturalized, both white and colored, earnestly desire the vigorous prosecution of this case.

(27) Again the notorious Ku Klux Klan, an organization of white racial and religious bigots, has aroused much adverse sentiment -- many people demanding its dissolution as the ...

Reconstruction Klan was dissolved. The Garvey organization, known as the U.N.I.A., is just as objectionable and even more dangerous, inasmuch as it naturally attracts an even lower type of cranks, crooks, and racial bigots, among whom suggestibility to violent crime is much greater.

(28) Moreover, since its basic law -- the very constitution of the U.N.I.A. -- the organization condones and encourages crime, its future meetings should be carefully watched by officers of the law and infractions promptly and severely punished.

(29) We desire the Department of Justice to understand that those who draft this documents, as well as the tens of thousands who will indorse it in all parts of the country, are by no means impressed by the widely circulated reports which allege certain colored politicians have been trying to use their influence to get the indictment against Garvey quashed. The signers of this appeal represent no particular political, religious or nationalistic faction. They have no personal ends or partisan interests to serve. Nor are they moved by any personal bias against Marcus Garvey. They sound this tocsin only because they foresee the gathering storm of race prejudice and sense the imminent menace of this insidious movement, which cancerlike, is gnawing at the very vitals of peace and safety -- of civic harmony and interracial concord.

The signers of this letter are:
HARRY H. PACE, 2289 Seventh avenue, New York City.
ROBERT S. ABBOTT, 3435 Indiana avenue, Chicago, IL.
JOHN E. NAIL, 145 West 135th Street, New York City.
DR. JULIA P. COLEMAN, 118 West 130th Street, New York City.
WILLIAM PICKENS, 70 Fifth avenue, New York City.
CHANDLER OWEN, 2305 Seventh Avenue, New York City
ROBERT W. BAGNALL, 70 Fifth avenue, New York City
GEORGE W. HARRIS, 135 West 135th Street, New City.

Harry H. Pace is president of the Pace Phonograph Corporation.
Robert S. Abbott is editor and publisher of the "Chicago Defender."
John E. Nail is president of Nail and Parker, Inc., Real Estate
Julia P. Coleman is president of the Hair-Vim Chemical Co. Inc.
William Pickens is field secretary of the National Association for the Advancement of Colored People.
Chandler Owen is co-editor of "The Messenger" and co-executive secretary of the Friends of Negro Freedom.
Robert W. Bagnall is director of branches of the National Association for the Advancement of Colored People.
George W. Harris is a member of the Board of Alderman of New York City and editor of the *New York News*.

Address reply to Chandler Owen, secretary of committee, 2305 Seventh Avenue, New York City.

Excerpt from Amy Jacques-Garvey, ed. *Philosophy & Opinions of Marcus Garvey*. New York: Athenaeum, 1969.

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Monumental City Bar Association

Home

Links

Photo Gallery

Association Officers

[redacted]

[redacted]

[redacted]

Web-Site Under Construction !

Monumental City Bar Association
500 East Lexington Street - Suite 118
Baltimore, Md. 21202

The Monumental City Bar Association (M.C.B.A.) was founded in the early 1930's and was incorporated on April 2, 1935. The incorporators were Thurgood Marshall, Warner T. McGuinn, George J. Evans, Emory R. Cole, W. Ashbie Hawkins, Robert McGuinn and Karl F. Phillips. All of the incorporators were Black and formed this organization because Black lawyers and women were excluded from the Baltimore City Bar Association.

The purposes of the organization, as expressed in the Charter are: "to aid in maintaining the ethics and dignity of the profession of the law" and to improve the administration of justice.

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History of the NAACP

National Association for the Advancement of Colored People

(Originally Written in 1914)

By Mary White Ovington

The National Association for the Advancement of Colored People is five years old--old enough, it is believed, to have a history; and I, who am perhaps, its first member, have been chosen as the person to recite it. As its work since 1910 has been set forth in its annual reports. I shall make it my task to show how it came into existence and to tell of its first months of work.

In the summer of 1908, the country was shocked by the account of the race riots at Springfield, Illinois. Here, in the home of Abraham Lincoln, a mob containing many of the town's "best citizens," raged for two days, killed and wounded scores of Negroes, and drove thousands from the city. Articles on the subject appeared in newspapers and magazines. Among them was one in the Independent of September 3d, by William English Walling, entitled "Race War in the North." After describing the atrocities committed against the colored people, Mr. Walling declared:

"Either the spirit of the abolitionists, of Lincoln and of Lovejoy must be revived and we must come to treat the Negro on a plane of absolute political and social equality, or Vardaman and Tillman will soon have transferred the race war to the North." And he ended with these words, "Yet who realizes the seriousness of the situation, and what large and powerful body of citizens is ready to come to their aid?"

It so happened that one of Mr. Walling's readers accepted his question and answered it. For four years I had been studying the status of the Negro in New York. I had investigated his housing conditions, his health, his opportunities for work. I had spent many months in the South, and at the time of Mr. Walling's article, I was living in a New York Negro tenement on a Negro Street. And my investigations and my surroundings led me to believe with the writer of the article that "the spirit of the abolitionists must be revived."

THE NAACP IS BORN

So I wrote to Mr. Walling, and after some time, for he was in the West, we met in New York in the first week of the year of 1909. With us was Dr. Henry Moskowitz, now prominent in the administration of John Purroy Mitchell, Mayor of New York. It was then that the National Association for the Advancement of Colored People was born.

It was born in a little room of a New York apartment. It is to be regretted that there are no minutes of the first meeting, for they would make interesting if unparliamentary reading. Mr. Walling had spent some years in Russia where his wife, working in the cause of the revolutionists, had suffered imprisonment; and he expressed his belief that the Negro was treated with greater inhumanity in the United States than the Jew was treated in Russia. As

Mr. Walling is a Southerner we listened with conviction. I knew something of the Negro's difficulty in securing decent employment in the North and of the insolent treatment awarded him at Northern hotels and restaurants, and I voiced my protest. Dr. Moskowitz, with his broad knowledge of conditions among New York's helpless immigrants, aided us in properly interpreting our facts. And so we talked and talked voicing our indignation.

LINCOLN'S BIRTHDAY

Of course, we wanted to do something at once that should move the country. It was January. Why not choose Lincoln's birthday, February 12, to open our campaign? We decided, therefore, that a wise, immediate action would be the issuing on Lincoln's birthday of a call for a national conference on the Negro question. At this conference we might discover the beginnings, at least, of that "large and powerful body of citizens" of which Mr. Walling had written.

And so the meeting adjourned. Something definite was determined upon, and our next step was to call others into our councils. We at once turned to Mr. Oswald Garrison Villard, president of the N. Y. Evening Post Company. He received our suggestions with enthusiasm, and aided us in securing the co-operation of able and representative men and women. It was he who drafted the Lincoln's birthday call and helped to give it wide publicity. I give the Call in its entirety with the signatures since it expresses, I think, better than anything else we have published, the spirit of those who are active in the Association's cause.

"The celebration of the Centennial of the birth of Abraham Lincoln, widespread and grateful as it may be, will fail to justify itself if it takes no note of and makes no recognition of the colored men and women for whom the great Emancipator labored to assure freedom. Besides a day of rejoicing, Lincoln's birthday in 1909 should be one of taking stock of the nation's progress since 1865.

"How far has it lived up to the obligations imposed upon it by the Emancipation Proclamation? How far has it gone in assuring to each and every citizen, irrespective of color, the equality of opportunity and equality before the law, which underlie our American institutions and are guaranteed by the Constitution?

DISFRANCHISEMENT

If Mr. Lincoln could revisit this country in the flesh, he would be disheartened and discouraged. He would learn that on January 1, 1909, Georgia had rounded out a new confederacy by disfranchising the Negro, after the manner of all the other Southern States. He would learn that the Supreme Court of the United States, supposedly a bulwark of American liberties, had refused every opportunity to pass squarely upon this disfranchisement of millions, by laws avowedly discriminatory and openly enforced in such manner that the white men may vote and that black men be without a vote in their government; he would discover, therefore, that taxation without representation is the lot of millions of wealth-producing American citizens, in whose hands rests the economic progress and welfare of an entire section of the country.

"He would learn that the Supreme Court, according to the official statement of one of its own judges in the Berea College case, has laid down the principle that if an individual State chooses,

it may 'make it a crime for white and colored persons to frequent the same market place at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested.

"In many states Lincoln would find justice enforced, if at all, by judges elected by one element in a community to pass upon the liberties and lives of another. He would see the black men and women, for whose freedom a hundred thousand of soldiers gave their lives, set apart in trains, in which they pay firstclass fares for third-class service, and segregated in railway stations and in places of entertainment; he would observe that State after State declines to do its elementary duty in preparing the Negro through education for the best exercise of citizenship.

"SILENCE . . . MEANS APPROVAL"

Added to this, the spread of lawless attacks upon the Negro, North, South and West--even in the Springfield made famous by Lincoln--often accompanied by revolting brutalities, sparing neither sex nor age nor youth, could but shock the author of the sentiment that 'government of the people, by the people, for the people; should not perish from the earth.'

"Silence under these conditions means tacit approval. The indifference of the North is already responsible for more than one assault upon democracy, and every such attack reacts as unfavorably upon whites as upon blacks. Discrimination once permitted cannot be bridled; recent history in the South shows that in forging chains for the Negroes the white voters are forging chains for themselves. 'A house divided against itself cannot stand'; this government cannot exist halfslave and half-free any better today than it could in 1861.

"Hence we call upon all the believers in democracy to join in a national conference for the discussion of present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty."

This call was signed by: Jane Adams, Chicago; Samuel Bowles (Springfield Republican); Prof. W. L. Bulkley, New York; Harriet Stanton Blatch, New York; Ida Wells Barnett, Chicago; E. H. Clement, Boston; Kate H. Claghorn, New York; Prof. John Dewey, New York; Dr. W. E. B. DuBois, Atlanta; Mary E. Dreier, Brooklyn; Dr. John L. Elliott, New York; Wm. Lloyd Garrison, Boston; Rev Francis J. Grimke, Washington, D . C .; William Dean Howells, New York; Rabbi Emil G. Hirsch, Chicago; Rev. John Haynes Holmes, New York; Prof. Thomas C. Hall, New York; Hamilton Holt, New York; Florence Kelley, New York; Rev. Frederick Lynch, New York; Helen Marot, New York; John E. Milholland, New York; Mary E. McDowell, Chicago; Prof. J. G. Merrill, Connecticut; Dr. Henry Moskowitz, New York; Leonora O'Reillys New York; Mary W. Ovington, New York; Rev. Dr. Charles H. Parkhurst, New York; Louis F. Post, Chicago; Rev. Dr. John P. Peters, New York; Dr. Jane Robbins, New York; Charles Edward Russell, New York; Joseph Smith, Boston; Anna Garlin Spencer, New York; William M. Salter, Chicago; J. G. Phelps Stokes, New York; Judge Wendell Stafford, Washington; Helen Stokes, Boston; Lincoln Steffens, Boston; President C. F. Thwing, Western Reserve University; Prof. W. I. Thomas, Chicago; Oswald Garrison Villard, New York Evening Post; Rabbi Stephen S. Wise, New York; Bishop Alexander Walters, New York; Dr. William H. Ward, New York; Horace White, New York; William English Walling, New York; Lillian D. Wald, New York; Dr. J. Milton Waldron, Washington, D.C.; Mrs. Rodman Wharton, Philadelphia; Susan P. Wharton, Philadelphia; President Mary E. Wooley, Mt. Holyoke College; Prof. Charles Zueblin, Boston.*

*(*Since the first printing in 1914 it has been discovered that the following persons were also signers of the original Call: Roy Standard Baker, New York: Rev. Walter Laidlow, New York; Rev. Jenkin Lloyd Jones, Chicago; Mrs. Mary Church Terrell, Washington; Mrs. Henry Villard, New York; Mayor Brand Whitlock, Toledo; and Rev, M. St. Croix Wright, New York.)*

CONFERENCE CALL

It was thus decided that we should hold a conference, and the next two months were busily spent arranging for it. Among the men and women who attended those first committee meetings were, Bishop Alexander Walters, Mr. Ray Stannard Baker, Mr. Alexander Irvine, Dr. Owen M. Waller, Mr. Gaylord S. White, Miss Madeline Z. Doty, Miss Isabel Eaton, besides many of the New York signers of the Call. It was agreed that the conference should be by invitation only, with the one open meeting at Cooper Union. Over a thousand people were invited, the Charity Organization Hall was secured, and, on the evening of May, 30th, the conference opened with an informal reception at the Henry Street Settlement, given by Miss Lillian D. Wald, one of the Association's first and oldest friends. The next morning our deliberations began.

We have had five conferences since 1909, but I doubt whether any have been so full of a questioning surprise, amounting swiftly to enthusiasm, on the part of the white people in attendance. These men and women, engaged in religious, social and educational work, for the first time met the Negro who demands, not a pittance, but his full rights in the commonwealth. They received a stimulating shock and one which they enjoyed. They did not want to leave the meeting. We conferred all the time, formally and informally, and the Association gained in those days many of the earnest and uncompromising men and women who have since worked unfalteringly in its cause. Mr. William Hayes Ward, senior editor of the Independent, opened the conference, and Mr. Charles Edward Russell, always the friend of those who struggle for opportunity, presided at the stormy session at the close. The full proceedings have been published by the Association.

MEMBERSHIP IN THE HUNDREDS

Out of this conference we formed a committee of forty and secured the services of Miss Frances Blascoer, as secretary. We were greatly hampered by lack of funds. Important national work would present itself which we were unable to handle. But our secretary was an excellent organizer, and at the end of a year we had held four mass meetings, had distributed thousands of pamphlets, and numbered our membership in the hundreds. In May, 1910, we held our second conference in New York, and again our meetings were attended by earnest, interested people. It was then that we organized a permanent body to be known as the National Association for the Advancement of Colored People. Its officers were:
National President, Moorfield Storey, Boston; Chairman of the Executive Committee, William English Walling; Treasurer, John E. Milholland; Disbursing Treasurer, Oswald Garrison Villard; Executive Secretary, Frances Blascoer; Director of Publicity and Research, Dr. W. F. B. DuBois.

THE ROLE FOR DR. DU BOIS

The securing of a sufficient financial support to warrant our calling Dr. DuBois from Atlanta University into an executive office in the Association was the most important work of the

second conference.

When Dr. DuBois came to us we were brought closely in touch with an organization of colored people, formed in 1905 at Niagara and known as the Niagara Movement. This organization had held important conferences at Niagara, Harpers Ferry, and Boston, and had attempted a work of legal redress along very much the lines upon which the National Association for the Advancement of Colored People was working. Its platform, as presented in a statement in 1905, ran as follows:

Freedom of speech and criticism.
An unfettered and unsubsidized press.
Manhood suffrage.
The abolition of all caste distinctions based simply on race and color.
The recognition of the principle of human brotherhood as a practical present creed.
The recognition of the highest and best training as the monopoly of no class or race.
A belief in the dignity of labor.
United effort to realize these ideals under wise and courageous leadership.

In 1910 it had conducted important civil rights cases and had in its membership some of the ablest colored lawyers in the country, with Mr. W. Ashbie Hawkins, who has since worked with our Association, on the Baltimore Segregation acts, as its treasurer.

The Niagara Movement, hampered as it was by lack of funds, and by a membership confined to one race only, continued to push slowly on, but when the larger possibilities of this new Association were clear, the members of the Niagara Movement were advised to join, as the platforms were practically identical. Many of the most prominent members of the Niagara Movement thus brought their energy and ability into the service of the Association, and eight are now serving on its Board of Directors.

"THE PRESENT CRISIS"

Our history, after 1910, may be read in our annual reports, and in the numbers of The Crisis. We opened two offices in the Evening Post building. With Dr. DuBois came Mr. Frank M Turner, a Wilberforce graduate, who has shown great efficiency in handling our books. In November 1910 appeared the first number of The Crisis, with Dr. DuBois as editor, and Mary Dunlop MacLean, whose death has been the greatest loss the Association has known, as managing editor. Our propaganda work was put on a national footing, our legal work was well under way and we were in truth, a National Association, pledged to a nation-wide work for justice to the Negro race.

I remember the afternoon that The Crisis received its name. We were sitting around the conventional table that seems a necessary adjunct to every Board, and were having an informal talk regarding the new magazine. We touched the sub subject of poetry.

"There is a poem of Lowell's," I said, "that means more to me today than any other poem in the world--'The Present Crisis.' "

Mr Walling looked up. "The Crisis," he said. "There is the name for your magazine, The Crisis.

And if we had a creed to which our members, black and white, our branches, North and South and East and West, our college societies, our children's circle, should all subscribe, it should be the lines of Lowell's noble verse, lines that are as true to-day as when they were written seventy years ago:

"Once to every man and nation comes the moment to decide,
In the strife of Truth with Falsehood for the good or evil side;
Some great Cause, God's New Messiah, offering each the bloom or blight,
Parts the goats upon the left hand, and the sheep upon the right.
And the choice goes by forever 'twixt darkness and that light.

"Then to side with Truth is noble when we share her wretched crust.
Ere her cause bring fame and profit, and 'tis properous to be just;
Then it is the brave man chooses, while the coward stands aside,
Doubting in his abject spirit, till his Lord is crucified,
And the multitude make virtue of the faith they had denied."

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PRESIDENTIAL PONTIFICATING

During February we celebrate Black History Month as a nation, so the AACo.YR's have focused on this theme f speakers. But as Republicans in 2001 in Maryland, where do we stand in the African-American community? goals for inclusion? How do we plan to reach out to a community that voted 9 of 10 for the other guy? What bring to the table?

Personally I was shocked by the high percentage of African-American voters who went for Gore, especially Bush spent much of his campaign discussing inclusion and the need to break down the racial divide. But played hard into the fear tactics and the NAACP was irresponsible and wrong for the ads they ran during Listening to Jesse "I can't stay out of the bushes" Jackson, I feel he is one of the biggest culprits in building a claiming African-Americans were intimidated at the polls or were not allowed to vote, using the past three mor class and race warfare to further his own agenda. Guess what folks, many Marylanders were turned away f white, black, Asian, Democrat and Republican, all due to the failure of the state-run MVA. But as responsible called to resolve the problem in the MVA and not try to start racial warfare by picking and choosing which case the media.

Where do we start? How do we begin to unite? Many African-Americans believe in the basic principles of t platform. Faith, education and family safety are important to all Americans. Being able to take more of your p with you to pay the bills is important to all Americans. We do not need to find "black issues" or even change line; maybe we need to show examples of our principles in action to make our party attractive to more American I did some research on the history of African-Americans in the Maryland Republican Party. I was surprised by always wondered how the party of Lincoln and the Emancipation Proclamation wound up on the wrong side American community. I discovered that many prominent African-Americans were members of the MD GOP H.J. Brown, John W. Locks, George M. Lane, W. Ashbie Hawkins, Harry S. Cummings, George W. F. McMech McGuinn and Frederick Douglass. In 1867 Maryland Republicans held a convention in Baltimore for t addressing the political and civil rights of citizens. The Republican/Unionist Party had been losing considerab state government. However, the party seemed poised to stage a serious fight for universal manhood suffrage. It if suffrage could be won for black men, the Republicans would create forty-thousand new loyal partymen. B Republican leaders were not allowed seats on the floor of the convention, they left in protest. Though this was black republican participation, in the absence of opportunity for African-Americans to run for office on the rep many began to weigh their political options.

Now, a 130 years later, we are faced with possibly the largest racial, political divide since the civil war. W history in high school I hated it. When I asked why I needed to learn about something that happened centuries c the answer was always the same: "So we can learn from our failures and not repeat them in the future."

Our new President has already established that every minority will have a seat at his table. We as Marylan should be very mindful of that as we search for candidates for the 2001 and 2002 elections. This does not mea pick candidates solely because they are minorities. We must choose our candidates, constantly remembering and reflect the people, the beliefs and ideals of a particular ward or district. Our candidates should reflect t represent.

Though I have spoken mostly of what seems to separate us, using the terms "Republicans" and "Afri Republicans", we are all Republicans. Our goal is to focus on issues that do not have color barriers. Happily y to look far to find those issues in the Republican platform. I believe education is a universal concern of all crosses all racial, political and social/economic lines. I am proud that education is a common thread through What do I mean by that? President Bush campaigned on education and right out of the starting block as Pr begun education reform. The beauty of it all is that it does not stop at the national level. Our state Delegate have put forth great legislation for education renewal here in Maryland. Delegates Greenip and Boschert are lottery proceeds go towards education on a prorated basis. Delegate Leopold and Senator McCabe are putting f for charter schools in Maryland. I was able to attend a press conference for Del. Leopold and Sen. McCabe rega bills. On our way to the Joint Hearing Room, two buses from Baltimore City and Prince Georges County unloa children in front of the senate building. The group consisted of mostly African-Americans and working Moms v signs demanding charter schools. They embraced us immediately as we announced we were headed to the rally not pandering, this is a common thread: Education. What a great issue! And we own it nationally and locally.

We have the right issues, we have the right leadership both nationally and locally, we have seats at the table to

where we as activists play a part. It is our job to be the *Citizens* that President Bush spoke of in his Inaugural Ad the ambassadors of this party, we must open the dialog box, we must be in our community reflecting the very bes to offer. Then and only then will we be able to begin to overcome the racial/political party divide. It must be commitment not just between a primary and general election. Otherwise, it *is* pandering.

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APARTHEID BALTIMORE STYLE: THE RESIDENTIAL SEGREGATION ORDINANCES OF 1910-1913

GARRETT POWER

Reprinted from
THE MARYLAND LAW REVIEW
Volume 42, Number 2, 1983

APARTHEID BALTIMORE STYLE: THE RESIDENTIAL SEGREGATION ORDINANCES OF 1910-1913*

GARRETT POWER**

On May 15, 1911, Baltimore Mayor J. Barry Mahool, who was known as an earnest advocate of good government, women's sufferage, and social justice, signed into law "[a]n ordinance for preserving peace, preventing conflict and ill feeling between the white and colored races in Baltimore city, and promoting the general welfare of the city by providing, so far as practicable, for the use of separate blocks by white and colored people for residences, churches and schools."[1] Baltimore's segregation law was the first such law to be aimed at blacks in the United States, but it was not the last. Various southern cities in Georgia, South Carolina, Virginia, North Carolina, and Kentucky enacted similar laws.[2]

The legal significance of housing segregation laws in the United States was shortlived. In 1917 the United States Supreme Court struck down the Louisville, Kentucky ordinance[3] and thereby constitutionally eviscerated the ordinances of other cities as well. But the historical significance of Baltimore's segregation ordinances remains.

History remembers the Mahool administration for having placed Baltimore in the forefront of municipal reform. The story of how the Mahool government earnestly proposed and enacted an apartheid statute as a progressive social reform has a contemporary message: It cautions us to discount the righteous rhetoric of reform; it reminds us of the racist propensities of democratic rule; and it sets the stage for understanding the development of a covert conspiracy to enforce housing segregation, the vestiges of which persist in Baltimore yet today.

Throughout the early nineteenth century Baltimore housing was not racially segregated, and even following the Civil War, blacks lived

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* This article is the second chapter of a book in progress, A Chronicle of Twentieth Century Land Controls in Greater Baltimore. It was funded in part by a grant from Resources for the Future.

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1. Baltimore, Md., Ordinance 692 (May 15, 1911).

2. C. JOHNSON, PATTERNS OF NEGRO SEGREGATION 173-75 (1943); Rice, *Residential Segregation by Law, 1910-1917*, 34 J.S. HIST. 179, 181-82 (1968). The cities were: Atlanta, Ga.; Greenville, S.C.; Ashland, Roanoke, Richmond, Norfolk, and Portsmouth, Va.; Winston-Salem, N.C.; and Louisville, Ky.

3. Buchanan v. Warley, 245 U.S. 60 (1917).

in all of Baltimore's twenty wards. Although the majority of blacks resided in the city's central, southern, and eastern sections, there was no Negro quarter or ghetto. Blacks were scattered throughout the northern reaches of the town, clustering together in narrow, two-story alley houses and working nearby in domestic service while more affluent whites lived on the main thoroughfares.[4]

Urbanization was to modify this fluid mixture. In 1860 only 4.2% of all Negroes in the United States were city dwellers; by 1890 it had risen to almost 20%,[5] as blacks joined whites in a rush to the cities. Between 1880 and 1900 Baltimore's black population increased 47% from 54,000 to 79,000. During this same period, the city's white population was increasing by 54%. Hence, while the black population was increasing by 25,000 people, the proportion of blacks in the population was on a slight decline.[6]

Negro newcomers with little money and limited job opportunities sought out the cheapest housing in town. They rented shanties and doubled up in small houses, resulting in Baltimore's first sizeable slums. The first slum to reach maturity was "Pigtown" in Southwest Baltimore. A contemporaneous account from 1892 describes it as follows:

> Open drains, great lots filled with high weeds, ashes and garbage accumulated in the alleyways, cellars filled with filthy black water, houses that are total strangers to the touch of whitewash or scrubbing brush, human bodies that have been strangers for months to soap and water, villainous looking negroes who loiter and sleep around the street corners and never work; vile and vicious women, with but a smock to cover their black nakedness, lounging in the doorways or squatting upon the steps, hurling foul epithets at every passerby; foul streets, foul people, in foul tenements filled with foul air; that's "Pigtown."[7]

As neighbors who could afford to do so moved away from this squalor, Pigtown ripened into a ghetto.[8] Whites were not the only residents to take flight. In this time of relative permissiveness in race relations, blacks also were free to buy houses elsewhere in the city.

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4. Hawkins, *A Year of Segregation in Baltimore*, 3 CRISIS 17, 17 (1911). *Cf.* W. Paul, The Shadow of Equality: The Negro in Baltimore 1864-1911 388-90 (1972) (unpublished Ph.D. dissertation, University of Wisconsin).

5. Haynes, *Conditions Among Negroes in the Cities*, 49 ANNALS 105, 108 (1913).

6. *A Social Problem in Baltimore*, 77 NATION 497, 497 (1903) [hereinafter cited as *A Social Problem*].

7. Baltimore News, September 20, 1892, *quoted in* J. CROOKS, POLITICS & PROGRESS: THE RISE OF URBAN PROGRESSIVISM IN BALTIMORE 1895 TO 1911 20 (1968).

8. S. OLSON, BALTIMORE 233 (1980); *A Social Problem*, *supra* note 6, at 497.

Baltimore's black bourgeoisie, then perhaps 250 in number, sought to remove themselves from the "disreputable and vicious neighborhoods of their own race."[9] Thus a first wave of blacks relocated in the northwestern part of the city as those blacks that could afford to do so purchased second-hand housing around St. Mary's Orchard and Biddle Streets, in what was to become the 17th Ward. (A street map of the 11th, 14th, and 17th Wards as they existed in 1904 appears at the end of this article.) Their neighborhood began in the alleys and then moved out to the wider streets, displacing Bohemians and Germans.

The Negro migration to Northwest Baltimore accelerated as whites abandoned their homes there and fled to newly opened suburban tracts. For example, when the B & O Railroad displaced 100 black families to expand its yards,[10] they sought alternative housing in the northwest's 17th Ward. The second wave of black arrivals was poorer and doubled up to pay the rent; slum conditions similar to those in some of the city's southwestern sections began to develop.[11] By 1903 the Negro population was perhaps the majority in the 17th Ward;[12] the slum that had developed in the Biddle Alley neighborhood in the lower portions of the ward had replaced Pigtown as the worst in the city.[13]

Blacks were not the only slum dwellers. In the 1880's Russian Jews and Poles were immigrating to Baltimore in large numbers. These immigrants faced the same problems as Negroes — little money and few jobs. As a result, their housing conditions were similar to those in the black slums: the houses were overcrowded, poorly ventilated, and lacked water and sewerage. The major difference between these immigrant ghettos and the black ghettos was in the type of housing they contained: Immigrants converted once-substantial three- and four-story row houses into tenements for up to ten families. The black alley districts consisted of smaller ill-built structures. Another difference was that the immigrant ghettos tended to locate on the east side of town. Thus the growing immigrant population exacerbated black housing conditions by displacing Negroes from that area.[14]

These slums were but a symptom of the social chaos in turn-of-

9. Haynes, *supra* note 5 at 111 (discussing consequences of segregation in cities generally).

10. Hawkins, *supra* note 4, at 27; transcript of interview with Dr. J.O. Spencer, Record Group [R.G.] 102, Box 121, National Archives (June 20, 1916).

11. U.S. CHILDREN'S BUREAU, REPORT ON CONDITIONS AFFECTING BALTIMORE NEGROES 32, R.G. 102, Boxes 120-21, National Archives (1923) (Bureau Publication 119, part of a study of infant mortality in Baltimore) [hereinafter cited as CHILDREN'S BUREAU STUDY].

12. *A Social Problem*, *supra* note 6, at 497.

13. W. Paul, *supra* note 4, at 392.

14. Hawkins, *supra* note 4, at 27.

the-century Baltimore. Between 1870 and 1900, the city's population grew from 250,000 to 500,000, as ex-Confederates, Negroes, and European refugees crowded into the city. The year 1890 was the beginning of a severe slump in the economy. Families could not afford even the cheapest housing so they doubled and tripled up. Unemployment was rampant; women and children worked for minuscule wages under horrendous conditions in an effort to make ends meet. Services proved inadequate or nonexistent — police, fire protection, water supply, and schools were deficient and the city had not yet constructed a sanitary sewer system.[15] Urbanization, industrialization, and depression had concentrated in Baltimore a growing population of the poor, the sick, and the ignorant.

The crisis in Baltimore and other cities produced a movement for social reform. Social reformers joined the already established Progressive Movement in opposing political machines such as the Rasin-Gorman Ring in Baltimore, and in advocating civil service reform, the merit system, streamlined government, home rule, and corrupt-practices legislation.[16] But the social reformers who came from the universities and churches had greater ambitions. They advocated initiatives designed to remedy the fundamental ills of society — illiteracy, pestilence, crime, and poverty.[17]

The first leader of the organized Social Reform Movement in Baltimore was Daniel Coit Gilman, President of the Johns Hopkins University. In 1881, he founded the Charity Organization Society and modeled it after similar groups in London, Buffalo, Boston, and New York. It provided the poor with gifts of food, clothing, and coal, along with "friendly visitors" who volunteered to help on a one-to-one basis.[18] In addition, Jane Addams's pioneer settlement house in Chicago was soon copied by Baltimore clergyman Edward H. Lawrence.[19] Further, Baltimore philanthropists Robert Garrett and Henry Walters copied projects undertaken elsewhere in sponsoring playgrounds and public baths.[20]

Social reformers found support for their efforts among Baltimore's medical community. Recent discoveries in bacteriology led prominent

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15. J. CROOKS, *supra* note 7, at 155-56.

16. *See generally* J. CROOKS, *supra* note 7; R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); Crane, *The Origins of Progressivism*, in THE PROGRESSIVE ERA 11-34 (L. Gould ed. 1974).

17. S. HUBER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT AND THE PROGRESSIVE ERA 1890-1920 77 (1964).

18. J. CROOKS, *supra* note 7, at 158-59.

19. *Id.* at 162.

20. *Id.* at 180-83.

physicians to identify the need for public health programs. For example, in the 1890's Dr. William Osler, physician-in-chief at the Johns Hopkins Hospital, called public attention to the social implications of typhoid and tuberculosis and supported efforts to establish a pure water system. His colleague, Dr. William Henry Welch, in a speech in 1892, estimated that better sanitation in American cities could save 100,000 lives each year.[21] In 1897, Dr. John S. Fulton, along with Osler and Welch, founded the Maryland Public Health Association.[22] It discussed proposals for construction of a sanitary sewer system (Baltimore then had none) and for establishment of a city hospital for infectious diseases.[23] The proposal for a hospital, however, was poorly received. The City Council resisted creation of a "pest house," because it would reduce property values and spread disease to the surrounding neighborhood.

In 1902, on the other hand, the state government began a city-wide campaign against tuberculosis. Tuberculosis was then the most widespread and fatal of the infectious diseases: it killed 1,000 Baltimoreans each year.[24] This campaign stressed the relationship between overcrowded housing, lack of open space, tainted food, and a high incidence of TB. It lobbied for laws requiring registration of persons infected with TB, prohibiting spitting, and providing for construction of hospitals.[25]

Not surprisingly, these first efforts at social reform proved unequal to the task. Self-help, friendly visiting, volunteerism, and timid government initiatives failed to abolish poverty, to prevent crime, and to cure tuberculosis and other infectious diseases. Among the reformers' greatest shortcomings was their failure to do more for blacks. The half-dozen privately financed settlement houses reached at most several hundred Baltimoreans; Negroes never saw a settlement. As initially established, public baths and playgrounds designed to humanize the urban environment were for whites only. These facilities were not available to blacks until 1905 and 1908, and then only to a limited extent.[26] Fledgling public health efforts had made no discernable impact on the black communities — the Negro death rate from both smallpox and tuberculosis was twice that of the white average.[27]

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21. *Id.* at 164-65.
22. *Id.* at 171-72.
23. *Id.* at 182-83.
24. *Id.* at 184.
25. *Id.* at 187.
26. *Id.* at 181, 183.
27. *Id.* at 188; S. Olson, *supra* note 8, at 236.

Notwithstanding their failures, social reformers remained undaunted. Unable to treat or to cure the fundamental ills from which the urbanizing, industrializing society suffered — illiteracy, morbidity, crime, and poverty — their response was to focus on a symptom rather than the disease. Slum housing came to the forefront of the reformers' concerns; environmentalism came to be an article of faith.[28] In Baltimore of 1903, progressive Mayor Thomas Hayes expressed this faith as follows:

> debasing environments like these are the ones from which creep forth the pinched bodies and pinched souls which make our criminals and disturbing elements. These wretched abodes are menacing to both health and morals. They are the breeding spots from which issue the discontents and heartburnings that sometimes spread like a contagion through certain ranks of our laboring element.[29]

Because city slums were to blame for vice, crime, pauperism, and anarchy, improved housing conditions would cure society's ills.

Not long after Mayor Hayes's remark, Gilman's Charity Organization Society commissioned an investigation entitled *Housing Conditions in Baltimore*.[30] This study was aimed at the alleys that housed Baltimore's blacks and at the sections occupied by rapidly increasing foreign populations, on the assumption that "conditions existed in those neighborhoods that could not but be detrimental to the welfare of their residents."[31] Its preliminary concerns were that: houses covered so much of the lot-space as to diminish the supply of light and air; large numbers of families were crowding into dwellings originally designed for single-family occupancy; many rooms were gloomy and ill-ventilated; alley houses were damp and dilapidated; and sanitation was defective. The Society intended the investigation "to secure accurate and reliable information" and thereby to take "the first step towards the removal of these evils."[32]

The investigation selected four districts for detailed field study. Two districts were described as "tenement districts" and included a large number of houses occupied by three or more families. One tenement district was occupied largely by Russian Jews, and the other was occupied almost exclusively by Poles. Two districts were described as

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28. *See generally* Moore, *Directions of Thought in Progressive America*, in THE PROGRESSIVE ERA 35-55 (L. Gould ed. 1974).

29. S. OLSON, *supra* note 8, at 270.

30. J. KEMP, HOUSING CONDITIONS IN BALTIMORE (1907).

31. *Id.* at 12.

32. *Id.*

"alley districts" because they illustrated conditions prevailing in interior alleys and minor streets. These districts were occupied largely by Negroes along with a few native white families and Germans. In reality, the housing stock in the tenement and alley districts was not mutually exclusive — tenement districts included houses on interior streets, and alley districts included some tenements.

One of the districts studied, Biddle Alley, was the same neighborhood to which middle-class blacks had escaped in the 1880's. By 1903 it had fallen on hard times. The area investigated by the Society was bounded by Biddle and Preston Streets and Druid Hill and Pennsylvania Avenues. Two hundred and fifteen overcrowded houses, containing 270 apartments (seventeen percent of which were one room), were crammed into the alleys and minor streets within the block. Typically, the houses were two or three stories high and two rooms deep with a basement kitchen and living room. The most common problem was the "dirty, dark, damp and dilapidated" basements.[33] The investigation did not determine the number of residents in Biddle Alley; the Society felt that tabulating the information concerning the number of people living in alley houses was a "waste of time" because of the untrustworthiness of the tenants.[34]

The Biddle Alley neighborhood was literally and figuratively at the bottom of what was becoming the black section of Baltimore. In 1903 the section with a majority Negro population was described as "bounded on the south by Biddle Street, on the west by Argyle Avenue, on the east by Druid Hill Avenue, and on the north by North Avenue. This region extends about a quarter of a mile from east to west and a mile north and south."[35] It consisted of the 17th Ward to the south and a portion of the 14th Ward to the north.

The Negro district was highly stratified, both economically and socially. The lower portion of the district, found in the 17th Ward, which embraced the Biddle Alley neighborhood, was a filthy slum. Animal excrement and garbage lay in the streets. Privy faults and cesspools overflowed into the alleys and oozed into the basement, kitchen, and living areas.[36] Cholera and typhoid were a constant threat, and the district was the tuberculosis center for the city: According to one health department official, "there is not a house on Biddle Alley, in which there has not been at least one case of tuberculosis."[37] Biddle

33. *Id.* at 45.
34. *Id.* at 43.
35. *A Social Problem*, *supra* note 6, at 498.
36. W. Paul, *supra* note 4, at 393-94.
37. J. KEMP, *supra* note 30, at 19.

Alley was the "lung block." The value of property in the 17th Ward was in a precipitous decline.[38]

The upper portion of the district, found in the 14th Ward, contained the houses of the Negro community's business and professional people. A quiet residential neighborhood, properties sold for higher prices than in equivalent white neighborhoods. Middle-class white residents still lived in the area. The best black dwellings bounded along upper Druid Hill Avenue.[39]

The *Housing Conditions in Baltimore* report, interrupted by the Baltimore Fire of 1904, was finished in 1907, under the direction of Janet E. Kemp. Its statistics and photographs vividly display the horrors of the slums and the plight of the slum-dwellers, but it was less compelling when suggesting solutions. The report's text observed: "Nothing but enlightened public sentiment crystallized into legislative requirements can ever guarantee sanitary surroundings to the small wage earner who cannot afford to pay a high rent."[40]

The report suggested legislative requirements that differed for tenements and alley houses. The report proposed an inexpensive "market" solution for tenement districts. It sought to force landlords to improve existing tenements, and to require builders to construct model tenements, by proposing regulations setting height limits, requirements of separate toilets for each apartment, and annual inspections. The proposal was plausible. In the early twentieth century, tenements were profitable ventures. Commerical developers were building new flats for the "dollar-a-day" man.[41] Together, housing codes and building restrictions might eliminate all substandard tenements by forcing entrepreneurs to pay the cost of improving them. The solution also was consistent with the classic concept of the state's police power. The report proposed regulations protecting health, safety, and morals which businessmen might not transgress in the pursuit of profit, but otherwise did not interfere with the economic order.

The report's recommendations for alley districts differed. It proposed to reduce the density in existing alley houses, to condemn those that were uninhabitable, to ban sleeping in basements, and to prohibit erection of additional alley houses.[42] Although these measures would improve the quality of housing, they necessarily would reduce the

38. S. OLSON, *supra* note 8, at 276.
39. W. Paul, *supra* note 4, at 391-92.
40. J. KEMP, *supra* note 30, at 93.
41. R. LUBOVE, THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY 1890-1917 182 (1962).
42. J. KEMP, *supra* note 30, at 87-92.

quantity. Thus the report's recommendations would work a particular hardship on blacks, who lived in the alleys, for whom no new houses were being built, and who encountered resistance when attempting to move into white neighborhoods. In effect, the report relegated the growing Negro population to a shrinking number of houses.

The report also distinguished between the inhabitants of tenements and alley-houses. Negroes were singled out for criticism: "This is not a study of social conditions, but it is impossible to observe these gregarious, light-hearted, shiftless, irresponsible alley dwellers without wondering to what extent their failings are a result of their surroundings, and to what extent the inhabitants, in turn, react for evil upon their environment."[43] The "low standards and absence of ideals" among Negroes was "held to some degree accountable for the squalor and wretchedness" which characterized the alley neighborhoods.[44]

Despite the plausibility of its proposals and the prestige of its sponsors, the city took no action on the *Housing Conditions in Baltimore* report. In the northwest the Negro district continued to grow both in population and size. By 1910, 12,738 blacks had crowded into the 17th Ward,[45] constituting over fifteen percent of the city's overall Negro population and sixty-one percent of the ward's overall population.[46] The few remaining whites were rapidly leaving. It was the worst slum in the city.[47]

Not surprisingly, those in the black community who could afford to do so also sought to move away from the squalor and disease. Middle-class blacks began to look covetously at quiet residential houses to the west and north. Between 1903 and 1910, the western boundary of the Negro district moved six or seven blocks from Argyle Avenue to Gilmore Street in the 15th and 16th Wards.[48] To the north, the black population in the 14th Ward continued to grow. By 1910, 8,392 Negroes resided there, the second highest number. Negroes were distributed fairly evenly over the remainder of the city, excepting five wards where their numbers were negligible.[49]

Expansion of the Negro district to the west and north was not without incident. White residents struggled against the "black sea" for years.[50] For example, a protest convinced the School Board to reverse

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43. *Id.* at 16.
44. *Id.* at 18.
45. CHILDREN'S BUREAU STUDY, *supra* note 11, at 5.
46. W. Paul, *supra* note 4, at 391.
47. *Id.* at 392; *see also supra* text accompanying note 13.
48. *A Social Problem*, *supra* note 6, at 497; Hawkins, *supra* note 4, at 27.
49. CHILDREN'S BUREAU STUDY, *supra* note 11, at 5.
50. *A Social Problem*, *supra* note 6, at 498.

a decision converting a white school to a black one.[51] Windows were broken and black tar was smeared on white marble steps.[52] And when a black family moved into a house on Stricker Street they were attacked and the house was stoned.[53] But white terrorism was no match for the combined purchasing power of housing-hungry blacks. Money talked.

In their effort to move eastward, on the other hand, blacks had been unsuccessful. Druid Hill Avenue had remained the eastern boundary of the Negro district. In its 1600 block, residences of the "best" Negro families were directly across the street from Western High School, the "best" public girl's school — which was for whites only.[54] This barrier was reinforced by the affluence of the white neighborhood to the east. Eutaw Place was a broad, landscaped boulevard which had been designed to encourage residential development and to enhance property values in the vicinity. The plan was a success and the Eutaw Place neighborhood had become one of the most fashionable residential sections of Baltimore.[55] It had spread three blocks west of the boulevard itself with Druid Hill Avenue serving as its western boundary.

In the summer of 1910, George W.F. McMechen purchased a house at 1834 McCulloh Street. McMechen, a Yale law graduate and a practicing attorney, moved with his wife and children from his former house on Prestman Street, ten blocks to the west. McMechen was celebrating his professional success by moving into one of the most fashionable neighborhoods in Baltimore.[56] The move is memorable only because McMechen and his family were black. He had crossed the eastern boundary of the Negro district and purchased a house in the Eutaw Place neighborhood.

This violation of the color line provoked considerable agitation. Police were necessary to protect the McMechen house from young ruffians.[57] A mass meeting was held on July 5, 1910 and a petition prepared requesting that the Mayor and City Council: "take some measures to restrain the colored people from locating in a white community, and proscribe a limit beyond which it shall be unlawful for

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51. *Id.*

52. Hawkins, *supra* note 4, at 27.

53. Transcript of interview with Dr. J.O. Spencer, R.G. 102, Box 121, National Archives (June 20, 1916).

54. S. OLSON, *supra* note 8, at 277.

55. J. DORSEY & J. DILTS, A GUIDE TO BALTIMORE ARCHITECTURE 187 (2d ed. 1981).

56. George W.F. McMechen, Md. Vertical File, Enoch Pratt Free Library; Hawkins, *supra* note 4, at 28.

57. Hawkins, *supra* note 4, at 28.

them to go . . . ."[58] The petitioners were concerned that Negroes intended to "plant themselves on Madison Street and Eutaw Place" as well.[59]

Milton Dashiell was George W.F. McMechen's brother at the Maryland Bar. Dashiell had been born in Dorchester County, Maryland in 1859; he attended St. John's College in Annapolis, read law, and was admitted to practice in 1882. For a time, he practiced in Kentucky before he returned to his home state.[60] According to all reports, his career was undistinguished; he was a "briefless lawyer."[61]

Dashiell resided on the southern fringe of the 11th Ward at 1110 McCulloh Street. The neighborhood was all white, but it was located just a block away from the Biddle Alley district, the infamous "lung block." The "Negro invasion" of Eutaw Place inspired Dashiell to draft a law designed to prevent blacks from further encroaching on white neighborhoods. The bill was introduced into the City Council by Councilman Samuel L. West.[62]

The bill took a long and tedious course. Public hearings were held at which the primary spokesmen against the ordinance were Negroes. Both branches of the City Council finally passed the ordinance, by a strict party vote — all Democrats voted in favor and all Republicans voted against.[63]

The *Baltimore Sun* summarized the ordinance's provisions as follows:

> That no negro can move into a block in which more than half of the residents are white.
> That no white person can move into a block in which more than half of the residents are colored.
> That a violator of the law is punishable by a fine of not more than $100 or imprisonment of from 30 days to 1 year, or both.
> That existing conditions shall not be disturbed. No white person will be compelled to move away from his house because the block in which he lives has more negroes than whites, and no negro can be forced to move from his house if his block has more whites than negroes.
> That no section of the city is exempted from the conditions of the

58. Petition to the Mayor and City Council, Baltimore City Archives, Mahool Files, File 406 (July 5, 1910).
59. *Id.*
60. Baltimore Sun, December 18, 1910, at 7, col. 6.
61. Hawkins, *supra* note 4, at 28.
62. Baltimore Sun, December 20, 1910, at 7, col. 7.
63. *Id.*

ordinance. It applies to every house.[64]

In addition, the ordinance prohibited negroes from using residences on white blocks as a place of public assembly and vice versa.[65]

On December 17, 1910, City Solicitor Edgar Allan Poe issued an opinion declaring the ordinance constitutional. He opined that the ordinance was within the state's police power "because of irrefutable facts, well-known conditions, inherent personal characteristics and ineradicable traits of character perculiar [sic] to the races, close association on a footing of absolute equality is utterly impossible between them, wherever negroes exist in large numbers in a white community, and invariably leads to irritation, friction, disorder and strife."[66] He determined that this ordinance was permissible under the fourteenth amendment to the U.S. Constitution because "a State has the right under its police power to require the separation of the two races wherever the failure to so separate then [sic] injuriously affects the good order and welfare of the community."[67]

Mayor J. Barry Mahool signed the ordinance into law on December 20, 1910. The occasion was a ceremonial one. Two pens were used in the signing — one was given to Dashiell and one to Councilman West. The pen was a "favor" which Dashiell announced he would "treasure . . . from every point of view."[68] West got into the spirit of the occasion by announcing that he would have a copy of the ordinance framed and hung in his home.[69]

It is easy to understand racist Dashiell's pride of authorship, but from today's perspective, Mayor Mahool's support is enigmatic. This experiment in apartheid is at best a sell-out to Baltimore plutocracy, and at worst an invidious denial of housing to Baltimore's blacks. Yet Mahool, who is remembered as a champion of social justice,[70] eagerly signed the ordinance without apology.

At first it seems anomalous that a member in good standing of the Progressive Movement — which advocated the elimination of slums as the breeding ground for crime, disease, and poverty — would enthusiastically support a law designed to worsen Negro housing conditions. But in a broader historic context it makes sense. Progressive reformers

64. *Id.* at cols. 5-6.
65. Baltimore, Md., Ordinance 610 (Dec. 19, 1910).
66. Memo from Edgar Allan Poe to Mayor J. Barry Mahool, Baltimore City Archives, Mahool Files, File 451 (Dec. 17, 1910).
67. *Id.*
68. Letter from Milton Dashiell to Mayor J. Barry Mahool, Baltimore City Archives, Mahool Files, File 406 (Nov. 26, 1910).
69. Baltimore Sun, December 20, 1910, at 7, col. 7.
70. J. CROOKS, *supra* note 7, at 102.

like Mahool found themselves faced with social chaos. Their efforts had failed to cure the fundamental ills — illiteracy, morbidity, crime, and poverty — from which the urbanizing, industrializing society suffered. Thus defeated, they resolved to treat two of the most bothersome and visible symptoms of society's ailments: riots and epidemic disease.[71]

Because the riots were often racial in nature, and because the black slums were viewed as the source of contagion, the reformers focused on the black neighborhoods. The ultimate goals of the Progressives, however, were not directed to improving the living conditions of black slum families. Progressive reformers were not concerned with the plight of Negroes; as C. Van Woodward observed: "The blind spot in the . . . progressive record . . . was the Negro . . . ."[72] "Victim blaming" was much less costly than attempting to solve the underlying social problems.[73]

Social Darwinism provided the ideological basis for this view, and some reformers used it to posit a basic inferiority of black people.[74] For example, the campaign rhetoric of the Disenfranchisement Movement (a nationwide effort to deny Negroes of their right to vote) depicted blacks as slovenly and corrupt brutes.[75] Turn-of-the-century census data supported the view that Negroes were a dying race: blacks showed a higher mortality rate and a lower birth rate than whites.[76]

Viewed in this context, Mahool's support for the first segregation ordinance is less surprising. Similarly, the *Baltimore Sun*, which by 1911 had good credentials as a reform newspaper, editorially apologized for the segregation ordinance as follows: "Baltimore has to deal with the condition as it exists and not with the abstract theories of theorists and those who are not personally concerned."[77]

Many Progressives thus agreed that poor blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease into the nearby white neighborhoods, and to protect property values among the white majority. Historian George M. Frederickson tied these strands together:

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71. R. LUBOVE, *supra* note 41, at 11-12.

72. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 91 (3d rev. ed. 1974).

73. J. LEVIN & W. LEVIN, THE FUNCTIONS OF DISCRIMINATION AND PREJUDICE 41-42 (2d ed. 1982).

74. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: The Heyday of Jim Crow* 82 COLUM. L. REV. 444, 453-54 (1982).

75. M. CALLCOTT, THE NEGRO IN MARYLAND POLITICS 1870-1912 101-38 (1969).

76. Schmidt, *supra* note 74, at 453.

77. Baltimore Sun, April 7, 1911, at 6, col. 3.

> If blacks were a degenerating race with no future, the problem ceased to be one of how to prepare them for citizenship or even how to make them more productive and useful members of the community. The new prognosis pointed rather to the need to segregate or quarantine a race liable to be a source of contamination and social danger to the white community, as it sank even deeper into the slough of disease, vice and criminality.[78]

The first segregation ordinance proved to be politically and legally deficient. It was a foregone conclusion that the ordinance would be vehemently opposed by the Negro community. But blacks were not alone in opposing the ordinance: they were joined in opposition by real estate brokers and white owners of property located in mixed neighborhoods. Objections arose before the ordinance was signed. For example, on December 10, 1910, a broker wrote Mayor Mahool expressing concern that the ordinance would preclude rental to Negroes in a block in which Negroes already lived but were in the minority. The writer said:

> the property owners of this city who will lose thousands of dollars through the too strict terms of this ordinance, rely upon you to carefully raise such facts as are here presented before signing this ordinance, a serious effect of which will probably not be fully realized until some of us come face-to-face with some of our property vacant and in a mixed neighborhood.[79]

On December 12, 1910, a property owner less gramatically, but more poignantly, made the same point:

> I am also a property owner and I have a house i [sic] south Baltimore where one of the owners have rented the next two houses from mine to colored. My tenants are white. They tell me in spring they will move, now that this ordinance becomes a law and if white people don't move in my house I will have to pay expenses on property that does not pay my [sic] in return. I approve in keeping colored people to themselves and this ordinance as it is will work a hardship on property owners all over the city. I would approve of a law where there is no colored people in the block.[80]

Hence, the ordinance was politically flawed in that it worked at cross purposes to the economic well-being of a significant white constituency.

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78. G. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914 255 (1971).

79. Letter to J. Barry Mahool, Baltimore City Archives, Mahool Files, File 451 (Dec. 10, 1910).

80. Letter from Charles S. Otto to J. Barry Mahool, Baltimore City Archives, Mahool Files, File 406 (Jan. 16, 1911).

In addition to its political flaws, literal application of the ordinance produced some unlikely incidents. One story is told of a white person who temporarily vacated his house while it was under repair, thereby making the block fifty-one percent black. Return to his own home would have made him a criminal.[81] In the same vein, Daniel W. Shaw, a black Methodist preacher, wrote Mayor Mahool and asked the following question:

> In reference to the operation of the . . . ordinance, I beg to ask: when colored Methodist preachers living in parsonages owned by their churches, located in blocks where the majority of the residences are white, are ordered by their bishops to move, and a new colored preacher is sent to take the charge, will the . . . ordinance prohibit the new colored preacher from moving into the house owned by his church located in the white block.[82]

Mayor Mahool referred the question to Milton Dashiell, who righteously replied:

> I am only able to say that the colored parson, considered to represent the most enlightened of the negro race, should have established his home in the midst of his race, and that he should have encouraged others of his race to do likewise . . . . The inquiry seems to me like a hypothetical one, and can be answered by the parson, unaided, save by the ordinance itself.[83]

A legal challenge to the ordinance was not long in coming. In less than a month, twenty-six criminal cases were sent to court. In the first one to go to trial, Judges Harland and Duffy of the Supreme Bench of Baltimore, without going into the merits of the legislation, declared the ordinance ineffective and void because it was "inaccurately drawn."[84] There is no published report of their opinion, but presumably the inaccuracy was in the ordinance's title. Section 221 of the City Charter of Baltimore provided: "Every ordinance enacted by the City shall embrace but one subject which shall be *described* in its title . . . ."[85] The title of the first segregation ordinance was nondescriptive; it grandly declared that the provision was "[a]n ordinance for preserving order, securing property values and promoting the great interests and insuring

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81. Hawkins, *supra* note 4, at 29.

82. Letter from Daniel W. Shaw to J. Barry Mahool, Baltimore City Archives, Mahool Files, File 406 (Jan. 16, 1911).

83. Letter from Milton Dashiell to Daniel W. Shaw, Baltimore City Archives, Mahool Files, File 406 (Jan. 17, 1911).

84. Hawkins, *supra* note 4, at 29.

85. BALTIMORE CITY CHARTER § 221 (1898) (emphasis added).

the good government of Baltimore City,"[86] without mentioning racial segregation of housing.

Partisans of the segregation ordinance were undaunted. Indeed, they viewed the court's decision as an encouragement "to push further their war into Africa."[87] Councilman West decided to drop lawyer Dashiell, however, and to seek the assistance of more eminent counsel. He turned to William L. Marbury, whose credentials as a segregationist were well established by his role in the Disenfranchisement Movement.[88]

The second segregation ordinance corrected the legal flaws of the first. Further, in a major substantive change, Marbury drafted the ordinance to be inapplicable to "mixed" blocks. All black blocks were to remain all black, all white blocks were to remain all white, and integrated blocks were left to pursue their market destiny. Marbury designed this change to quiet opposition from white landowners and real estate professionals. He also changed the ordinance's style, replacing Dashiell's reasonably straightforward prose with redundant legalese. For example, the most important sentence in the second ordinance read as follows:

> [I]t shall be unlawful for any colored person to move into or use as a residence or place of abode any house, building or structure, situated or located on any block . . . the houses, buildings and structures on which block, so far as the same are occupied or used as residences or places of abode, in whole or in part, shall be occupied or used as residences or places of abode by white persons . . . .[89]

Not everyone was pleased with the second segregation ordinance. A delegation of black property owners urged its veto,[90] and some brokers reiterated their concern that the ordinance would depress real estate values in mixed neighborhoods. Milton Dashiell wrote to Mayor Mahool from his sick room both to reaffirm his authorship of "the plan of segregation" and to object to some features of the Marbury version which were too liberal in permitting mixed occupancy.[91] These objections notwithstanding, Mahool signed the ordinance on April 7, 1911.[92]

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86. Baltimore, Md., Ordinance 610 (Dec. 19, 1910).
87. Hawkins, *supra* note 4, at 29.
88. *Id.* at 30.
89. Baltimore, Md., Ordinance 654, § 2 (April 7, 1911).
90. Baltimore Sun, April 8, 1911, at 9, col. 5.
91. Letter from Milton Dashiell to J. Barry Mahool, Baltimore City Archives, Mahool Files, File 475 (April 6, 1911).
92. Baltimore, Md., Ordinance 654 (Apr. 7, 1911).

Approximately a month after its adoption, the City Council repealed the second segregation ordinance and reenacted it with amendments. The text of the ordinance remained essentially the same; the purpose of the reenactment was to cure a technical flaw in enactment. The Council added two new provisions: neither black schools nor black churches could be established in white blocks and vice versa.[93] Mahool signed the third segregation ordinance on May 15, 1911, as his last official act. The next day he was replaced in office by regular Democrat James H. Preston, who had defeated Mahool's bid for reelection in the 1911 Democratic primary.

A challenge to Baltimore's third segregation ordinance was two years in coming. A criminal indictment was filed against John E. Gurry, "a colored person," charging that he had unlawfully moved into a residence on an all-white block. Gurry was defended in the Criminal Court of Baltimore City by W. Ashbie Hawkins,[94] a Negro, who was to play an active role in legally attacking the segregation ordinances.[95]

At trial the court dismissed the indictment against Gurry, finding the ordinance nonsensical. Judge Elliott focused on sections 1 and 2 of the ordinance. According to his interpretation, section 1 excluded whites from blocks "in whole or in part" black, and section 2 excluded blacks from blocks "in whole or in part" white.[96] Hence, he concluded, the ordinance would depopulate mixed blocks by precluding whites and blacks alike from moving there. Therefore, the ordinance must fail because of its own unreasonableness.[97]

The ordinance, of course, could be interpreted another way. Lawyer Marbury intended for it to exclude blacks from blocks "in whole or in part" residential, where all the residences are occupied by whites. The Maryland Court of Appeals rescued Marbury from his circumlocution by adopting this interpretation, which permits either blacks or whites to move onto mixed blocks.[98] The Maryland high court had a substantive quarrel with the ordinance, however. It found the ordinance unconstitutional because it took away the vested rights of the

93. Baltimore, Md., Ordinance 692 (May 15, 1911).

94. State v. Gurry, 3 Baltimore City Ct. 262 (1913).

95. Hawkins came to Baltimore to attend Morgan College. Thereafter he attended the University of Maryland Law School for a year before he transferred to Howard University Law School. He later was associated in the practice of law with George W.F. McMechen, who had broken the color line on McCulloh Street. *See* W. Ashbie Hawkins, Baltimore Newspost, April 7, 1941 (Biography File, Enoch Pratt Free Library); 7 MORGAN ST. C. BULL. 24, May 1941. For a contemporaneous account of these events, see Hawkins, *supra* note 4, at 28-30.

96. Baltimore, Md., Ordinance 692 (May 15, 1911).

97. State v. Gurry, 3 Baltimore City Ct. at 263.

98. State v. Gurry, 121 Md. 534, 539, 88 A. 546, 548 (1913).

owner of a dwelling to move into it if he happened to be white and the block was all black, or vice versa.[99]

There was no lapse in coverage, however: a week before the Maryland Court of Appeals struck down the third segregation ordinance, the Baltimore City Council had enacted a fourth. The fourth segregation ordinance cured the constitutional infirmity of its predecessor by making its application prospective only; it provided "that nothing herein contained shall be construed or operate to prevent any person, who at the date of the passage of this ordinance, shall have acquired a legal right to occupy, as a residence any building or portion thereof . . . from exercising such legal right . . . ."[100]

In the short run the segregation ordinances served the goal of their proponents — the protection of Eutaw Place from a "Negro Invasion"[101] — while presenting blacks with few problems. To the contrary, blacks at first were able to buy or to rent at distress prices as whites fled mixed blocks.[102] The ordinances failed to accomplish the more long term goals of the white majority, however, and eventually worked a positive hardship on blacks, the effects of which are apparent even today.

The ordinances did not succeed in protecting against crime and contagion, the more general objectives of the white middle class. For example, the ordinances had targeted the 17th Ward for degradation. Its streets and alleys were "honeycombed with saloons and gambling dens, as well as numerous billiard halls, dance halls and several brothels."[103] In the making was what modern sociologist Kenneth Clark was to call the "pathologies of the ghetto."[104] Blacks formed a self-help organization, the Baltimore Colored Law and Order League, to pressure municipal government to enforce liquor laws, but to little avail.[105] Rowdyism and theft increased in frequency and spread to surrounding

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99. *Id.* at 550-51, 88 A. at 553 (holding that the state legislature had never authorized the city to pass such an unreasonable ordinance).

100. Baltimore, Md. Ordinance 339 (Sept. 25, 1913).

101. A black real estate dealer described this development as follows:

> The crowding among the colored people, especially in the 17th Ward is greatly on the increase . . . . They have been moving rapidly into the 17th Ward and packing it. Normally they would have spread over all of McCulloh Streets [sic] and the larger streets in this Ward and the district to the northwest. This movement has been prevented by the artificial pressure of the Segregation Act.

Transcript of interview with William L. Fitzgerald, R.G. 102, Box 121, National Archives (June 28, 1916).

102. Hawkins, *supra* note 4, at 30.

103. W. Paul, *supra* note 4, at 393.

104. K. CLARK, DARK GHETTO DILEMMAS OF SOCIAL POWER 12-20 (1965).

105. W. Paul, *supra* note 4, at 397.

areas, both as a product of and a reaction against this environment.[106] Thus, creation of a black ghetto increased crime in the contiguous white neighborhoods.

Housing segregation also failed to protect the white community from contagion. The mortality rate among Negroes from tuberculosis remained 260% higher than that of whites and the death rate from all diseases ninety-six percent higher than that of whites.[107] H.L. Mencken directly commented on the segregation ordinance's negative effect on public health:

> But who ever heard of a plan for decent housing for negroes in Baltimore? Most of them live in filthy hovels, crowded together in the winter, breeding diseases in themselves and constantly communicating these diseases to the rest of us. The persons who govern us have never thought to look to this matter. When the darky tries to move out of his sty and into human habitation a policeman now stops him. The law practically insists that he keep on incubating typhoid and tuberculosis — that he keep these infections alive . . . for the delight and benefit of the whole town.[108]

Even Mayor James H. Preston, who after replacing Mayor Mahool became a great proponent of the segregation ordinance, conceded that it failed to protect the public health of the white middle-class:

> [T]he evil effects of the unhealthy state of the negro race are not confined within their own numbers. With little if any knowledge of their home surrounding we call upon these people to serve us in our households, prepare our food, tend our children and perform countless other services wherein personal contact is a matter of course. Regardless of our efforts to maintain [a] sanitary and healthful environment for ourselves and families the insidious influence of slum conditions is carried into our very midst to defile and destroy.[109]

In short, the ordinances failed to segregate germs in the 17th Ward.

The ordinances also were disastrous for Baltimore's black community because their effect was to limit further the overall housing supply available to an increasing black population. An economist asked to guess the likely impact of a law which limited the supply of housing for which there was an increasing demand would make two prophecies —

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106. *Id.*

107. Preston, *What Can Be Done to Improve the Living Conditions of Baltimore's Negro Population?* 5 BALTIMORE MUN. J. 1, 1 (March 16, 1917).

108. H.L. Mencken, 1 The Free Lance 137 (1911-1915) (unpublished collection found in Mencken Room, Enoch Pratt Free Library, Baltimore).

109. Preston, *supra* note 107, at 1.

the price of Negro housing would increase, and the quality of Negro housing would decline. Both came to pass. Although the ordinances at first made some housing available to blacks as whites abandoned their homes on mixed blocks, only a limited number of mixed blocks existed and the pressure for additional Negro housing was unrelenting. The Negro population in Baltimore was 85,000 in 1910. It had been increasing by approximately 600 per year during the previous decade,[110] yet the additional housing available to blacks was being exhausted. A growing population was "bottled-up" into a limited number of houses.[111]

On the surface the segregation ordinances do not seem designed to shrink black housing opportunities. Indeed, the ordinances permitted the creation of new all-black subdivisions. But circumstances conspired to foreclose this possibility. New housing was financed largely by building and loan associations created by ethnic groups and labor unions that refused to extend credit to Negroes. By 1900 there was only one black building and loan association.[112] Even if a black family could find the capital, few blacks could afford new housing. According to census figures from 1910, which show home ownership among Negroes in seventy-three southern cities with a black population of 5,000 or over, Baltimore ranked seventy-second. Only 933 of the city's 85,000 blacks owned their homes.[113] Finally, even if a group of middle-class blacks could be found who could afford new housing on the outskirts of town, they were likely to receive a hostile reception from white neighbors. [114]

For example, a move of Morgan College to the northeast suburbs encountered great opposition. Residents resisted the plan to create a community of "scientifically sanitary" housing for the black faculty; the president of the local community association declared his preference to live near a community of "ignorant and tractable negroes" rather than one of "educated negroes."[115] During this period "Patapsco Park" was advertised in the *Afro-American* newspaper as "the only suburb strictly for colored people."[116] But for most blacks, second-

110. CHILDREN'S BUREAU STUDY, *supra* note 11, at 2-3.

111. Transcript of interview with S.C. Fernandez, R.G. 102, Box 121, National Archives (June 19, 1916).

112. S. OLSON, *supra* note 8, at 234-35.

113. CHILDREN'S BUREAU STUDY, *supra* note 11, at 33.

114. Transcript of interview with Dr. J.O. Spencer, R.G. 102. Box 121, National Archives (June 20, 1916).

115. S. OLSON, *supra* note 8, at 278; transcript of interview with William L. Fitzgerald, R.G. 102, Box 121, National Archives (June 28, 1916).

116. CHILDREN'S BUREAU STUDY, *supra* note 11, at 33.

hand houses were the only option.

Increased demand and a limited supply naturally results in rising prices. By 1916 various observers noted, and three different studies confirmed,[117] that blacks were forced to pay more than whites for housing. As blacks dispossessed whites on mixed blocks, the rents went up. Dr. J.O. Spencer, President of Morgan College, tells of a case where a black family moved into a house that previously had been rented to whites for $27.50 per month and were charged $32.00.[118]

As the price went up, the quality of housing in black neighborhoods was inexorably declining. In a market characterized by increased demand, a limited housing stock, and rising cost, Negroes had no choice but to crowd together in order to make the rent.[119] Even the small alley houses were turned into tenements for three or more families. In 1913, the director of the National League on Urban Conditions Among Negroes described what was happening in the picturesque slang of that period: "For the poorer and less thrifty element . . . loose building regulations allow greedy landlords to profit by 'gun-barrel' shanties and cottages, by 'arks' of which the typical pigeon-house would be a construction model, and by small houses crowded upon the same lot."[120]

Baltimore's middle-class black neighborhood also was under seige. Established in the 14th Ward along upper Druid Hill Avenue, it had been "mixed" when the segregation ordinances went into effect. A quiet residential neighborhood with stately three-story town houses, W.E.B. DuBois described Druid Hill Avenue as "one of the best colored streets in America."[121] Its middle-class inhabitants had the same aspirations as their white neighbors — they sought to distance themselves from the crime, contagion, and squalor of the slums. But the segregation ordinances fated the neighborhood eventually to become a slum. Speculators outbid homeowners for the houses and converted them into tenements for three or more families. A familiar pattern repeated itself: As the lower-class population grew, entreprenuers established saloons, gambling places, and brothels. The black bourgeoisie resisted through such self-help organizations as the Baltimore Colored Law and Order League, but it was at best a holding action.[122]

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117. *See* S. OLSON, *supra* note 8, at 277, and authorities cited therein.

118. Transcript of interview with Dr. J.O. Spencer, R.G. 102, Box 121 National Archives (June 20, 1916).

119. CHILDREN'S BUREAU STUDY, *supra* note 11, at 32; Transcript of interview with William L. Fitzgerald, R.G. 102, Box 121, National Archives (June 28, 1916).

120. Haynes, *supra* note 5, at 111.

121. S. OLSON, *supra* note 8, at 277.

122. W. Paul, *supra* note 4, at 397.

Notwithstanding this negative assessment of the effects of the segregation ordinances, they were popular with white citizenry. Dollars dictated this positive response. In a letter to Mayor Preston in 1916, Reverend W.J. McMillian, the pastor of the Maryland Avenue Presbyterian Church, expressed the views of the white majority:

> Personally I believe that the segregation matter is one of the greatest problems of the modern municipality. The proximity of the negro race to good property means its undoing. This is the fact with which we must deal rather than concerning ourselves with the theories that race prejudice ought not to be. Personally I believe that the property of the church which I serve has been injured $5,000 in the last twelve months by the negroes' getting the block on Oak Street between 24th and 25th Streets.[123]

Mayor Preston summed up the official attitude in a letter to the President of the New York Title and Mortgage Company: "Our segregation ordinance is acting admirably in Baltimore, in operation and effect — and has very great influence on property values and on the condition of both races."[124]

The "Baltimore idea" for promoting residential segregation was quickly adopted in other southern and border cities. In 1912 Mooresville and Winston-Salem, North Carolina enacted segregation ordinances. One year later Asheville, North Carolina; Richmond, Norfolk, and Roanoke, Virginia; Atlanta, Georgia; Madisonville, Kentucky; and Greenville, South Carolina passed similar legislation. And in 1914 Louisville, Kentucky; Birmingham, Alabama; and St. Louis, Missouri followed suit.[125]

Indeed the success of residential segregation ordinances was the catalyst for the emergence of the National Association for the Advancement of Colored People as an effective counterforce to segregation. The NAACP had been founded in 1909.[126] But its membership and political power grew as it established local branches to press court challenges to the segregation ordinances.[127] The success of these challenges varied: The North Carolina Supreme Court had struck down an ordinance as a violation of property rights;[128] Georgia's Supreme Court

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123. Letter from the Rev. W.J. McMillan to Mayor Preston, Baltimore City Archives, Preston Files, File 506 (Jan. 18, 1916).

124. Letter from Mayor Preston, Baltimore City Archives, Preston Files, File 506 (Mar. 17, 1917).

125. Schmidt, *supra* note 74, at 499-500.

126. Rice, *supra* note 2, at 182.

127. Schmidt, *supra* note 74, at 503.

128. State v. Darnell, 166 N.C. 300, 81 S.E. 338 (1914); (city charter authorized aldermen to enact any ordinance they deem proper for city's good order and general welfare so long as

vacillated, first rejecting,[129] then approving,[130] different versions of Atlanta's ordinance; and the Virginia Court of Appeals sustained its ordinances with some qualifications.[131]

As we have already seen, the Baltimore branch of the NAACP, under the leadership of W. Ashbie Hawkins, had successfully attacked an early version of Baltimore's segregation ordinance.[132] Hawkins' plan to take a constitutional challenge to the United States Supreme Court had been postponed by this success. But in 1915, Hawkins again started up the judicial ladder when he challenged, before the Maryland Court of Appeals, the constitutionality of Thomas S. Jackson's criminal conviction for violation of Baltimore's fourth segregation ordinance.[133] At the request of Mayor Preston, William L. Marbury filed a brief in support of the city's position. Preston remained apprehensive; he wrote to Marbury: "In this brief there is a page and a half of argument. It seems to me that this is too important a matter to be 'kissed down the wind' so lightly."[134] Mayor Preston went on to request his City Solicitor, S.S. Field, to file an additional brief in support of the constitutionality of the segregation ordinance.

The Maryland Court of Appeals postponed its decision in the case pending a decision by the United States Supreme Court in a closely related case. In 1914, the City of Louisville, Kentucky had passed a segregation ordinance of its own. The text of the Louisville ordinance closely resembled the text of the first segregation ordinance which Milton Dashiell had drafted for Baltimore. The ordinance made it unlawful for blacks to reside in residential blocks more than fifty percent white and vice versa.[135]

The Supreme Court case was a product of the efforts of the NAACP's national headquarters. The NAACP had formed a Louis-

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the ordinance did not contravene state constitution and its laws, and did not authorize enactment of racial segregation ordinance).

129. Carey v. City of Atlanta, 143 Ga. 192, 84 S.E. 456 (1915); (city's racial segregation ordinance violated due process clauses of both the state constitution and the fourteenth amendment to the federal constitution, because it denied a person's inherent right to acquire, to enjoy, and to dispose of property).

130. Harden v. City of Atlanta, 147 Ga. 248, 93 S.E. 401 (1917); (city's racial segregation ordinance, by its terms applicable only prospectively, did not violate due process).

131. Hopkins v. City of Richmond, 117 Va. 692, 86 S.E. 139 (1915); (enactment of racial segregation ordinance is within the city's police power to promote peace and good order, and ordinance is constitutional insofar as it is applied only to persons whose property rights accrued after its enactment).

132. *See supra* text accompanying notes 94-95.

133. Jackson v. State, 132 Md. 311, 103 A. 910 (1918).

134. Letter from Mayor Preston to William L. Marbury (Nov. 29, 1915), Baltimore City Archives, Preston Files, File 506.

135. Buchanan v. Warley, 245 U.S. 60 (1917).

ville branch and had recruited prominent local counsel, but orchestrated the litigation from its New York office. With the assistance of the local black leaders and white members of the Louisville Real Estate Exchange, it created a test case in the context least favorable to the ordinance's unconstitutionality.[136]

The scenario had William Warley, president of the Louisville branch of the NAACP, contract to buy a corner lot from Charles Buchanan, a white real estate agent. The lot in question was in a "white block" but was surrounded by black residences. The contract provided that Warley was not required to perform "unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence."[137] Buchanan sought specific performance of the contract in the state courts and Warley set up the ordinance as his excuse for not performing. The state courts held the Louisville ordinance constitutional and therefore a complete defense to Warley.[138]

Hence the case of *Buchanan v. Warley* had been staged to work a role reversal. Buchanan, the plaintiff challenging the constitutionality of the ordinance, was a white real estate agent. Warley, the defendant defending the ordinance, was the black president of the Louisville branch of the NAACP. The explanation of this litigation strategy is straightforward. At the turn of the twentieth century the U.S. Supreme Court had come to accept Jim Crow laws: in *Plessy v. Ferguson*,[139] decided in 1896, the Court found state law requiring racial segregation on railroads consistent with the fourteenth amendment; and in *Berea College v. Kentucky*,[140] decided in 1908, it found that the state of Kentucky had the power to require racial segregation in a private college. But during this same era the Court had actively embraced the credo of "economic laissez-faire." In 1905, in *Lochner v. New York*,[141] the Court constitutionally protected freedom of contract in the baking business from maximum-hour legislation. In *Buchanan*, the NAACP hoped to convince the Court to protect Buchanan's constitutional right to engage in the real estate business without meddlesome interference from the City of Louisville (and thereby incidentally to protect blacks from residential housing segregation).

136. *See generally* Rice, *supra* note 2, at 183-88 (a detailed discussion of *Buchanan*'s historical background). *See also* Schmidt, *supra* note 74, at 498 (summary of the decision).

137. Buchanan v. Warley, 245 U.S. at 70 (quoting contract).

138. Schmidt, *supra* note 74, at 498.

139. 163 U.S. 537 (1896).

140. 211 U.S. 45 (1908).

141. 198 U.S. 45 (1905).

Buchanan v. Warley was first argued before the Supreme Court in April of 1916 before seven justices. The Court then ordered reargument before a full bench. The significance of the case was well recognized; twelve amicus briefs were filed on both sides. From Baltimore, City Solicitor Field filed a brief defending the ordinance, while W. Ashbie Hawkins (who had hoped himself to argue a case challenging the Baltimore ordinance before the Supreme Court) filed a brief on behalf of the Baltimore NAACP.[142] The case was reargued and the Court finally rendered a decision in November of 1917.

The NAACP's litigation strategy almost back-fired. Justice Holmes prepared a dissent in which he argued that the case should be dismissed because of its collusive nature. Holmes said: "The contract sounds so very like a wager upon the constitutionality of the ordinance that I cannot but feel a doubt whether the suit should be entertained without some evidence that this is not a manufactured case."[143] But Holmes decided not to deliver his dissent and a unanimous Court held the Louisville housing segregation ordinance unconstitutional.[144]

The NAACP's tactic had worked. Justice Day's opinion emphasized Buchanan's property right to dispose of his lot as he saw fit.[145] Also in the opinion, however, were expressions of concern for the rights of Negroes. Day found "the difficult problem arising from a feeling of race hostility" an insufficient basis for depriving citizens of their constitutional rights to acquire and to use property without state legislation discriminating against them on the sole basis of color.[146] From today's perspective the opinion seems analytically imprecise. The Court intertwined Buchanan's right to substantive due process with Warley's right to equal protection.[147] But the opinion served perfectly the NAACP's purpose. The Supreme Court was afforded a mechanism through which it could squelch residential segregation laws without overruling recent precedents that had sustained racial segregation in transportation and schools.

Nationwide, the black press exulted in the *Buchanan* decision.[148] The Baltimore *Afro-American* editorialized: "The joy in Bunkville [sic] when home run Casey came to bat in the final inning of a famous game with the bases loaded is nothing compared with the rejoicing in Balti-

142. Buchanan v. Warley, 245 U.S. at 68-69.
143. Schmidt, *supra* note 74, at 512.
144. Buchanan v. Warley, 245 U.S. 60 (1917).
145. *Id.* at 79.
146. *Id.* at 80-82.
147. Schmidt, *supra* note 74, at 517-23.
148. *Id.* at 508.

more, Richmond, St. Louis and other Southern towns over the outcome of the Louisville Segregation decision."[149] Law reviews from all parts of the country generally were critical of the decision. The critics were unable to see how segregation could be reasonable in transportation and education but not in housing.[150] An interested observer, Baltimore City Solicitor Field, lamented in the *Virginia Law Review* the "modern tendency to look upon property rights as more sacred than personal rights"[151] (i.e., the *property right* of blacks to acquire and use property free from racial discrimination versus the *personal right* of whites to discriminate on the basis of race).

The Maryland Court of Appeals responded promptly. Just three months after the Supreme Court decision, it rendered an opinion in *Jackson v. State*, striking down the Baltimore segregation ordinance on the grounds that it and the Louisville ordinance were "essentially alike in theory and purpose."[152] The court concluded: "It is thus definitely settled, upon highest authority, that the right of the individual citizen to acquire or use property can not be validly restricted, by State or municipality, on the ground of his color."[153]

Black Baltimoreans seized the opportunity to renew their movement into white neighborhoods. Two black families moved into the 1100 block of Bolton Street, one of the oldest middle-class residential sections of the city; another family moved into the 1200 block of McCulloh Street.[154] White Baltimoreans responded with petulance and frustration. Miss Alice J. Reilley asked, "What is the use of trying to beautify a city or put in any civic improvements if Negroes are to acquire all of the property?"[155]

Mayor Preston was undaunted. He sought the advice of Dr. A.K. Warner of Chicago, where plans for keeping Negroes out of white territory were in effect.[156] In addition to pursuing the Chicago Plan, Mayor Preston conceived of another "radical measure" to complement his plan for segregation. He proposed "the elimination of certain conjested sections, populated by Negroes, in which has been noted a very high

149. Baltimore Afro-American, November 10, 1917, *quoted in* Rice, *supra* note 2, at 194.

150. Schmidt, *supra* note 74, at 509-11; Rice, *supra* note 2, at 195-96.

151. Field, *The Constitutionality of Segregation Ordinances*, 5 VA. L. REV. 81, 84 (1917).

152. 132 Md. at 312, 103 A. at 910.

153. *Id.* at 316, 103 A. at 911.

154. Undated newspaper clippings, Baltimore City Archives, Preston Files, File 506.

155. Letter from Alice J. Reilly to James H. Preston, Baltimore City Archives, Preston Files, File 506.

156. Letter from Real Estate Bd. to James H. Preston (July 20, 1918), Baltimore City Archives, Preston Files, File 106.

percentage of deaths from . . . communicable diseases."[157]

It is doubtful that Preston appreciated the irony of his requesting advice from Dr. Warner. Chicago was then undergoing widespread rioting in response to Negro movement into white neighborhoods. Before it was over there would be fifty-eight bomb explosions, two Negroes dead, many people of both races injured, and property damage in excess of $100,000.[158] Chicago was a peculiar place to seek advice for one whose avowed purpose was improving race relations.

Nevertheless, Preston determined to implement the Chicago Plan. It was a simple one. The plan was "to forc[e] out the blacks already residing in [white] neighborhoods and [to ensure] that no others entered. The activities of [the white property owners' association] consisted both of mass meetings to arouse the neighborhood residents against the blacks and the publication in white journals of scathing denunciations of the race."[159] The auspices of the Real Estate Board of Baltimore, the City Building Inspector, and the Health Department also would be employed to discourage "block busting." In essence, Preston proposed to replace de jure segregation with de facto segregation, enforced by a conspiracy in restraint of rental or sale to Negroes.

The plan for segregation passed its first test. In August of 1918 Mayor Preston became aware that Louis Buckner, owner of the house at 649 Lee Street, proposed to rent to Negroes the second floor flat of his three-story house in an all-white neighborhood. When asked if he did not feel he was being inconsiderate to others in the block, Buckner responded: "They do not pay my way, I must look out for myself."[160] He was visited by the Secretary of the Real Estate Board of Baltimore and at the Mayor's behest, by the Inspector of Buildings for Baltimore. Buckner was counselled against the rental and that if the rental went through he would be cited for any code violations. Finally, at a meeting between Buckner and the Real Estate Board, Buckner assured the Board's members that he would not rent to blacks.[161]

Slum clearance—Mayor Preston's own "radical measure"—was not a new idea. Years before, the Baltimore & Ohio Railroad had used its condemnation powers to dispossess one hundred black families

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157. *Need for Better Housing for Negroes Revealed in Tuberculosis Statistics*, 5 BALTIMORE MUN. J. 5 (Aug. 10, 1917).

158. CHICAGO COMM'N ON RACE RELATIONS, THE NEGRO IN CHICAGO 122-23 (1922), *quoted in* Johnson, *supra* note 2, at 178.

159. W. TUTTLE, JR., RACE RIOT—CHICAGO IN THE RED SUMMER OF 1919 171 (1972).

160. Letter from Real Estate Bd. of Baltimore to James H. Preston (Aug. 16, 1918), Baltimore City Archives, Preston Files, File 106.

161. Letter from Real Estate Bd. of Baltimore to James H. Preston (Aug. 22, 1918), Baltimore City Archives, Preston Files, File 106.

when expanding its railyard in South Baltimore.[162] But Preston proposed to use the strategy in a more calculated fashion. The Commission on Housing Conditions would convert "the worst infected blocks" into parks.[163]

The first public slum clearance project provided for "the parking of St. Paul and Courtland Streets" between Lexington and Centre Streets. The city began in 1914 to buy up properties that were used as third-rate rooming houses and cheap flats.[164] Eventually, in 1917, proceeds from a harbor loan were used to hire landscape architect Thomas Hastings, who replaced Courtland Street with a sunken garden and widened St. Paul Street. The project was intended to improve the traffic flow, as well as to eliminate a downtown slum.[165] When completed in 1919, some Baltimoreans called it Preston's Folly, others called it Preston Gardens.[166]

Hence, in the aftermath of *Buchanan v. Warley*, the Baltimore plan for segregation had come to consist of two discrete strategies — clearance and containment. Clearance was used to remove Negro slums from areas where they were not wanted; containment was used to prevent the spread of black residential districts.

The plan for segregation went into operation at a tumultuous time. Following World War I, Baltimore was undergoing dramatic growth. In 1918 the city had added a new annex which tripled its area. Between 1920 and 1930 the city's population rose from 730,000 to one million. In that period, housing starts peaked at 6,000 per year, most of them in the new area.

Along with this growth came a redefinition of "race spaces." Negroes continued to pour into Baltimore from the countryside, but restrictive immigration laws had stopped the influx of Europeans. Population in the new annex doubled.[167] Although the white middle class was in the vanguard of the exodus to the suburbs, by 1930 they had been joined by the foreign-born. The Negro population in the old city increased from fifteen percent to thirty percent, while white population in the old city decreased by one-half.[168] Baltimore was becoming a black center surrounded by a white ring. The racial Social

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162. *See supra* note 10.

163. *See Need for Better Housing for Negroes Revealed in Tuberculosis Statistics*, 5 BALTIMORE MUN. J. 5 (Aug. 10, 1917).

164. Kelly, "The Birth of Preston Gardens," Baltimore Sun, May 9, 1954 (found in vertical file Parks, Baltimore, Preston Gardens, in Enoch Pratt Free Library).

165. *The Parking of St. Paul and Courtland Streets*, 7 BALTIMORE MUN. J. 5 (May 23, 1919); *see also* 5 BALTIMORE MUN. J. 4 (Oct. 5, 1917).

166. Kelly, *supra* note 164.

167. S. OLSON, *supra* note 8, at 302-03.

168. *Id.* at 324-25.

Darwinists who had been instrumental in proposing residential segregation had assumed that Negroes would constitute a declining percentage of the population.[169] In the old Baltimore City the opposite was proving to be the case.

The exodus of whites to the new annex ameliorated crowding in black housing. Most families lived in a separate house with less than one person per room.[170] In the short run the problem was quality, not quantity. A 1933 study found that Baltimore's "blighted" areas — areas in which the physical condition of dwellings is below the standard for rehabilitation, and with substantial health and sanitary problems— were predominantly populated by blacks.[171] These districts received few municipal services. Garbage and refuse went uncollected. Alleys were infested with rats. The sewer system had been completed in 1914, but many houses in the 17th Ward were still not connected; it is said that building inspectors were bribed.[172] When toilets were installed, in some small houses there was so little space they were placed next to the front door.[173] The vast majority of the Negro population continued to live under unsanitary conditions, to infect one another, and to spread communicable diseases to the broader community.

It was in this setting that the city undertook to clear "pest holes." One such effort was the construction of a Negro school on one-half of the Biddle Alley district — the old "lung block." The black community objected that because substitute housing was not provided, such projects merely removed poor blacks from one slum to another.[174]

Although improved public health continued to be used as a justification for slum clearance projects, this justification was not taken too seriously. Knowledgeable observers recognized that clearance projects merely crowded the displaced population into other blighted areas. A 1934 study prepared for Mayor Howard W. Jackson provided a more candid rationalization: blighted black areas close to the downtown commercial district and white neighborhoods yield declining tax reserves and are a nuisance. Therefore, the public interest would be served by their replacement with white housing or industry.[175]

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169. *See supra* text accompanying notes 74-76.

170. S. OLSON, *supra* note 8, at 325-26.

171. IRA DEA. REID, SUMMARY REPORT: THE NEGRO COMMUNITY OF BALTIMORE 27-28 (1934).

172. Interview with Mrs. Eugene R. Smith, instructor at Morgan College, R.G. 102, Box 121, National Archives (June 20, 1916).

173. *Id.*

174. S. OLSON, *supra* note 8, at 326.

175. W.W. EMMART, REPORT ON HOUSING AND COMMERCIAL CONDITIONS IN BALTIMORE, CONSTITUTING A STUDY PREPARED FOR MAYOR HOWARD W. JACKSON (1934).

Another study, prepared under the auspices of the Joint Committee on Housing created by the State Advisory Board of the Federal Emergency Administration of Public Works, considered the feasibility of the rehabilitation for six particular blighted areas.[176] The planners selected these six areas because they were close to better areas, served by an adequate transportation system, and would contribute to the cost of existing streets, schools, sewers, and utilities.[177] The study recommended restoration and modernization for white habitation of three of the areas, even though all six were primarily populated by blacks.[178] In two areas found suitable for black housing, the buildings had decayed "beyond the point of even low level Negro occupancy,"[179] the sites had "no other value except for Negro residence and never will have,"[180] and were "certainly only usable for Negro habitation unless commerce and industry can absorb it, which seems doubtful . . . ."[181] The study was criticized by an Urban League analyst as promoting "newer, bigger and better slums."[182] In any case, the removal of blacks from areas where they proved inconvenient or expensive to the white majority had become part of the plan for segregation.

Containment was the other strategy. We have already discussed how, when de jure segregation failed, de facto segregation was implemented through a conspiracy which restrained residential sales or rentals to Negroes in white neighborhoods. Once the conspiracy was in place it grew and formalized. Originally it was enforced through peer pressure from neighbors, administrative harassment by housing and health inspectors, and by the suasion of the Baltimore Real Estate Board. Later this conspiracy came to be institutionalized.

In 1922 the National Association of Real Estate Brokers (NAREB), of which the Baltimore Board was a member, published a textbook entitled *Principles of Real Estate Practice*. The textbook emphasized that "the purchase of property by certain racial types is very likely to diminish the value of other property."[183] It was deemed unethical to sell blacks property that was located in white neighborhoods. As recently as 1950 the NAREB's code of ethics provided:

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176. *Report of the Joint Committee on Housing in Baltimore*, THE BALTIMORE ENGINEER 6 (Jan. 1934).

177. *Id.* at 6-7.

178. *Id.* at 8-10.

179. *Id.* at 8.

180. *Id.*

181. *Id.* at 9.

182. Reid, *supra* note 171, at 32.

183. U.S. COMM'N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING 3 (Clearinghouse Pub. No. 42, 1973).

> The realtor should not be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality or any individual whose presence will clearly be detrimental to property values in the neighborhood.[184]

In the 1930's the new housing market was in Baltimore's annex where row houses were being built. These houses were sold to whites only. It would have been considered foolhardy to sell to blacks and whites in the same row. Some builders perpetuated this restriction by placing restrictive covenants in the deeds prohibiting resale to blacks.[185] The Maryland Court of Appeals upheld the enforcement of racial restrictions under the fourteenth amendment, because the discrimination was private rather than public.[186]

Mortgage lenders joined in the conspiracy. Traditionally in Baltimore, most house purchases were financed by mutual savings and loan associations, which discriminated against blacks. Credit unions for ethnic and white church groups, and for work organizations (e.g., B&O), also excluded blacks from participating.[187] And when general banking institutions began to extend mortgage credit they "redlined" black and integrated neighborhoods as unstable and risky. Later, in the 1930's when the federal government became active in housing fields, it denied Federal Housing Administration support in neighborhoods with "inharmonious racial groups."[188]

In Baltimore in 1934 the 3,800 middle-class black families who could afford to own a house were those most immediately affected by the conspiracy of containment. If they already owned a home it was likely to be in the upper Druid Hill Avenue district, which still was "the best that Negroes could get in the city proper."[189] Yet the neighborhood was in some respects unsatisfactory: it was noisy as a result of street cars, lacked recreational facilities, was removed from shopping facilities, and had areas of improper sanitation. Moreover, it was undergoing change. The neighborhood had been encroached upon by brothels and saloons. Landlords were outbidding individuals for some of its large houses with a view toward creation of tenements. Black homeowners attempting to escape these problems had no place to go.[190]

Those Negroes attempting to buy their first house were similarly

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184. *Id.*
185. S. OLSON, *supra* note 8, at 325.
186. Meade v. Dennistone, 173 Md. 295, 301, 196 A. 330, 333 (1938).
187. S. OLSON, *supra* note 8, at 325.
188. U.S. COMM'N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING 4-5 (Clearinghouse Pub. No. 42, 1973).
189. Reid, *supra* note 171, at 33.
190. *Id.* at 33-34.

frustrated. The housing boom of the mid-20's had been for whites only. The economic depression had brought the housing industry to a standstill — during 1934 only 119 houses were built in Baltimore.[191] The only recent development for blacks had been Morgan Park, for the faculty of Morgan College next to its new campus. Conventional financing likewise was nonexistent. One nonconventional response was known as the Homemakers' Building and Loan Association. It was a cooperative organized in the 1930's by the Interracial Commission with power to buy, sell, lease, manage, and build. It invested $35,000 converting one house into modern apartments and selling other houses to stockholders before disappearing from the pages of history.[192] But by-in-large, the plan for segregation denied the black bourgeoisie a spacious house on a quiet street.

Hence, once the plan for segregation was in effect, Baltimore's housing market had achieved a dynamic equilibrium of two markets — one white and the other black. "Respectable" real estate dealers and financing institutions were active only in the white market.[193] Baltimore was among the nation's leaders in white ownership. The black market (except for the 300 houses built in Morgan Park) was second-hand houses. Negro houses were in the older portion of the city in "blighted districts." The city from time to time demolished black slums if they became a nuisance. It proposed construction of public housing for the poor, but never carried through with the proposals.[194]

Baltimore's housing market was to retain most of these characteristics for the next 30 years. But one inexorable force for change remained: between 1930 and 1960 Baltimore's black population grew from 142,000 to 326,000.[195] The market described above made no allowance for increasing the number of black housing units. This gap was widened by actions of the city government. Between 1930 and 1960 programs of school building, slum clearance, urban renewal, and expressway construction displaced large numbers of households.[196] Between 1951 and 1971 alone, 75,000 people were removed, and eighty to ninety percent of them were Negroes. During this same period the city had various public housing programs, but by 1976 only 15,000 public

191. S. OLSON, *supra* note 8, at 303.

192. Reid, *supra* note 171, at 34.

193. *See* S. OLSON, *supra* note 8, at 325.

194. *Id.* at 326.

195. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ABSTRACT OF THE FIFTEENTH CENSUS OF THE UNITED STATES 104 (1933 ed. reprint 1976); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION: 1960, PART 22, MARYLAND 178 (1961).

196. S. OLSON, *supra* note 8, at 377.

housing units were available.[197] Hence, the city exaggerated the shortage by demolishing many more houses than it created.

"Blockbusting" was the answer. Economists have commented upon the difficulty of enforcing multi-party agreements in restraint of trade. The problem is simple: "The temptation of members to cheat is strong . . . because the returns from cheating are substantial . . . ."[198] This certainly proved to be true in Baltimore's housing industry. The treaty between white homeowners, the real estate industry, financiers, and the Federal Housing Administration had left unmet the demand for black housing. A house could be sold at a premium to a black buyer by a seller willing to violate the treaty. Moreover, this premium could be multiplied by real estate speculators who capitalized on the panic in white neighborhoods that had begun to change in racial make-up. Brokers bought whole blocks at a distress price from nervous white sellers, and sold at a premium to housing-hungry black buyers.[199]

Later, speculators broadened their market. They used their credit to borrow money from financial institutions. Turned-over houses were then sold on easy terms to low-income, high-risk black buyers pursuant to "buy-like-rent" contracts. The sales were often illusory; foreclosure was the rule rather than the exception. The speculator would sell and resell the same house to a series of buyers. By this technique the block-busters took a profit from the under-class as well as the middle-class Negroes. Blockbusting transferred tens of thousands of houses from the white market to the black market.[200]

Blockbusting poses an ethical enigma. Its practitioners were outlaws, violating the real estate industry's code of ethics and cheating on the cartel between white homeowners, real estate dealers, mortgage lenders, city government, and the FHA, which restrained the sale or rental of housing to blacks in white neighborhoods. Speculators employed a psychology designed to scare white homeowners out of their accumulated equities. They sold to black purchasers for whatever the market would bear, sometimes exacting exorbitant profits. Conversely, its practitioners were providing housing opportunities otherwise unavailable to Negroes. And the "ethical" precept which they violated was part of a racist conspiracy. Speculators provided financing and housing when mortgage lenders and "ethical" real estate brokers re-

197. *Id.* at 53-54.

198. R. POSNER, ECONOMIC ANALYSIS OF LAW 115 (1972).

199. Douglas Connah, Jr., Run Baby, Run: Study of Blockbusting in Baltimore (Nov. 22, 1968) (unpublished manucript).

200. *See* S. OLSON, *supra* note 8, at 378-79 (discussing career of Morris Goldseker).

fused to do so. The unsavory blockbuster or the respectable conspirators: Who is to blame?

Although apartheid, Baltimore style, was doomed to failure, the white body politic refused to accept defeat gracefully. It fought for the city's territory district-by-district, neighborhood-by-neighborhood, and block-by-block. In an effort to maintain de facto segregation in housing, it used the whole bag of tricks: Negro removal through slum clearance, public works projects, and urban renewal; restrictive covenants denying blacks access to "exclusive" white neighborhoods; refusal of financing for black or integrated housing; and professional sanctions against real estate brokers dealing with blacks in white neighborhoods. But unrelenting demographic forces were increasing the black population of Baltimore from fifteen to seventy percent. Over the long term the dwindling white majority lacked both the political and economic power to keep a restrictive cordon around the black community.

Once again it was the United States Supreme Court that cut the knot. In 1948 the Court took the first step in *Shelley v. Kraemer*.[201] It ruled that the legal enforcement of private, racially restrictive covenants was unconstitutional under the equal protection clause of the fourteenth amendment. The Court conceded that the amendment was directed only against state action and not private conduct, but found that state judicial enforcement of private agreements brought them within the amendment's purview.

Shelley was a setback for segregated housing, but for twenty years the conspirators fought on, using the other tools of de facto segregation — peer pressure, "redlining" of mortgages, and professional sanctions. Finally, in 1968, the Supreme Court decided in *Jones v. Mayer*[202] that the 1866 Civil Rights law passed pursuant to the thirteenth amendment bars all housing discrimination, private as well as public. This decision, taken along with the 1968 Federal Housing Law[203] — which prohibited discriminatory practices by real estate brokers, builders, and lenders — dismantled the dual housing market. In Baltimore and in the other urban areas that share much of this housing history, the white market and the black market merged into one housing market.

Disappearance of the dual housing market does not mean that housing is desegregated, that racial discrimination has been eliminated, or that good housing is available for the poor. Residential housing in Baltimore remains by-in-large segregated. In part this segregation is a

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201. 334 U.S. 1 (1948).
202. 392 U.S. 409 (1968).
203. Civil Rights Act of 1968, Title VIII, §§ 801-819, 42 U.S.C. §§ 3601-3619 (1976) (as amended).

result of preference: Blacks and whites alike may prefer to live in their old neighborhoods that developed in the days of de facto segregation. Segregation also results from economics: The median black family income is lower than that of whites, creating an economic barrier to entry into more affluent areas. But the notion that blacks need only a larger income to gain an equal choice of housing is inaccurate. Old practices die hard; muted voices of discrimination persist in the real estate and financing fields. Black buyers are steered to black neighborhoods, and mortgage money is more readily available to whites. Studies show that black families have less access to suburban housing than do white families of equivalent income.[204]

Moreover, the power of local governments to select the site for public projects may be used to perpetuate racial segregation. In the 1960's, expressways in Baltimore sought out the routes of least resistance — black ghettos. When the roads were built, displaced residents lacked reasonable relocation opportunities; when the roads were not built, whole neighborhoods, such as Rosemont, were left desolate and abandoned. In one instance the city took the houses in what had been a working-class black neighborhood, condemned them for a highway which was never built, and then created the fashionable Otterbein district for the affluent professionals returning to reside in the gentrified city. Class distinction, if not racial discrimination, influences the location of public projects.

Finally, elimination of the dual housing market has done little to improve the quality of housing available to low-income blacks. When Baltimore's plan for segregation was first conceived, the building industry was providing low-income housing. Commercial builders catered to the dollar-a-day man. Tenements and flats were profitable speculative ventures.[205] Negroes were excluded from these buildings on racial grounds. Today the free market no longer produces low- and moderate-income housing. Increased costs of energy, financing, and construction price housing beyond the reach of the poor and near-poor. Public and federally subsidized housing partially fill the void. But Baltimore's 15,000 public units, along with the various federally subsidized units, fall far short of meeting the demand. And it is impossible to locate a new subsidized low-income housing project without encountering outraged community opposition. Thus most of Baltimore's poor (both black and white) continue to live under slum conditions.

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204. U.S. COMM'N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING 15 (Clearinghouse No. 42, 1973).

205. *See supra* note 41 and accompanying text.

CONCLUSION

Historian Samuel P. Hays has said: "Local history if purely factual and descriptive, advances knowledge only in a rudimentary fashion; but if local history can illuminate broad processes of social change concretely, then it adds a dimension unobtainable through an emphasis on top-level, nationwide personalities and events."[206] The preceding account of the Baltimore segregation ordinances and their aftermath is intended to achieve the latter goal. Baltimore's experience with residential housing segregation is by no means unique; with only minor variation in scenario and cast it was played out in other cities that came of age in the early twentieth century.

If this article's objective is attained, the details of the Baltimore story will provide insight and lessons with broader implications. Indeed, several aspects of Baltimore's history of housing segregation challenge conventional explanations of not only housing segregation itself, but also, on a broader level, democracy, reform, and social change.

First, the facts and descriptions in this history call into question free-market economic analysis of the causes of racial segregation. Much of Baltimore's housing history follows the economist's script. Economic theory would have predicted the development of slums as a market response to the demand for inexpensive housing by a growing population of low-income city dwellers. Moreover, fear of crime and contagion predictably provided economic incentives for self-segregation by middle- and upper-income residents who responded with a willingness to pay a premium to locate in neighborhoods remote from slums. Finally, separation by income level naturally will tend to result in separation by race because blacks have lower average incomes than whites and spend less on housing.[207]

But some analyses go a step further and attempt to explain all residential segregation by race as individually motivated. For example, economist Richard Muth argues that segregation is the natural result of whites having a greater preference for segregation than blacks have for integration. To make his model work, Muth must assume that middle-class blacks are less averse to living in proximity to slums than middle-class whites;[208] otherwise one would expect to find middle-class black families sprinkled throughout neighborhoods remote from slums. The details of this study belie his assumption. We have documented the

206. Hays, *Forward* to R. LUBOVE, *supra* note 41, at ix-x.
207. *See* R. MUTH, URBAN ECONOMIC PROBLEMS 86-110 (1975).
208. *Id.* at 87, 94-100.

efforts of the black bourgeoisis (e.g., George W.F. McMechen, the Morgan College faculty, the Baltimore Colored Law and Order League), to remove themselves from the vicinity of slums. In Baltimore, the aversion to crime and contagion knew no color line.

Muth also rejects the possibility that a conspiracy between home owners, real estate agents, mortgage lenders, and local government officials limited the availability of housing to blacks. The conspiracy argument cannot be taken "very seriously" he says, because each individual in the urban housing market would have a profit incentive not to join it: "[b]y not doing so he avoids his share of the costs of the conspiracy, but, having a negligible effect on the outcome, shares in its benefits."[209] Notwithstanding Muth's rejection, our study shows that a dual housing market in fact was created. The white majority, first through the segregation ordinances and then through a publicly sponsored conspiracy, enforced racial segregation in the city. The shared incentives of the white majority (isolation of crime, quarantining of disease, and maintenance of property values at black-white boundaries) proved collectively powerful enough to support a loose treaty which stifled sales to blacks. This treaty was violated from time to time by outcast blockbusters willing to buy from white sellers and to sell to black buyers, but ironically these blockbusters became political partisans of the dual housing market because it afforded them an opportunity for profit-taking. Blockbusting vented the pressure and permitted the treaty to endure.

In rejecting the possibility of a conspiracy, Muth errs by assuming that behavior in the aggregate is nothing more than a summation of individual behaviors. Political economist Thomas C. Schelling provides a more sophisticated view in his book *Micromotives and Macrobehavior*.[210] Therein he opines that housing segregation is at once individually motivated, collectively enforced, and economically induced.[211] Baltimore's history of residential segregation supports Schelling's thesis.

Second, the Baltimore segregation ordinances remind us of forgotten fears and false forecasts; they caution us of the perils of social planning. At the turn of the century the threat of contagion was a mortal concern. With the acceptance of the germ theory came the recognition

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209. *Id.* at 96. Muth also thinks it problematic that racial segregation results in blacks paying markedly higher prices for housing of a given quality than do whites. But his questions are based on the assumption of a single housing market. Actually, Baltimore had a dual housing market in which a growing black population was crowded into a more-or-less fixed number of houses. If Muth were to accept the findings of this history, his model would also predict higher housing prices for blacks. *Id.* at 100-02.

210. T. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 137-66 (1978).

211. *Id.* at 139.

that the poor were carriers of tuberculosis, typhus, and other diseases (all of which poor blacks had in disportionate numbers). The simplest single explanation for segregation is that it represented an effort by the healthy white majority to quarantine the unhealthy black minority.

When the segregation ordinances were conceived, racial Social Darwinism was in vogue. This false teaching made the quarantine seem an effective strategy. Blacks were viewed as a degenerating race with a high mortality rate, low birth rate, and no future. Left to themselves, the Social Darwinists argued, Negroes would die out and with them the threat of epidemic disease. Advances in public health, however, not racial quarantines, finally reduced the threat of contagion. The black population, rather than disappearing, came to outnumber whites in Baltimore City. The social engineers who propounded the segregation ordinances were on the wrong track moving in the wrong direction.

A third lesson we have gained from Baltimore's history of housing segregation is that we must discount the righteous rhetoric of reform. Since the early twentieth century the Progressive Reform Movement has advocated government intervention into the residential housing market. But, if we observe closely the motives of the self-appointed promoters of the public interest, the reformers plainly were not interested in improving the living conditions of those who suffered most from the industrializing, urbanizing society. Instead, the reformers supported housing segregation as a means for preventing contagion and civil disturbance as it affected the white community. Similarly, these reformers earnestly proposed and implemented slum clearance without providing substitute housing opportunities for those whose homes were destroyed. In their efforts to impose a quarantine on disease and crime, and to protect the value of their property, reformers conveniently overlooked the devastating effect slum clearance and racial segregation had on black housing opportunities. Instead, reformers salved their guilt by "blaming the victims" for the slum conditions in which they lived.

Finally, this history of residential segregation in Baltimore documents the racist propensity of democratic rule. In an opinion sustaining the constitutionality of a law that required a majority vote at a local referendum as a prerequisite to the siting of a low-income housing project, U.S. Supreme Court Justice Hugo Black said: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[212] Our history suggests that Black's dichot-

212. James v. Valtierra, 402 U.S. 137, 141 (1971).

omy is a false one. In Baltimore's housing market, democracy and discrimination were inclusive, not exclusive. Democratic institutions conceived, promoted, and implemented racial prejudice and bias. Justice Black's idealized notion of democracy presupposes that "government of the people, by the people, and for the people" promotes the welfare of *all* the people. More often under democratic rule, a majority of the people form a coalition that takes political, economic, and social advantage of a minority of the people.

While Baltimore's democratic institutions were unrelenting in their anti-black bias, the United States Supreme Court thrice intervened to abrogate discrimination in the housing market. *Buchanan v. Warley*,[213] decided in 1917, held de jure segregation of residential housing unconstitutional; *Shelley v. Kraemer*[214] decided in 1948, held judicial enforcement of private racial restrictions unconstitutional; and, *Jones v. Mayer*,[215] decided in 1968, found all public and private racial discrimination in housing unlawful on statutory grounds. In a grand sense the Court was living up to its role as a protector of minorities from majority oppression. Mr. Justice Jackson best described this need: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[216] But in historic and legal context each of these decisions was a surprise. *Buchanan v. Warley* was soundly criticized in the law reviews of its day for the cavalier manner in which the opinion ignored precedents that had upheld de jure segregation in education and transportation.[217] Leading legal scholars have questioned whether in *Shelley v. Kraemer* "the state may have properly been charged with discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make."[218] And in *Jones v. Mayer* the Court breathed a new meaning into a statutory provision that had been construed for 100 years as applicable only to governmental action.[219] Taken together,

213. 245 U.S. 60 (1917).
214. 334 U.S. 1 (1948).
215. 392 U.S. 409 (1968).
216. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
217. *See supra* text accompanying note 150.
218. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).
219. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 148-56 (1962) (discussing the concept of desuetude as it relates to an analogous situation in Poe v. Ullman, 376 U.S. 497 (1961): "The question is whether a statute that has never been enforced and that has not been obeyed for three quarters of a century may suddenly be resurrected and applied." A. BICKEL at 148).

these three cases support the hypothesis that racial restrictions on land use are peculiarly vulnerable to judicial challenge.

A realpolitik explanation suggests itself. Land use and politics make strange bedfellows. For example, in *Construction Industry Association v. City of Petaluma*,[220] a 1975 federal case, the NAACP found itself sleeping with the builders and the brokers in opposing land use controls that curtailed the growth rate of a California town. This *menage à trois* favored growth as a means not only of expanding housing opportunity, but also of turning a profit. The plaintiffs alleged that limitations on growth violated both "personal" and "property" rights under the fourteenth amendment.

In Baltimore's history of housing segregation, the line-up of parties was not quite so anomalous. Most respectable bankers, builders, and brokers acquiesced in the creation of a dual real estate market. But others—property owners and brokers who found their holdings devalued by the segregation laws—yelled loud and hard. Significantly, in *Buchanan v. Warley* the court struck down the segregation ordinance because it deprived landowners of their property without due process of law, while in *Shelley v. Kraemer* the Court voided restrictive covenants because they deprived blacks of equal protection of the law. Hence; the ultimate rejection of housing segregation in *Jones v. Mayer* afforded the Court an opportunity to strike a blow for the sanctity of property and against racial discrimination, with a single stroke.

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220. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

28

29

Phone: St. Paul 8755.

WARNER T. McGUINN

Attorney-at-Law

REAL ESTATE

215-217 COURTLAND ST. RESIDENCE: **1911 Division St.**

Office—C. & P. Phone St. Paul 1512. Res. Phone: Madison 6570

HARRY S. CUMMINGS

Attorney-at-Law

219 COURTLAND STREET, BALTIMORE, MD.
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W. ASHBIE HAWKINS
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Attorneys and Counsellors-at-Law

21 EAST SARATOGA STREET. BALTIMORE, MD.

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21 EAST SARATOGA STREET
Residence—**1940 Druid Hill Avenue,** BALTIMORE, MD.

ROY S. BOND

Attorney and Counsellor at Law

238 COURTLAND ST.
Practice in all the Courts—Claims adjusted—Houses bought and sold—Rents collected.
Residence—1411 Druid Hill Avenue, Baltimore, Md.

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CLARKE L. SMITH

Attorney and Counsellor at Law

21 E. SARATOGA ST.
Residence—406 Presstman St. n. e. cor. McCulloh St., Balto., Md.

30

January 26, 1938

W. Ashbie Hawkins, Esq.,
c/o [redacted],
[redacted],

Dear Judge Hawkius:

Enclosed herewith you will please find a testimonial to you which I have been instructed to forward to you from Gamma Boule'. I trust that this finds you much improved and that you soon will be yourself once again.

Fraternally yours

dfn/l

Dallas F. Nicholas
Grammateus

NICHOLAS PAPERS: 8A2 (GRAND BOULE FILE)

W. Ashbie Hawkins, Esq.,
c/o [redacted],
[redacted],
[redacted] York.

Dear Archon Hawkins:

As Gamma Boule' met to usher in the year of 1938, it was not unmindful of those who were missing from the seats they have so long occupied in the Council. Among those who were missing and whose absence was very keenly and poignantly felt, we numbered "Judge Hawkins;" and the Boule' as a group, felt it fitting and proper, that this expression of good fellowship and camaraderie be forwarded to you, so that you might be aware of our true feelings towards you.

Though Gamma has several times in the past year, attempted to express its feelings towards you in a material way, we have not recorded the void that your absence causes in the Council; nor have we transcribed to writing the many good wishes which, from time to time, go out from our minds to you. To more effectively so do, so that our absent Archon may in some measure be cheered by our thoughts, be strengthened in his hour of distress and be assisted once more on the road of good health so that he may again walk with us, Gamma Boule' herewith wishes you, Archon Hawkins, a speedy recovery and all that is good in 1938, to the end that all of us may soon again break bread over the festive board.

Done at Baltimore, Maryland and signed and sealed by the Sire Archon, attested to by the Grammateus this 25th day of January, 1938.

Grammateus	Sire Archon

April 12, 1958

W. Ashbie Hawkins, Esq.,
[redacted],
[redacted], New York.

Dear Judge:

When you left here several weeks ago it was with the understanding that you were to forward to me the sum of at least $25.00 to be used in payment of the taxes upon the Mosher Street property. If you will recall the settlement, which was made in [redacted]'s office, with reference to the [redacted] was dependent upon the adjustment with [redacted] and the Old Folks Home and we agreed that the taxes were our responsible.

I do not mean to harass you but this is a matter that should be attended to with reasonable dispatch, and I will thank you at your very early convenience to see that this money is forwarded to me so that I may adjust this matter.

With every good wish for your continued improvement and awaiting your reply, I am

Yours very truly

dfn/l

Dallas F. Nicholas

Hawkins (WBI)

31

The black lawyers of Baltimore pictured here had gathered at the home of the Reverend Harvey Johnson (1923 Druid Hill Avenue), circa 1910. Johnson had been instrumental in securing the admission of the Maryland bar's first black lawyer. In the doorway (*center*): Rev. Harvey Johnson. *From left to right*, top row: U. Grant Tyler (Howard University, 1894) and C. C. Fitzgerald (Howard University, 1892); second row: John L. Dozier (Howard University, 1891), Hugh M. Burkett (Howard University, 1898), Warner T. McGwinn (Yale University, 1887), and H. R. White (layman); third row: George L. Pendleton (Howard University, 1896) and William Chester McCard (Wisconsin and Northwestern universities, 1896); fourth row: W. Ashbie Hawkins (Howard University, 1892); bottom row: William H. Daniels, Harry S. Cummings (University of Maryland, 1889), and J. W. Parker. (Courtesy of Ollie May Cooper and Mr. and Mrs. Paul F. Cooper.)

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from the FREEMAN (Indianapolis) July 9, 1892, p.7, bottom col. 1, top col. 2

The rank of the legal fraternity here have recently been increased by the addition of David D. Dickson and W. Ashbie Hawkins. Mr. Dickson is an instructor in the Custom House, and one of our most popular public speakers. He studied law privately and was admitted to the bar at the last meeting of the Supreme bench. Mr. Hawkins is a prominent teacher, and the editor of the Educational Era. He studied law one session at the University of Maryland, but was not allowed to return the second year, because of the refusal of many of the white students to remain in the school if he and other colored men were retained. He entered the Senior class of Howard University Law school, Washington, D.C., last October, graduating May 30th. He retained his school, going to Washington and returning every day. During the eight months he traveled nearly twenty thousand miles. He was admitted to the bar June 25th.

33

1802

Sharp Street Memorial United Methodist Church

DOLPHIN AND ETTING STREETS
BALTIMORE, MD.

1977

LILLIE M. JACKSON

JOHN D. LINDSAY

ELVIRA BOND

MISS MOUNTAIN

Memorial Sunday 1977

W. ASHBIE HAWKINS

HOWARD M. WASHINGTON

MRS. C. MADDOX McINTYRE

JOHN A. WAKE

Mitchell House

"A Heritage to Remember-A Future to Share"

Richard L. Clifford, Pastor
Morris C. Queen, Organist-Director

22nd Sunday of 175th Anniversary Observance

May 29, 1977

WELCOME TO SHARP STREET MEMORIAL!

Thank you for sharing in the life of our congregation during our Anniversary Observance. If you are new to our Community, a very special welcome to you. We invite you to become a part of this fellowship as we serve our Lord and Savior Jesus Christ and His People.

ORDER OF WORSHIP-11:00 A.M.

PRELUDE
LIGHTING OF CANDLES
CALL TO WORSHIP
OPENING HYMN

UNISON PRAYER

O GOD, who as at this time didst teach the hearts of thy faithful people, by sending to them the light of thy Holy Spirit; Grant us by the same Spirit to have a right judgment in all things, and evermore to rejoice in his holy comfort; through the merits of Christ Jesus our Savior, who liveth and reigneth with thee, in the unity of the same Spirit, one God, world without end. Amen.

LEADER: O Lord, open thou lips
PEOPLE: AND OUR MOUTH SHALL SHOW FORTH THY PRAISE
LEADER: Praise ye the Lord
PEOPLE: THE LORD'S NAME BE PRAISED

*PSALTER #583....."Sing To The Lord A New Song"
*THE GLORIA PATRI
*AFFIRMATION OF FAITH #738....."The Apostles' Creed"

--People Enter--

SCRIPTURE LESSON

LEADER: The Lord Be With You
PEOPLE: AND WITH YOUR SPIRIT
LEADER: Let Us Pray

THE MORNING PRAYER
CHORAL SELECTION
RITUAL OF FRIENDSHIP AND INFORMAL MOMENTS
OFFERTORIAL SELECTION
*CONSECRATION OF TITHES AND OFFERING
175 Years of Methodist Singing
SERMON.....The Pastor

Theme: "Fare-Well"
Text: Scriptural Benedictions:
Romans 16:25; 2 Cor. 13:11;
Eph. 6:23; 2 Thess. 3:16; Hebrews 13:20
2 Peter 3:18; Jude 1:24; Rev. 22:21

THE LORD'S PRAYER.....Led by the Choir
*ALTAR CALL AND INVITATION TO CHRISTIAN TO DISCIPLESHIP
*INVITATION HYMN # 119....."Just as I Am, Without One Plea"
MOMENTS OF MEDITATION
CANDLES ARE EXTINGUISHED
PASSING OF PEACE
BENEDICTION HYMN
POSTLUDE

PEOPLE STANDING

****

Flowers on the altar today are in memory of Addie M. Butler, wife of Everett, and also in memory of William I. and Annie Elizabeth Butler, parents of Everett Butler and Edith Cavanaugh.

****

The United Methodist Men will meet Monday, June 6, 1977 at 7:30 p. m.

****

Young Adults of our Church are sponsoring their Annual Father's Day Breakfast on June 19, 1977 at 9:00 a. m. in the Lower Auditorium

****

The Y outh Choir will be having a dinner on June 26, 1977 at 6:00 p. m. Tickets $6.00 will be sold by Choir memberd

****

ANNOUNCEMENTS CONT'D

This is to remind our members that our Anniversary Banquet will be the culmination of our Celebration and you will want to be a part of this great event. PLEASE RESERVE SPACE NOW.

****

Our Chancel Choir will be Presenting, The Paul Johnson and Cherry Hill Community Choir in Concert, for the Benefit of our 175th Anniversary Observance. On June 12, 1977 at 4 p.m. Main Auditorium. Tickets are $2.00 and can be obtained from any Chancel Choir Member. Won't you join us. Refreshments will be served. John T. Robinson, President.

****

We need your support for the Blood Bank Program. The Cost of Blood is expensive. Some of our members have had to be turned down because we have not had enough contributors to the program. Contribute in the name of Sharp Street Memorial.

****

A member of the Finance Committee will be in the Pastor's Study for 15 minutes immediately following Sunday Morning Worship, each Sunday, until further notice. At this time, members of the congregation may make their time payments on their 175th Anniversary Pledge commitments (i.e., payment cards with you when making payments). The committee wishes to keep very accurate records. Any member as yet without a card may pick up one at the same time and place. May God bless you.

****

I wish to thank all who contributed toward the N.A.A.C.P. baby contest. Our baby Jamal Wesly Kelly not only won a certificate but, also a $25.00 Bond. Thank you for your cooperation. Hilda Mussenden.

****

****

The Evangelism Committee recomends that you read the poem "A Call To Service" occasionally for inspiration. Please write on the back of each poem the date of February 1977 and the complete name and address of our church for the record. Have you brought in your new member for the year? Do you have a poem passed out in February 1977. If you do not please call the office, 523-1193, or see Earl Smith.

****

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MSA SC 5339-56-9, Image No: 85 Enlarge and print image (244K)

LANDLORD AND TENANT'S AGREEMENT. Commercial Printing & Stationery Co. Form 88

This Agreement, made this 25th day of January 1941, between Banneker Building Company Landlord, and W. Norman Bishop Tenant,

WITNESSETH, that the said Landlord do hereby rent to the said Tenant Basement, 14 E. Pleasant Street

for the term of one year, beginning on the 25th day of January 1941, and ending on the 24th day of January 1942, at and for the sum of Twenty-five dollars a month, payable monthly in advance.

And the said Tenant hereby covenant that he will keep the premises in good order, and surrender the peaceful and quiet possession of the same at the end of said term, in as good condition as when received, (the natural wear and decay of the property and unavoidable accidents excepted), and further, that the said Tenant will not do, suffer or permit anything to be done, in or about the premises, which will contravene the policy of insurance against loss by fire; nor use, nor permit their use, for purposes other than those of a Law Office and Real Estate *and will not at any time assign this agreement, or sublet the property thus let or any portion thereof, without the consent in writing of the said Landlord or representatives; and further, that whatever alterations or repairs the said Tenant shall be permitted to make shall be done at* his *own expense.*

IT IS FURTHER AGREED that if the rent shall be fifteen *days in arrear, the Landlord shall have the right to distrain for the same, and to re-enter and take possession; and if the Tenant shall violate any of the covenants on part herein made, the Landlord shall have the right, without formal notice, to re-enter and take possession; and if the property shall be destroyed or rendered untenantable by fire the tenancy hereby created shall be thereby terminated, and all liability for rent hereunder shall cease upon payment proportionately to the day of fire or unavoidable accident.*

AND IT IS ALSO FURTHER AGREED that this agreement, with all its provisions and covenants, shall continue in force from term to term after the expiration of the term above mentioned; provided, however, that the parties hereto, or either of them, can terminate the same at the end of the term above mentioned, or of any thereafter, by giving to the other part hereto at least Thirty *days' previous notice in writing.*

IN TESTIMONY WHEREOF, the said parties have hereunto subscribed their names and affixed their seals the day and year first above written.

Test:

Charles C. Jennings

The Banneker Building Co. of Baltimore City
By W. Ashbie Hawkins, Pres. (SEAL)

W. Norman Bishop (SEAL)

(SEAL)

Attorney W. Ashbie Hawkins (1862–1941) led a distinguished career in Baltimore. It is reported that the majority of the student body of the University of Maryland Law School forced the ouster of Hawkins and another student by means of an anti-black petition in 1890. Hawkins then attended Howard University Law School, graduating in the class of 1892. He joined forces with another prominent attorney, George W.F. McMechen, in a flourishing legal practice. The partnership of Hawkins and McMechen was housed in the Banneker Building at 14 E. Pleasant Street, which was the first office complex erected solely for black professionals. This site was dedicated in 1903. The landlord and tenant's agreement, seen here, contains Mr. Hawkins's signature. According to this document, it appears that Hawkins is both the owner and the president of the Banneker Building Company. He is leasing office space to attorney William Norman Bishop (Yale Law School). Notary Public Charles C. Jennings, who was associated with the law offices of William C. McCard, affixed his signature to this document.

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DENTISTS

Arnold, O. H., 1214½ Pennsylvania Ave., Madison 1197.
Avery, William R., 519 N. Caroline Street, Wolfe 6198-W.
Bailey, C. C., 928 Pennsylvania Avenue, Mt. Vernon 5377.
Baker, Richard, 1527 Druid Hill Avenue, Madison 4234.
Brown, Benjamin F., 1320 N. Carey Street, Madison 3528-J.
Brown, Daniel C., 1311 Druid Hill Avenue, Madison 1472.
Butler, L. A., 1641 Pennsylvania Avenue, Madison 158.
Coleman, Charles H., 902 N. Eutaw Street, Mt. Vernon 3521-W.
Dickerson, Enoch, 1606 Pennsylvania Avenue, Madison 8728-J.
Gloster, Cecil F., 905 Druid Hill Avenue, Mt. Vernon 4714-J.
Hackett, Robert J., 1122 Druid Hill Avenue, Mt. Vernon 5149.
Hairston, Chalmers, 1140 Druid Hill Avenue, Mt. Vernon 6066.
Jones, Oscar D., 1405 Druid Hill Avenue, Madison 4537.
Mayer, Leon H., 1200 Pennsylvania Avenue, Madison 1621.
Reid, Albert O., 1935 Druid Hill Avenue, Madison 3318-W.
Stone, A. D., 1606 Pennsylvania Avenue, Madison 8728-J.
Smith, Albert A., 1536 E. Monument Street, Wolfe 3741-J.
Sykes, Frank, Pennsylvania Avenue and Lanvale St., Madison 1589-W.
White, James A., 1038 Pennsylvania Avenue, Mt. Vernon 1773-W.
Wilkens, Jesse M., Pennsylvania Ave. and Presstman Street, Madison 1480-J.
Young, Isaac H., Myrtle Avenue and George St., Mt. Vernon 4859-W.

PROSTHETIC DENTIST

Hicks, J. H., 928 Pennsylvania Avenue.

LAWYERS

Robert G. I. Brown, 1501 Presstman St., Madison 3168.
Otis T. Ball, 1160 N. Calhoun St.
W, Norman Bishop 14 E. Pleasant St., Mt. Vernon 1194.
Roy S. Bond, 217 Courtland St., St. Paul 4488.
Arthur E. Briscoe, 215-217 Courtland Street.
J. Steward Davis, 14 E. Pleasant St., Mt. Vernon 1194.
Louis F. Flagg, Jr., 14 E. Pleasant St., Mt. Vernon 5525-W.
C. C. Fitzgerald, 217 Courtland St., St. Paul 2171.
William L. Fitzgerald, 1206 Druid Hill Avenue, Madison 1979.
W. Ashbie Hawkins, 14 E. Pleasant St., Mt. Vernon 5250.
John H. Hampton, 14 E. Pleasant St., Mt. Vernon 1194.
Ephriam Jackson, 118 E. Lexington St., Calvert 538-J.
William C. McCard, 14 E. Pleasant St., Mt. Vernon 5450.
George W. F. McMechen, 14 E. Pleasant St., Mt. Vernon 5250.
Warner T. McGuinn, 217 Courtland Street, St. Paul 8755.
J. Howard Payne, 514 St. Paul Street, Mt. Vernon 2171.
George L. Pendleton, 14 E. Pleasant St., Mt. Vernon 3129-W.
Clarke L. Smith, 14 E. Pleasant St., Mt. Vernon 5233.
U. Grant Tyler, 14 E. Pleasant St., Mt. Vernon 5525-J.

MINE OPERATORS

Big Four Coal Land Development Company, 246 W. Biddle St., Baltimore, Md.
H. S. Sterling, Pres., 802-3 House Bldg., Pittsburg, Pa. Jas. McMillan, Treas. R. H. Tate, Sec.

NOTARIES PUBLIC

Annie E. Anderson, 1109 Etting Street.
Truly Hatchett, N. W. Cor. of Biddle and Eutaw Streets.
C. C. Jennings, 14 E. Pleasant Street.

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W. Ashbie Hawkins, William C. McCard, Clarke L. Smith and George W. F. McMechen. The building is a four-story modern structure, containing seventeen rooms and four lavatories. It is heated by steam and lighted by electricity. This is the first and only instance in the United States where four colored lawyers own and occupy their own office building.

LAWYERS

Robert G. I. Brown, 118 E. Lexington St., St. Paul 8652.
Otis, T. Bull, 118 E. Lexington St.
Roy S. Bond, 217 Courtland St., St. Paul 4488.
W. Norman Bishop, 118 E. Lexington St., St. Paul 3473.
Residence, 1107 Druid Hill Ave., Mt. Vernon 854.
J. Steward Davis, 118 E. Lexington St., St. Paul 3473.
Residence, 1107 Druid Hill Ave., Mt. Vernon 854.
C. C. Fitzgerald, 217 Courtland St., St. Paul 2471
William L. Fitzgerald, 1206 Druid Hill Ave., Madison 1979.
W. Ashbie Hawkins, 14 E. Pleasant St., St Paul 3966.
Ephriam Jackson, 118 E. Lexington St., Calvert 538-J.
William C. McCard, 14 E. Pleasant St., St. Paul 2578.
George W. F. McMechen, 14 E. Pleasant St., St. Paul 3966.
Warner T. McGinnis, 217 Courtland St., St. Paul 8755.
J. Howard Payne, 514 St. Paul St., Mt. Vernon 2171.
George L. Pendleton, 118 E. Lexington St., St. Paul 3746.
Clarke L. Smith, 14 E. Pleasant St., St. Paul 2367.
C. Grant Tyler, 14 E. Pleasant St., St. Paul 8275.

NOTARIES PUBLIC

Miss Annie E. Anderson, 1189 Etting Street.
Truly Hatchett, N. W. Corner of Biddle & Eutaw Sts.
C. C. Jennings, 14 E. Pleasant St.
William L. Fitzgerald, 1206 Druid Hill Ave.
Minnie B. Lewis, 1319 Argyle Ave.
C. M. Dorsey, 1310 N. Fremont Ave.
C. Henry Jenkins, 829 Druid Hill Ave.
J. Winfield Thomas, 2101 Druid Hill Ave.
Helen C. Fisher, 421 Druid Hill Ave.
Arthur N. Rogers, 118 E. Lexington St.
J. H. Liverpool, Eutaw & Fayette Sts., Second Floor.

ORGANIZATIONS

Baltimore Educational Association—H. Milton Gross, President.

Day Nursery Association for Colored Children—Mrs. Jennie H. Ross, President, 2047 Division St.

Maryland Colored Public Health Association—Mason A. Hawkins, President, 1532 Druid Hill Ave.

The Colored High School Alumni Association—Mr. C. S. Whyte, President.

The DuBois Circle—Mrs. C. H. Steptoau, President, 1132 W. Lexington Street.

Woman's Suffrage Organization—Mrs. Howard E. Young, President, 1100 Druid Hill Ave.

Woman's Cooperative Civic League—Mrs. Sadie Fernandis, President.

Eva Jenifer Neighborhood Club—Mrs. Daniel Murphy, 559 Laurens Street.

The Y. M. C. A.—Dr. H. E. Young, President.

The Y. W. C. A.—Miss M. Edith Cooper, 1216 Druid Hill Ave.

Maryland Association for Colored Blind—W. H. Langley, President. 1506 McCulloh St.; Robt. W. Coleman, Manager, 418 E. Federal Street.

National Association for the Advancement of Colored People—Dr. H. S. McCard, President, 2005 Druid Hill Ave.

Maryland Association for Social Service—Prof. James R. L. Diggs, A.

C. COLEMAN 1919-1920

Coleman, Chas. H., 901 N. Eutaw St.
Gloster, C. F., 901 Druid Hill Ave., Mt. Vernon 4714-J.
Jones, Oscar D., 1405 Druid Hill Ave., Madison 4537.
Jones, Thomas, 1510 Pennsylvania Ave.
Reid, Albert O., 1935 Druid Hill Ave., Madison 3318-W.
Ston-, A. D., 1619 Druid Hill Ave.
Wilkins, Jesse M., Penna. Ave. and Presstman St., Madison 1488-J.
Mayer, L. H., Cor., Penna. Ave. and Dolphin St.

REAL ESTATE AND INSURANCE

Hugh M. Burkett, 514 St. Paul St., Mt. Vernon 2171.
William L. Fitzgerald, 1206 Druid Hill Ave., Madison 1979.
William C. McCard, 21 E. Saratoga St., St. Paul 2578.
Cornelius C. Fitzgerald, 217 Courtland St., St. Paul 2471.
Clarke L. Smith, 21 E. Saratoga St., St. Paul 2367.
Arthur L. Johnson, 746 Pennsylvania Ave., Mt. Vernon 5062-W.
Harry O. Wilson, Fayette and Pearl Sts., St. Paul 7346.
Truly Hatchett, 2026 Druid Hill Ave., Madison 937.
Philip H. Pratt, 1322 Argyle Ave., Madison 4850-W.
Carlos C. Jennings, 21 E. Saratoga St., St. Paul 2578.
C. Henry Jenkins, 829 Druid Hill Ave., Madison 3263-J.
Gross & Grant, 2031 Division St., Madison 4138-J.
Robert J. Young, 1100 Druid Hill Ave., Mt. Vernon 5975.
Charles Tolson, 506 Baker St., Madison 1613-J.
Allen & Tibbs, 1117 N. Carey St., Madison 1856-J.
Samuel E. Robinson, 1721 Baker St., Madison 3657-J.
J. Winfield Thomas, 621 S. Sharp St., Madison 886-W.
Charles H. Johnson, 519 Robert St., Madison 1761-W.
The J. Winfield Thomas Company, 621 South Sharp St., South 536.
J. Howard Tolson, 1057 Argyle Ave., St. Paul 7346.
Garnett, Russell Waller, Jr., 1800 McCulloh St., Madison 2418-J.
Charles E. Williams, 1429 Argyle Ave., Madison 3969-W.
Arthur N. Rogers, 21 E. Saratoga St., St. Paul 6275.
George R. Parron, 1900 White St., Gilmor 2185-W.
C. Henry Jenkins, 829 Druid Hill Ave., Madison 3263-J.
Parran & Fowlkes, 1316 Druid Hill Ave.
George Wingate, 1722 Druid Hill Ave., Madison 1474-J.
W. Ellsworth Griffin, 1639 Pennsylvania Ave., Madison 2992-W.

NOTARIES PUBLIC

Truly Hatchett, 2026 Druid Hill Ave., Madison 937.
Carlos C. Jennings, 21 E. Saratoga St., St. Paul 2578.
William L. Fitzgerald, 1206 Druid Hill Ave., Madison 1979.
Minnie B. Lewis, 1319 Argyle Ave., Madison 6288.
C. M. Dorsey, 1310 N. Fremont Ave., Madison 5079.
C. Henry Jenkins, 829 Druid Hill Ave., Madison 3263-J.
J. Winfield Thomas, 2101 Druid Hill Ave., Madison 886-W.
Helen C. Fisher, 421 Druid Hill Ave., Mt. Vernon 3461-W.
Arthur N. Rogers, 21 E. Saratoga St., St. Paul 6275.
J. H. Liverpool, Eutaw and Fayette Sts., Second floor.

LAWYERS

Robert G. I. Brown, 118 Lexington St.
Roy S. Bond, 217 Courtland St., St. Paul 4488.
Arthur E. Briscoe, 21 E. Saratoga St., St. Paul 6275.
W. Norman Bishop, 217 Courtland St., St. Paul 4488.
W. Stewart Davis, 217 Courtland St.
C. C. Fitzgerald, 217 Courtland St., St. Paul 2471.
W. L. Fitzgerald, 1206 Druid Hill Ave., Madison 1979.
James H. Hammond, 217 Courtland St., St. Paul 5755.
W. Ashbie Hawkins, 21 E. Saratoga St., St. Paul 3966.
Ephraim Jackson, 118 E. Lexington St.
George W. F. McMechen, 21 E. Saratoga St., St. Paul 3966.
William C. McCard, 21 E. Saratoga St., St. Paul 2578.
Warner T. McGuinn, 217 Courtland St., St. Paul 5755.
George L. Pendleton, 118 E. Lexington St., St. Paul 3746.
John W. Parker.
J. Howard Payne, 1006 Linden Ave., Mt. Vernon 3019-J.
Clarke L. Smith, 21 E. Saratoga St., St. Paul 2267.
U. Grant Tyler, 21 E. Saratoga St., St. Paul 6275.
Arthur E. Briscoe, 217 Courtland St., St. Paul 5755.

PROBATION OFFICERS

Beale Elliott, 1628 Druid Hill Ave., Supreme Bench of Baltimore City.
Juliet A. Thomas, 1109 Druid Hill Ave.

BLACK BIOGRAPHY

W. Ashbie Hawkins — GRADUATE OF MD LAW SCHOOL
DIED 4/10/41
[PICTURE IN MICROFICHE]

Gregory Hawkins

U. Theodore Hayes

Josiah P. Henry, Jr. — BORN 8/2/96 IN CAMBRIDGE, MD
DIRECTOR OF BALTIMORE URBAN LEAGUE
GRADUATED MICHIGAN LAW 1923

William Hicks — [KAPPA ALPHA PSI MEMBER] ODD FELLOWS, MASONS, ELKS
HOUSE OF DELEGATES MAN TO RUN ON DEMOCRATIC TICKET FOR LEGISLATURE IN SOUTH

Charles P. Howard — CRIMINAL LAWYER

Joseph C. Howard

W. A. C. Hughes — BORN 7/24/05 ADMITTED TO MD BAR 2/5/31
UNDERGRAD: LINCOLN U PA; LAW: BOSTON UNIV 1930
MONUMENT CITY BAR ASSOC. NATIONAL LAWYERS GUILD MEMBER

Ephrim Jackson

Charles W. Johnson — GRADUATED FROM LINCOLN UNIVERSITY IN 1887

Richard E. King

Thomas Knox

~~A. Briscoe Koger~~ LUNWOOD G KOGER, SR — BORN 3/10/1894 ASHEVILLE, NC
HOWARD LAW
ASSLT. CITY SOLICITOR IN B-MORE
NATIONAL LAWYERS GUILD MEMBER

C. & P. ST. PAUL 3966

HAWKINS & McMECHEN
ATTORNEYS AND COUNSELLORS-AT-LAW
21 EAST SARATOGA STREET
BALTIMORE MD.

W. ASHBIE HAWKINS
G. W. F. McMECHEN

May 8th 1914

Dr. J. E. Spingarn,
9 W. 73rd St.,
New York City.

Dear Dr. Spingarn:

Thanks your favor of the 6th inst. and in reply to which I beg for two reasons to assure you that no apology is due me as you seem to think. In the first place, on account of the very poor light I was kept so busy trying to see what was on my manuscript, that I had it time to observe your movements; and second, knowing as I did what you were about, I would have been entirely satisfied.

At their meeting Thursday night our Executive Committee received a letter purporting to come from the trustees of the University expressing regrets for the "mistake" in not opening McCoy Hall, and undertaking to place responsibility for it on our committee for not reminding them of their agreement. A copy of this letter has been sent Mr. Villard, I understand.

We all feel morally certain that failure to open the Hall was deliberate, and that it was a studied attempt to humiliate us, and to embarrass the N.A.A.C.P. in the great work it is doing. My people feel the sting of this keenly, but we are consoled somewhat that one so well known and so valiant as yourself was on hand to champion our cause. With best wishes I am

Very sincerely yours,
W. Ashbie Hawkins

W. Ashbie Hawkins
Geo. W. F. McMechen
Dallas F. Nicholas

HAWKINS & McMECHEN
ATTORNEYS AT LAW
BANNEKER BUILDING
14 E. PLEASANT STREET
BALTIMORE, MD.

TELEPHONE
VERNON 5205

April 8th, 1931.

James J. Lindsay, Jr. Esq.,
Attorney at Law,
824 Equitable Bldg.,
City.

Jones v. Mayflower Cab Co.

Dear Mr. Lindsay:

I saw the clerk of the City Court this afternoon, and the above cases have been placed in the assignment to be tried, either Thursday, or Friday of next week.

Very truly yours,

BFN:MLF.

OFFICERS OF NATIONAL BAR ASSOCIATION

George H. Woodson,
President Emeritus

Raymond Pace Alexander,
President

Georgia Jones Ellis,
Vice-President

Charles E. Robinson,
Vice-President

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Chas. E. Robinson, Pres. Ernest J. Davis, Vice-Pres.

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Frank Adams, Treas.

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Perry W. Howard,
General Chairman
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Charles E. Robinson
Philip W. Thomas
Ambrose Shief, Jr.
Miss Ollie M. Cooper
Frank W. Adams
J. Franklin Wilson
Louis R. Mehlinger
Earl R. Alexander

Augustus W. Gray
William L. Houston
Charles H. Houston
Arthur G. Froe
George E. C. Hayes
Karl F. Phillips
Josiah Henry
W. Ashbie Hawkins
George McMechen
Benjamin L. Gaskins
Roy S. Bond

Fifth Annual Meeting

of the

National Bar Association

This may help the "routing"

W.H.F + D.F.M

Please Return to: H.F. Phillips 2 54. Paul St.

Thursday and Friday

August 7th and 8th, 1930

Washington, D. C.

NICHOLAS PAPERS: 7/12

(NATBARASSOC

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COPY

GRAND BOULE

OF THE

SIGMA PI PHI FRATERNITY

ANNUAL REPORT OF

GAMMA Boule, No. _____

City of BALTIMORE

State of MARYLAND

For the year beginning _____

A newly instituted Boule will make its first report to the Grand Grammateus at the beginning of the term next following its being set apart.

The Annual Report must be made out by the Grammateus and signed by the Sire Archon and Grammateus and sent to the Grand Grammateus not later than 60 days after Tax becomes due. Tax must be paid on all members---$3.00 per member in advance.

NICHOLAS : 812 (GRAND BOULE FILE)

ROSTER

1. BERRY, JOHN L.
2. BERRY, WILLIAM LEROY
3. BROWN, BENJAMIN F.
4. BROWN, DANIEL C.
5. BROWN, THOMAS I.
6. COOK, RALPH U.
7. DAVIS, CARRINGTON L.
8. HAWKINS, GREGORY
9. HAWKINS, MASON A.
10. HAWKINS, THOMAS S.
11. HAWKINS, W. ASHBIE
12. McCARD, H. STANTON
13. McMECHEN, GEORGE W. F.
14. MORSELL, SAMUEL R.
15. NICHOLAS, DALLAS F.
16. PENNINGTON, P. D. G.
17. REID, ALBERT O.
18. SCOTT, D. GRANT
19. SMITH, ALBERT A.
20. WALLER, GARNETT R.
21. WHEELER, JOHN J.
22. WILSON, EDWARD N.
23. WRIGHT, WILLIAM H.
24. YOUNG, HOWARD E.
25. YOUNG, ISAAC H.
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NICHOLAS PAPERS - BA2 (GRANVILLE CO.)

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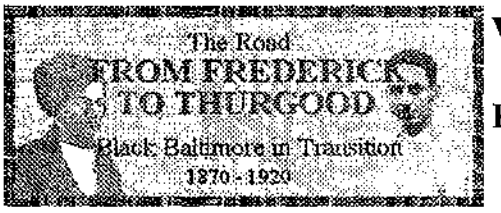

W. Ashbie Hawkins:

Professional Career

After a spell as a public school teacher (1885-1892), Hawkins was admitted to the Maryland bar on January 29, 1897 (click here to view test book entry) and set up his own law practice. About 1905 Hawkins joined forces with George W.F. McMechen in the firm of Hawkins and McMechen, headquartered initially at 327 St. Paul Street, later at 21 E. Saratoga Street, and at 14 E. Pleasant Street beginning around 1920. The partnership lasted until Hawkins passed away in 1941. [1]

Hawkins got involved in the independent Republican movement in 1897, which featured George M. Lane. He made speeches at Committee of 100 meetings and was almost selected by the Republican Party as a candidate [2]

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- Personal Life
- Obituaries
- Historic Sites
- Bibliography
- Return to W. Ashbie Hawkins Introduction
- Return to Civil Rights and Politics Introduction
- Return to *The Road from Frederick to Thurgood* Introduction

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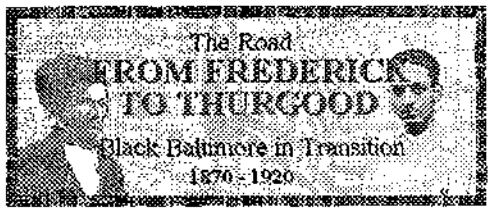

W. Ashbie Hawkins:

Legal Activity

Hawkins, along with Warner T. McGuinn, got involved in a dispute over a segregation law enacted in 1910. They successfully defended a black man who suffered violence at the hands of whites disturbed at his decision to reside in their neighborhood. The law, designed by one Samuel West, was rejected as unconstitutional by the Criminal Court on February 4, 1911. [1]

In October of 1911 Hawkins, outraged at poor sleeping and eating conditions for blacks on Chesapeake Bay ferryboats, took the Baltimore, Chesapeake and Atlantic Railway Company to court. Though his complaint was dismissed, the decision of the Public Service Commission on February 13, 1912 did recommend that the company upgrade it's facilities for blacks. [2]

1913 saw Hawkins in action again, this time as counsel for John H. Gurry, indicted for violating another recently enacted segregation ordinance. The Baltimore Criminal Court and the Maryland Court of Appeals agreed with Hawkins that the law was unconstitutional. [3]

Hawkins made his biggest mark in 1917 before the U.S. Supreme Court in *Buchanan v. Worley.*

- Personal Life
- Professional Career
- Obituaries
- Historic Sites
- Bibliography
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Dr. Charles H. Wesley
Masonic Research Society

Loading

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THE M. W. UNITED GRAND LODGE OF FREE AND ACCEPTED MASONS OF MARYLAND vs. WM. F. GREEN, GRAND MASTER OF THE FREE AND ACCEPTED YORK MASONS, ET AL.

COURT OF APPEALS OF MARYLAND

June 17, 1920, Decided

PRIOR HISTORY: [***1] Appeal from the Circuit Court No. 2 of Baltimore City (DOBLER, J.).

DISPOSITION: Decree affirmed, the appellant to pay the costs.

CORE TERMS: lodge, colored, colored men, grand master, grand lodge, convention, connected, injunction, subordinate, attended, charter, sine die, fraternal, amongst, membership, sentiments, believing, factions, regular, following resolution, subordinate lodge, present time, full power, fraternity, infringement, continuously, dispensation, appellations, unanimously, clandestine

HEADNOTES: *Fraternal Organization--Use of Name "Masons"--Injunction.*

In case of dispute between fraternal organizations as to the use of a particular name, relief will not be given by way of injunction unless the right thereto is clearly established.

p. 592

On an issue between two bodies or associations of colored persons, each claiming a superior right as to the use of the appellations "Masons" and "Free Masons," *held* that the evidence being conflicting, the plaintiff was not entitled to an injunction to restrain defendant from using such appellations and from establishing lodges thereunder.

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COUNSEL: Edwin T. Dickerson and W. Ashbie Hawkins, with whom were Hawkins & McMechen

on the brief, for the appellant.

Charles W. Main and Benjamin H. McKindless, for the appellees.

JUDGES: The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, ADKINS and OFFUTT, JJ.

OPINIONBY: BOYD

OPINION: [*582] [**851] BOYD, C. J., delivered the opinion of the Court.

The Most Worshipful United Grand Lodge of Free and Accepted Masons of Maryland, Incorporated, filed a bill in equity against the Grand Master of the Free and Accepted York Masons, the Worshipful Master of a Lodge affiliated with the Free and Accepted York Masons and twenty-four others, who are alleged to be the officers and members of a voluntary unincorporated body of men, known as Mount Sinai Lodge No. 1 Free and Accepted Ancient York Masons. The object of the bill is thus stated in the prayer:

> "That the said * * * may be enjoined from using the name of Masons, or Free Masons, as the name of a fraternal, benevolent or charitable organization, and from using any name of which the term [***2] Masons or Free Masons forms a part, or using the said words Masons or Free Masons for any purpose, whether alone, or in conjunction with any other words; and from engaging in any other effort to add to the membership of said Mt. Sinai Lodge, or from organizing any other lodges of the same kind and character bearing the name of Masons or Free Masons or any other name which the name Masons or Free forms a part, and from in any manner representing as members of said lodge so organized, or as being members of the Order of Masons, or Order of Free Masons, or connected in any way with said order, or in any way forming a component part of the said Order of Masons or Order of Free Masons."

The plaintiff (appellant) alleges that for many years prior to the grant of any of its charters referred to in the bill:

> "The Fraternity of Ancient Free and Accepted Masons, now generally known as Free and Accepted Masons, had operated among colored men in the State of Maryland, sometimes with divided ranks, bearing different names, but holding all of them to the essential rites, ceremonies and traditions of the great Fraternity of Free Masons, until in the year 1876 all of these separate bodies [***3] of colored men claiming the rights and benefits of the Fraternity of Free Masonry were united in one body, known as The Most Worshipful United Grand Lodge of Free and Accepted [*584] Masons of the State of Maryland, and that from that date until very recently no other body of Free Masons, operating among colored men, has been known in this State, nor has authority been given to nor exercised by any other body of men to so operate in this State."

It is also alleged that the appellant has at this time about 2,000 members in this State, who are attached to and members of forty-eight subordinate lodges, located in different parts of the State, which are component parts of and are under the supervision of said Grand Lodge; that it has since its first institution among the colored men in this State, and before then in Boston and where the Fraternity of Masons existed among colored men:

> "borne at different times the name of Ancient Free and Accepted Masons and of Free and Accepted Masons, and this name has been continuously used by the complainant, and now is used by it and its votaries, and by long use it has acquired the sole and exclusive right to use such name as it [***4] refers to colored men in the State of Maryland, and no other persons or order has any right to the use of such name as it refers to colored men in this State, either along with or in connection with any other words, or parts of a name, of any other fraternal organization operating among colored men in the State of Maryland."

It further alleges that the use of the name Masons by the defendants has caused and is causing great confusion and is tending to mislead the public into believing that the defendants, constituting the said Mount Sinai Lodge No. 1, is a part of appellant's organization, whereas it is not and cannot be,

> "but is made up largely of a class of men who cannot become affiliated with any regular body of Free Masons anywhere, and as part of its [**852] scheme to embarrass your complainant it is making the claim that it, and not your complainant, is the original Order of Free Masons."

Among other things, it is alleged:

> "That the use of the name Masons by the defendants, its agents, servants and members is part of a fraudulent scheme to induce the public and those seeking to join the Order of Free Masons into believing that they are joining the said [***5] named order, and it will be impossible to prevent such persons from so believing if said defendants are allowed to continue to use the same name, all of which is contrary to equity and is a fraudulent and illegal invasion and an infringement of the rights of the Order of Free Masons in the premises and a fraudulent and inequitable competition in business, and an infringement upon and an illegal invasion of the rights, good-will and name of the Order of Free Masons."

An order to show cause why a writ of injunction should not be issued as prayed was passed, the defendants answered and, after a large amount of testimony was taken, the bill was dismissed and this appeal was taken. The defendants denied all allegations of deception, fraud, misleading acts, etc., and set out in some detail a history of the organization of colored lodges of Masons. They allege:

> "That in the year 1775 or 1776 a regiment of British soldiers stationed in Boston, in possession of regular authority from the Grand Lodge of England, made Masons of a number of colored men, who obtained a dispensation under which they worked for a number of years, and that in November, 1784, the Grand Lodge of England granted [***6] to one Prince Hall and other colored men residing in Boston a charter under the name of African Lodge No. 457 of the roll of the Grand Lodge; that thereafter other lodges were warranted in other States of the Union, and that on or about the 24th day of June, 1847, a convention was held in the City of Boston, composed of representatives from the various lodges of colored men throughout the United States," who unanimously adopted a resolution "to organize and open a National Grand Lodge of Free [*586] and Accepted Ancient York Masons, National Compact, Inc., for the United States of

> America and Masonic jurisdiction; that the said National Grand Lodge working under and by authority of the only warrant that was ever granted colored Masons in the United States, established subordinate and Grand State lodges in the different States of the Union, among which was Friendship Lodge No. 6 of Baltimore City, Maryland, warranted on the 2nd day of February, 1825, and that thereafter other subordinate lodges were organized by the National Grand Lodge within the State of Maryland, and that some time thereafter, about the year 1873 or the year 1874, the Grand Lodge of Maryland seceded and withdrew [***7] from the National Grand Lodge, carrying with it the warrant that had been given it by the National Grand Lodge."

It is alleged that the appellant was declared by the National Grand Lodge to be rebellious and was expelled, and was existing only as a spurious and clandestine body and has no Masonic authority whatever from the National Grand Lodge.

It is further alleged that the respondents in August, 1918, formed a club and made application for membership in the so-called body (the plaintiff), that one Joseph P. Evans, the Grand Master of the said lodge, met the respondents and after lecturing to them accepted ten dollars for an application for membership in the said lodge; that they were examined by a physician and passed the physical test and several of them desired to be informed whether the appellant was connected in any way with any National Grand Lodge and were informed that it was not, thereupon all of the respondents refused to become members of the said lodge and made application to the National Grand Master of Masons at Montgomery, Alabama, for a warrant as a subordinate lodge of the National Body; that the National Grand Master of Masons sent the National Grand Organizer [***8] for the State of Virginia and adjacent territory to Baltimore with a warrant and Masonic authority to organize respondents into a [*587] subordinate lodge, which he did on the 20th of November, 1918, under the name of Mount Sinai Lodge No. 1 Free and Accepted Ancient York Masons, National Compact.

It is thus seen that the plaintiff claims to be the only authorized Masonic power in this State, while the respondents claim that it is spurious and clandestine, and that they are the duly authorized Masons through the action of the National Grand Lodge. The evidence is conflicting, the feeling is bitter and it is not the kind of case which appeals to a court of equity. It is always unfortunate when such controversies get into the courts, and before a court of equity can grant such relief as is sought in this case the right to it must be clearly established. It is not merely a question of what relief a court of equity can grant to an Order, to protect it from an unjustifiable use of its name, etc., by those having no claim of right to use them, but the first question is whether the appellant has shown that it has such an exclusive right to represent the colored Masons of Maryland that [***9] it can properly ask a court to prohibit by injunction the respondents from doing what it complains of.

Each side claims descent from a lodge which was established in Boston under the name of African Lodge No. 459 (457 in answer), generally referred to as Prince Hall Lodge. The first colored persons who became Masons were admitted to an English army lodge attached to the command of General Gage, at Boston in 1775, as stated in *Funk and Wagnalls' Standard Encyclopedia,* and as we understand to be admitted in this case. Lodges were established in the different states, and Grand Lodges were formed in Massachusetts, Rhode Island, New York and [**853] Pennsylvania. William Henry Grimshaw, assistant librarian in Congress, wrote a book on the history of Free Masonry among colored people in the United States. He was a witness for appellant and testified that the first lodge of colored Masons in the United States was organized at Boston in 1784, and said it was still in existence. He said that there was a lodge in Massachusetts called Prince Hall Grand Lodge of Massachusetts, which was established in 1848, and that that was the present Grand Lodge, but the

original Grand Lodge of Massachusetts [***10] was established in 1792 by the authority of the Grand Master of England, issuing the warrant to Prince Hall Lodge; that that existed until several lodges were formed in the United States, and then they organized the Prince Hall Grand Lodge, which prior to that was called African Grand Lodge; that Prince Hall Grand Lodge, by the authority of the Grand Master of England, had jurisdiction over all the United States and had authority to open lodges which were amenable to the Grand Lodge of England. He testified that in 1847 the Grand Lodges of New York, Pennsylvania and Rhode Island (we suppose Massachusetts also) called several men from their jurisdictions to meet in Boston,

> "to consult as to the *death message* (best method, we suppose) of distributing Masonry over the states in the Union. There was no other colored lodges nowhere in North America at that period. These men came together, three representatives from each of these bodies, and they styled themselves 'National Compact." It was for the purpose of advising the Grand Masters of the several states as these lodges might be made in the several states, how to practice Ancient Freemasonry, as an advisory body only, without [***11] charter, without any authority whatever; they simply assumed that authority. They never were chartered, never had any charter from England, nor does the English constitution recognize anything as the National Compact, nor would one be admitted in the anteroom of a Grand Lodge of a regularly made lodge."

He further testified that the National Compact, "as it is called," existed from 1848 until 1874, and he read from his book the following resolution:

> "At a meeting of the National Grand Lodges held in Wilmington, Delaware, in the year 1877, the following resolution was unanimously adopted: Resolved, That each state is its sovereign head and that each delegate [*589] be directed to report to his state Grand Lodge the action taken by this body. And be it further resolved, That the National or Compact Grand Lodge is and the same is hereby declared to be an irregular and unheard-of body in Masonry, and it is hereby declared forever void."

Immediately below that in the record is the following:

> "In this connection the defendants offered in evidence a pamphlet written by Dr. H. M. Butler, another State Rights Mason, wherein he states that the convention of the National [***12] Grand Lodge was held in Wilmington in 1878, and the resolution adopted was as follows: Resolved, That the National Grand Lodge do wind up its affairs and adjourn *sine die*."

There does not seem to be any explanation as to why the two authors gave different dates for the meeting, and different resolutions as passed at it. It is not only denied by the appellees that the National Grand Lodge was wound up and adjourned *sine die*, but they offered evidence to show that regular meetings were held as late as 1918. Rev. J. M. Cornell testified that he had been a Mason for thirty years, and for the entire time had "been a very ardent student of the institution." He was a member of the Free and Accepted Ancient York National Compact and he had been Grand Master of Tennessee, which recognized the National Grand Lodge as the superior body. He testified that the National Grand Lodge had been in existence continuously since it began in 1847; that the Grand Lodges of Massachusetts, Rhode Island, New York and Pennsylvania were represented at that meeting and they were all of the Grand Lodges of colored people in this country at that time; that they

adopted sentiments and principles which [***13] were to govern the craft among colored men for all time to come. He was then handed a book (which is not explained) and said that it contained the sentiments adopted by the National Grand Lodge. [*590] Amongst other "Sentiments," as they are called, set out in the record, is the following:

> "Therefore, in solemn convention assembled, we do, in the name of the great Masonic body of Free and Accepted A. Y. Masons, declare ourselves a free and independent body of Masons, to be known as the National Grand Lodge of Free and Accepted Ancient York Masons (Colored) of the United States of America and Masonic Jurisdiction thereto belonging, with full power and authority to grant warrants of constitution to all state Grand Lodges under our jurisdiction, and that the said state Grand Lodges shall have full power and authority to grant letters of dispensation and warrants of constitution to subordinate lodges within their several jurisdictions, and to establish as many lodges as they deem most expedient."

He further testified that on June 24th, 1848, all of the Masons of color in the United States held a convention in New York City and confirmed and ratified the action of the Boston [***14] convention of the preceding year. He gave the names of the Grand Masters of the National Compact from the first one to the present time--including Bishop John Wesley Allstalk, who was the incumbent when he testified; that the National Grand Lodge has held meetings once every three years, that he attended one in 1898 at Columbus, Ohio, one at Chattanooga, Tenn., in 1901, and one at Atlanta, Ga., in 1904, that those were all he [**854] had attended in person but that he had received a summons from the Most Worshipful National Grand Lodge to attend them for a period of twenty-nine years. Robert J. Dimmons testified that he was Right Worshipful National Grand Secretary of Free and Accepted Ancient York Masons, National Compact--being the National Grand Lodge--that he had attended sessions of the National Grand Lodge in Washington, D. C., in 1909, Orangeburg, S. C., in 1912, Atlanta, Ga., in 1915, and Louisville, Ky., in 1918. He was made secretary at Washington and the minutes of that meeting were before him. He said that the [*591] National Grand Lodge had Grand Lodges in twenty-eight states--approximately twenty-five hundred lodges which recognized the National Grand Lodge. He [***15] also testified as to who the Grand Master of the National Grand Lodge was, and said from his reading and conversation with well-informed Masons his understanding was that the National Grand Lodge had held sessions from the time of its organization to the present; that in 1888 the Maryland Grand Lodge, together with some others, became rebellious and were expelled. The Rev. Solomon Hudson testified that he had been a Mason since April, 1876, and he attended three meetings of the National Grand Lodge--at Wilmington, Del., in 1878 and 1881, and at Washington in 1909. He said that the National Lodge did not adjourn *sine die* in 1878, that the meeting was in 1878 and not in 1877, as Mr. Grimshaw said, and from his knowledge of the history of Masonry and his personal knowledge he said that the National Grand Lodge had been a continuous body from its formation to the present time. Rev. William H. Benderson, who organized the Mount Sinai Lodge in Baltimore, was the Grand Master of the State of Virginia and National District Deputy Grand Master of the National Grand Lodge of Virginia, District of Columbia, Maryland and North Carolina. He was sent to Baltimore by Bishop Allstalk, National [***16] Grand Master. He said there were three lodges now in Baltimore connected with the National Compact, having about two hundred members, and that in Virginia there were between 150 and 175 lodges, having from 3,000 to 3,500 members connected with the National Compact.

We have thus at some length referred to the testimony of witnesses on both sides. The evidence on neither side can be regarded as satisfactorily establishing the claim to its right to represent the Masonic Fraternity among colored people, to the exclusion of the other. Like most church, fraternity and family

quarrels which get into courts the evidence is unsatisfactory because it is colored by prejudices and partisan views of most things connected with the controversy. Neither [*592] of those factions is recognized by the white Masons of this country, although both have amongst their numbers ministers of the Gospel and others who would seem to be amongst the most intelligent colored people. But the appellant has the burden of satisfying the court that it is entitled to the claim it makes to the exclusion of the other side. It is sufficient to say that it has not established to our satisfaction the right to have the [***17] appellees enjoined from the use of the name Masons or Free Masons, or from having lodges in Baltimore, or doing the other things mentioned in the prayer of the bill. The evidence is not of the certain and authentic kind which a court should require before undertaking to determine such questions between two branches of factions of an order. There is irreconcilable conflict between the witnesses who ought to be the best informed.

Having reached the conclusion indicated above, it will serve no good purpose to further prolong this opinion. It may be well to add that by refusing the injunction we do not determine which of the two factions properly represents the colored Masons of this country, or of Maryland, but only that the right of the appellant to enjoin the defendants as prayed for is not sufficiently sustained to justify the Court in doing so, and the decree dismissing the bill of complaint will be affirmed.

Decree affirmed, the appellant to pay the costs.

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IN DEFENSE OF SELF

Eight Negroes vs. Marcus Garvey

I have to bring to your attention the greatest bit of treachery anc that any group of Negroes could be capable of. This thing is so s vicious and murderous as to make it impossible for any self-resp to imagine that any one, other than a culprit of the meanest kind responsible for its authorship.

Honor Among Thieves.

It is said that there is honor even among thieves, but it is appare no honor and self-respect among certain Negroes, in that they w the meanest and lowest methods possible, not only to pilfer the p their brothers but to rob one of his fair name. Stealing a man's n Shakespeare says, trash, but to injure a man's reputation, to tarn character, is a crime of the lowest kind, which not even ordinary would indulge in. To further imagine that a group of colored me responsible for writing to the Attorney General of the United St America and to the white people at large in endeavoring to preju against fellow Negroes whose only crime has been that of makin improve the condition of the race is beyond the conception of th imagination; nevertheless, the thing has been done by a group of Negroes who have written their names down everlastingly as en own race by maliciously, wickedly and treacherously endeavorin misrepresent their race which represents the minority group in a civilization as to cause that majority to unwillingly, and not of it impose such punishment upon the race as to make it harder for u in the country of our common adoption.

Writing to U. S. Attorney General

The following vicious and wicked letter was written by a group names are appended hereto and directed to the Honorable Attor of the United States of America. My comment will continue at t communication.

The letter to the Attorney General:

2305 Seventh Avenue,
New York City, Jan 15, 1923.

Hon. Harry M. Daugherty, United States Attorney-General, Dep
Justice, Washington, D. C.

Dear Sir:

(1) As the chief law enforcement officer of the nation, we wish t
attention to a heretofore unconsidered menace to harmonious ra
relationships. There are in our midst certain Negro criminals and
murderers, both foreign and American born, who are moved and
intense hatred against the white race. These undesirables contin
that all white people are enemies to the Negro. They have becor
that they have threatened and attempted the death of their oppo
assassinating in one instance.

(2) The movement known as the Universal Negro Improvement
has done much to stimulate the violent temper of this dangerous
president and moving sprit is one Marcus Garvey, an unscrupulc
demagogue, who ceaselessly and assiduously sought to spread a
Negroes distrust and hatred of all white people.

(3) The official organ of the U. N. I. A., The Negro World, of w
Garvey is managing editor, sedulously and continually seeks to a
feeling between the races. Evidence has also been presented of a
alliance of Garvey with the Ku Klux Klan.

(4) An erroneous conception held by many is that Negroes try tc
hide criminals. The truth is that the great majority of Negroes ar
opposed to all criminals, and especially to those of their own rac
they know that such criminals will cause increased discriminatio
themselves.

(5) The U. N. I. A. is composed chiefly of the most primitive lar
element of West Indian and American Negroes. The so-called re
element of the movement are largely ministers without churches,
without patients, lawyers without clients and publishers without
are usually in search of "easy money." In short, this organization
in the main of Negro sharks and ignorant fanatics.

(6) This organization and its fundamental laws encourage violen
Constitution there is an article prohibiting office holding by a co
criminal, EXCEPT SUCH CRIME IS COMMITTED IN THE I
OF THE U. N. I. A. Marcus Garvey is intolerant of free speech
exercised in criticism of him and his movement, his followers se
prevent such by threats and violence. Striking proof of the truth
assertion is found in the following cases:

(7) In 1920 C[illegible]

(7) In 1920 Garvey supporters rushed into a tent where a religio was being conducted by Rev. A. Clayton Powell in New York C sought to do bodily violence to Dr. Charles S. Morris, the speak evening-who they had heard was to make an address against Ga were prevented only by action of the police. Shortly afterward n Baltimore branch of the U. N. I. A. attempted bodily injury to W Hawkins, one of the most distinguished colored attorneys in Am he criticized Garvey in a speech. During the same period an anti- meeting held by Cyril Briggs, then editor of a monthly magazine Crusader-in Rush Memorial Church, New York City, on a Sund was broken up by Garveyites turning out the lights.

(8) Several weeks ago the Garvey division in Philadelphia cause disturbance in the Salem Baptist Church, where Attorney J. Aus graduate of Yale University, and the Rev. J. W. Eason were spe Garvey, that the police disbanded the meeting to prevent a riot c Reports state the street in front of the church was blocked by G insulted and knocked down pedestrians who were on their way t meeting.

(9) In Los Angeles, Cal., Mr. Noah D. Thompson, a distinguish citizen of that city, employed in the editorial department of the I Daily Express reporting adversely on the Garvey movement as a visit to the annual convention, was attacked by members of Gar Angeles division, who, it is alleged, had been incited to incited t Garvey himself, and only through the help of a large number of as Thompson saved from bodily harm.

(10) A few months ago, when some persons in the Cleveland, O of the U. N. I. A. asked Dr. LeRoy Bundy, Garvey's chief assist accounting of funds a veritable riot took place, led, according to America, by Bundy himself.

(11). In Pittsburgh, Pa., on October 23 last, after seeking to dist conducted by Chandler Owen, editor of the Messenger Magazin who had lurked around the corner in a body rushed on the street meeting, seeking to assault him, but were prevented by the inter police.

(12) When William Pickens, who had co-operated in the expose frauds, was to deliver an address in Toronto, Garveyites met hin of the church, with hands threateningly in their hip pockets, tryi intimidate he should further expose the movement.

(13) In Chicago, after seeking to break up an anti-Garvey a Gar shot a policeman who sought to him from attacking the speaker building

(14) In New York last August during a series of meetings by the Negro Freedom to expose Garvey's schemes and methods, the s

threatened with death of Garveyites came into the meetings with intention of breaking them up. This they were prevented from th determination on the part of the leaders, of the New York police mass of West Indians and Americans, who clearly showed that t not permit any cowardly ruffians to break up their meetings.

(15) In fact, Marcus Garvey has created an organization which i fundamental law condemns and invites to crime this is evidenced of Article V of the Constitution of the U. N. I. A., under the cap Reception at Home." It reads: "No one shall be received by the I Consort who has been convicted of felony, EXCEPT SUCH CR FELONY WAS COMMITTED IN THE INTEREST OF THE NEGRO IMPROVEMENT ASSOCIATION AND THE AFRIC COMMUNITIES LEAGUE."

(16) Further proof of this is found in the public utterances of Wi one of the chief officials in the organization and Garvey's envoy of Nations Assembly at Speaking Geneva. Speaking at the Gold in Baltimore, Md., on August 18, 1922, he is quoted as saying: ' FOLK AS WELL AS WHITE WHO TAMPER WITH THE U. GOING TO DIE.'"

(17) What appears to be an attempt to carry out this threat is see assault and slashing with a razor of one S. T. Saxon by Garveyit Cincinnati, Ohio, when he spoke against , the movement there la

(18) On January 1, this year, just after having made an address in Orleans, the Rev. J. W. Eason, former "American Leader" of the movement, who had fallen out with Garvey and was to be the ch against him in the Federal Government's case, was waylaid and a is reported in the press, by the Garveyites. Rev. Eason identified men as Frederick Dyer, 42, a longshoreman, and William Shakes painter. Both of them are prominent members of the U. N. I. A. Orleans, one wearing a badge as chief of police and the other as Fire Department of the "African Republic." Dr. Eason's dying w identifying the men whom he knew from long acquaintance in th were:

(19) "I had been speaking at Bethany and was on my way home men rushed out at me from an alley. I saw their faces and (point and Shakespeare) I am positive that these two men here are two

(20) The vicious inclination of these Garvey members is seen in comments in an interview:

(21) (The N. Y. Amsterdam News reports): "Both Dyer and Sha have denied the attack, but declared they were glad of it, as they richly deserved what he got. 'Eason', said one of them, 'was a so association made him what he was. When he was expelled becau misconduct he went up and down the country preaching against

Garvey, who is doing great good for our race. Someone who ev thought it was time to stop his lies took a crack at him. I don't b that did it. Eason richly deserved what he got.'"

(22) Eason says he knew the men who shot him were directed t much, however, as the assassination of Mr. Eason removes a Fe we suggest that the Federal Government probe into the facts an whether Eason was assassinated as the result of an interstate co emanating from New York. It is signficant that the U. N. I. A. h in its organ, The Negro World, the raising of a defense fund for for the murder, seemingly in accordance with its constitution.

(23) Not only has this movement created friction between Negr whites, but it has also increased the hostility between American Indian Negroes.

(24) Further, Garvey has built up an organization which has vict of ignorant and unsuspecting Negroes, the nature of which is cle Judge Jacob Panken of the New York Municipal Court, before Garvey's civil suit for fraud was tried: Judge Panken says: "It se that you have been preying upon the guillibility of your own peo kept no proper accounts of the money received for investments, organization of high finance in which the officers received outra salaries and were permitted to have exorbitant expense accounts jaunts the country. I advise those dupes who have contributed t organizations to go into court and ask for the appointment of a

(25) For the above reasons we advocate that the Attorney-Gene influence completely to disband and extirpate this vicious mover he vigorously and speedily push the government's case against M for using the mails to defraud. This should he done in the interes even as a matter of practical expediency.

(26) The government should note that the Garvey followers for part voteless-being either largely unnaturalized or refraining fro because Garvey teaches that they are citizens of an African repu greatly exaggerated the actual membership of his organization, conservative estimated to be much less than 20,000 in all countr the United States and Africa, the West Indies, Central and Soutl (The analysis of Garvey's membership has been made by W. A. I highly intelligent West Indian from Jamaica, Garvey's home, in " Crusader" magazine, New York City; also by Dr. W. E. DuBois known social statistician, in "The Century Magazine," February, York City). On the other hand, hosts of citizen voters, native bo naturalized, both white and colored, earnestly desire the vigorou of this case.

(27) Again the notorious Ku Klux Klan, an organization of whit religious bigots, has aroused much adverse sentiment-many peo its dissolution as the Reconstruction Klan was dissolved. The G

its dissolution as the Reconstruction Klan was dissolved. The U.
organization, known as the U. N. I. A., is just as objectionable a
dangerous, inasmuch as it naturally attracts an even lower type c
crooks and racial bigots, among whom suggestibility to violent c
greater.

(28) Moreover, since its basic law--the very constitution of the U
the organization condones and encourages crime, its future mee
be carefully watched by officers of the law and infractions prom
severely punished.

(29) We desire the Department of Justice to understand that tho
this document, as well as the tens of thousands who will indorse
of the country, are by no means impressed by the widely circulat
which allege certain colored politicans have been trying to use tl
to get the against Garvey quashed. The signers of this appeal re
particular political, religious or nationalistic faction. They have r
ends or partisan interests to serve. Nor are they moved by any p
against Marcus Garvey. They sound this tocsin only because the
gathering storm of race prejudice and sense the imminent menac
insidious movement, which cancerlike, is gnawing at the very vit
and safety-of civic harmony and rater-racial concord.

The signers of this letter are:
HARRY H. PACE, 2289 Seventh avenue, New York City.
ROBERT S. ABBOTT, 3435 Indiana avenue, Chicago, Ill.
JOHN E. NAIL, 145 West 135th Street, New York City.
DR. JULIA P. COLEMAN, 118 West 130th Street, New York
WILLIAM PICKENS, 70 Fifth avenue, New York City.
CHANDLER OWEN, 2305 Seventh avenue, New York City.
ROBERT W. BAGNALL, 70 Fifth avenue, New York City.
GEORGE W. HARRIS, 135 West 135th Street, New York City
Harry H. Pace is president of the Pace Phonograph Corporation
Robert S. Abbott is editor and publisher of the "Chicago Defend
John E. Nail is president of Nail and Parker, Inc., real estate.
Julia P. Coleman is president of the Hair-Vim Chemical Co., Inc
William Pickens is field secretary of the National Association fo
Advancement of Colored People.
Chandler Owen is co-editor of "The Messenger" and co-executi
of the Friends of Negro Freedom.
Robert W. Bagnall is director of branches of the National Assoc
Advancement of Colored People.
George W. Harris is a member of the Board of Aldermen of Ne
and editor of the "New York News."
Address reply to Chandler Owen, secretary of committee, 2305
avenue, New York City.

Considering The Letter

Let us consider the above letter as written by these wicked Negr
to the Attorney General of the United States of America and to

to the Attorney-General of the United States of America and to press of the nation.

In the first paragraph of the above communication the writers, b made use of the following statement, speaking to the Attorney-(say:

"As chief law enforcement officer of the nation, we wish to call to A HERETOFORE UNCONSIDERED MENACE TO HARM RACE RELATIONSHIP. THERE ARE IN OUR MIDST CER NEGRO CRIMINALS AND POTENTIAL MURDERERS, BC FOREIGN AND AMERICAN BORN, WHO ARE MOVED A ACTUATED BY INTENSE HATRED AGAINST THE WHIT THESE UNDESIRABLES CONTINUALLY PROCLAIM TH. WHITE PEOPLE ARE ENEMIES TO THE NEGRO."

Good Old Darkies

To imagine that any group of Negroes could be so base as to att impress upon not only the Attorney General of the United State: but the white people at large that member of their own race, alth untrue, are desirous of murdering members of the white race an maintaining a hatred against them, knowing well the position of America and his relationship to his white brother, is more than a expect at this time in the struggle for race uplift. Everyone know statement is false and only manufactured by these wicked and m individuals for the purpose of directing the hatred of the Attorne the white people of America against the Universal Negro Impro Association and Marcus Garvey; nevertheless, the statement rev Negro men the lowest possible trait. Like the good old darkey, t they have some news to tell and they are telling it for all it is wo and fabricators that they are, for everyone who knows the Unive Improvement Association and Marcus Garvey, white or black, k that there is absolutely no desire on their part to murder anybod far as criminals are concerned, more are to be found probably ar who signed the letter than could be found in the extensive memt Universal Negro Improvement Association.

No Hatred for White People

In paragraph 2 they stated that "the President-General of the Un Improvement Association is Marcus Garvey, an unscrupulous d who has ceaselessly and assiduously to spread among Negroes c hatred among people."

About being unscrupulous and a demagogue, we need pay no at because the very villians who wrote such a letter are better able unscrupulousness and demagogy than anyone else, in that they s more about it, but when it comes to the point of "Marcus Garve seeking to spread among Negroes distrust and hatred for all whi is time for the white and black races to realize the truth about th Negro Improvement Association and its President. At no time h President of the Universal Negro Improvement Association prea

of the white people. That in itself is a violation of the constitutio organization, which teaches all its members to love and respect t all races, believing that by so doing, others will in turn love and rights.

No Ill Feeling Between Races

In paragraph 3 they try to make out that The Negro World, sedu continually, seeks to arouse ill-feeling between the races, yet in t breath they further try to make out that there is an alliance betw and the Ku Klux Klan. If these men were in the possession of th were actuated by truth rather than by a desire to do harm and inj would have realized that the Ku Klux Klan is a white organizatic for white supremacy, so that Garvey would be illogical and fooli one hand he preached ill feeling and hatred between the two rac went back upon all this and allied himself with the Ku Klux Klar

Wicked Maligners

These wicked maligners, above the protest of Marcus Garvey ar Universal Negro Improvement Association for over one hundrec still endeavoring to make it appear as if there is some understanc the President of this organization and the Ku Klux Klan.

"Bunch" of Selfish Grafters

In paragraph 4 these men state that: "An erroneous conception l is that Negroes try to cloak and hide their criminals; the truth is majority of Negroes are bitterly opposed to all criminals and esp those of their own race because they know that such criminals w increased discrimination against themselves." And here we have lofty (?) purposes of these so-called race leaders and race reform races try to reform and improve their criminals whilst these splei Negro leaders of ours avow that they are bitterly opposed to the because they know that such criminals will cause increased discr against them. The selfish dogs that they are! It is not a question the condition of the race; it is a question of how much they will being members of the race, and if there is a criminal in the Negrc preferable that he die rather than he should even exist to be impr because in so doing he may cause a discrimination against these individuals. We will prove that these men are just what they stat to be in these paragraphs--a "bunch" of selfish grafters who have off the blood of the race and who feel that the Universal Negro Association has come upon the scene to so change and improve to make it impossible for them to continue to suck the last drop of our people under the guise of race business men and race leac

Primitive Negroes

In paragraph 5 they further state that "the Universal Negro Impr

Association is composed chiefly of the most primitive land ignor
of West Indian and American Negroes.
Now we come to the crux of the matter. These fellows represen
group of men led by DuBois, who believe that the race problem
solved by assimilation, and that the program for the Negro is to
the best imitation of the white man and approach him as near as
the hope of jumping over the fence into the white race and be cc
in another one hundred years; therefore they everything Negro a
haven't sense enough to hide it. Now, what do they mean by "th
primitive and ignorant element of West Indian and American Ne
We will all remember that in the slave days the Negroes of Amer
West Indies were taken from Africa, and that they then represen
primitiveness. The emancipation, both in America and the West
brought us up to the present state, with the majority of our peop
resemblance of this tribal primitiveness, whilst a few endeavored
themselves Caucasianized. These men regard it as a crime to be
made us, and for us to be as nature made us is to be ignorant; th
much love these would-be Negroes have for the motherhood of
paragraph stating that "The respectable element with the moven
largely professional men without calling," and that "the organiza
composed of Negro and ignorant Negro fanatics," again reveal t
these so-called business and professional scoundrels in that they
make it appear that only professional men are respectable, and tl
organization has no white sharks or ignorant fanatics in it. Were
ignorant element of Negroes, these very fellows would have star
because all of them earn their living either by selling out the race
guise of leadership or by exploiting the race in business. We only
the so-called ignorant Negroes of America will get to know thes
they are and let them pay the price through their pocketbooks fc
large a number of people who are proud of their race and color.

Forced Companionship Between Races

These nonentities show us in paragraph 5 that they do not believ
tolerate any organization that is not made up of either respectab
people or white sharks and ignorant fanatics. These are the fello
foment lynching by always endeavoring to encourage forced cor
between the two races.
In paragraph 6 they depict Marcus Garvey as being intolerant of
when, in fact, he has always advocated freedom of a universal ki
that paragraph they state that "The laws of the Universal Negro
Association encourage violence." That is a lie. In many of the su
paragraphs they further endeavor to make out that the Garveyite
of the Universal Negro Improvement Association have on sever
disturbed the peace of public meetings and individuals organized
against Garvey and the movement.
The persons cited in the paragraphs who were alleged to be distu
respective meetings are, with one exception, all members of the
have produced the letter now under criticism. They were all org
purpose of injuring the Universal Negro Improvement Associati

Marcus Garvey. Nevertheless, at no time has the association or
ever made any effort to check or embarrass them. Their own un
created in their meetings, no doubt, the displeasure of the peopl
attended them, and now they try to label the Association and Ga

Colored Caste Prejudice

It is strange that whenever anything is referred to derogatory to
gentlemen use the term "Negro," but whenever they want to imp
the Attorney-General or the white people of the standing of any
the race they refer to him as "colored," such as paragraph 7, wh
was made to W. Ashbie Hawkins as one of the most distinguish
attorneys in America, and to Noah D. Thompson as a distinguis
citizen of Los Angeles, being employed, as he is in the editorial
the white Los Angeles Daily Express. This reveals again the hid
intention of these plotters who are endeavoring to set up social
distinct from Negro, which they claim to be primitive and ignora

Socialist Judge as Propagandist

In paragraph 25 the writers state that Judge Jacob Panken of the
Municipal Court made certain derogatory remarks against Marc
the Universal Negro. Improvement Association in a case brough
They hadn't the honesty to tell the public and the Attorney-Gene
letter that Judge Jacob Panken is a Socialist and that at the time
being tried the Socialist group of Negroes in Harlem, New York
it as a splendid opportunity to get back at Marcus Garvey and th
Negro Improvement Association, who had been against Socialis
Socialist judge take advantage of the situation while hearing a e
by making use of such remarks as would be used by the Socialis
propaganda inst Marcus Garvey and the Universal Negro Impro
Association.
Now they are making use of the Statement of Panken, as they h
would use certain remarks for propaganda purpose, and they stil
all Negroes are foolish enough to follow the advice of a Socialis
against whom, as a Socialist, Marcus Garvey and the Universal
Improvement Association stand out. Hundreds of other cases ha
before other judges of New York, and no one ever used the rem
Panken's, hence everyone knows they were made for propagand
Negro voters will take keen notice of it.

U. N. I. A. Controls Thousands of Votes

In paragraphs 27 they infer that "the Garvey followers are for th
voteless." This is another lie, because the Universal Negro Impr
Association can marshal twenty times as many voters in the Unit
America as all other Negro organizations put together, and that
proved in a short while for the good of the race. About the "exa
membership" of the organization, any reader of the letter has bu
granted that some of the things said about the organization in di

of the country were true; but even if they were only partly true t
least reveal a membership in three or four sections larger than th
be all over the world. No one will ever know accurately the men
the Universal Improvement Association, because every second N
meet, if not an actual member, is one in sprit.

A Barber Shop Philosopher

In reference to W. A. Domingo as an "intelligent" West Indian N
Jamaica, who made an analysis of the Garvey membership, all th
acquainted with the Universal Negro Improvement Association
Domingo was a dismissed employee of the association and that h
no one but himself. He is what is commonly called a "barber sho
talks the kind of philosophy indulged in by frequenters of the to
He also is a Socialist who has a desperate grudge against work a
the dreamer's vision that one day all the rich people of the world
up their wealth with the loafer, thereby bringing into existence th
of Socialism.

Crusader Magazine Out of Business

The magazine (Crusader) referred to also will be remember as th
of Cyril Briggs, who collected donations from colored and white
support the paper some years ago, and who up to nine months a
that he had received $5,000 for the purpose of starting another
called the Liberator, and that colored people were to subscribe $
It is for me to state that the Crusader has long been out of busin
Liberator has never appeared. What has become of the $5,000 a
and the subscription taken for the publication of the Crusader no
W. E. B. DuBois is a colored man who hates the drop of Negro
veins, and he is as much against the Universal Negro Improvem
Association from a prejudice viewpoint as the Devil is against H
The demolition of the Universal Negro Improvement Associatio
by the writers of the letter. In paragraph 27 they state that the o
as objectionable and even more dangerous than the Ku Klux Kla
granted that the Ku Klux Klan sought black supremacy. If there
program these Negroes would prefer the existence of the Ku Kl
Universal Negro Improvement Association is more dangerous. T
they are illogical, foolish, wicked and malicious. They seek to de
Universal Negro Improvement Association as a Negro organizat
knowing that a precedent will be set for the destruction of all Ne
organizations that seek in any way to improve the condition of t
race. These bigots believe the own the United States of America
no more right in America than other colored men, so that they w
much disappointed if they believe that the Department of Justice
Attorney-General would, for the purpose of pleasing eight Negr
the ends of the Constitution of e United States of America. But
Negroes? They themselves have told us what they are in their re
business.

Group of Unknown Persons

Take them as they are, one is a business exploiter who endeavor
the patriotism of the race by selling us commodities at a higher r
charged in the ordinary and open markets. Another is a race defi
Chicago who publishes in his newspaper week after week the gr
scandals against the race, showing up the crimes and vices of ou
was the man who published in his newspaper for over one year a
advertisement showing the pictures of two women, a black wom
light woman, with the advice under the photograph of the black
"lighten your black skin." The other is a real estate shark who de
the guise of race patriotism, to raise the rent of poor colored pe
beyond that of white landlords, who are generally more consider
the economic condition of the colored race. Another is a hair str
face bleacher whose loyalty to race is to get the race to be dissat
itself. Still we have another as a turn coat and lackey who has nc
manhood to stand up and defend his own cause in his relationshi
but who was so mean and low down as to have approached Mar
for a job about nine months ago, representing to him that he was
with because of his color, and after he was offered a berth he to
opportunity of going back to his old employers to get them to ra
which he never would have gotten raised, but for the fact that he
new employment in a rival organization. Then we have the graft
who started so many enterprises among colored people, such as
Men's Union, and has not been able to account for the funds. W
another who maintained a Blue Vein Society Church in Detroit,
who was subsequently relieved of his charge because of alleged
and another unscrupulous politician whom everyone knows to b
has lost the respect of the ordinary members of the community.
angels and "respectable" citizens who have written this infamous
Attorney-General of the United States of America against Marc
the Universal Negro Improvement Association.

Sinners to Purge Their Souls

It is hoped that these sinners will purge their souls of the crime t
committed against their race, for surely in the accusation of thei
consciences they shall not see salvation.

Let me implore all members, divisions and friends of the Univers
Improvement Association to now make every effort to push fort
our great movement. Now is the time for every man and woman
loyally by this organization. Whatsoever might have been the dif
opinions in local divisions or your dissatisfaction, you must stan
millions of members throughout the world, for the enemy within
now knocking at the door. It is for us unitedly to stand together
foe. The greatest weapon we can use at this time is stronger org
Let all members come together more than ever everywhere and
world that not by misrepresentation, but by fair play and justice
problem of race be settled.

It is hoped that the white people of America and of the world wi

It is hoped that the white people of America and of the world w. cognizance of the vicious lies and misrepresentations of these wi Negroes. Everyone will realize that the Universal Negro Improv Association preaches the doctrine of human brotherhood and th mankind.

MARCUS GARVEY, President-General,
Universal Negro Improvement Association.

New York, Tuesday, February 6, 1923.
P. S. The signers of the letter to the Attorney-General are nearly Octoroons and Quadroons. Two are black Negroes, who have n Octoroons. One is a Mulatto and Socialist, a self-styled Negro l had expressed his intention of marrying a white woman but was prevented from doing so by the criticism of the U. N. I. A. With exception all of the others are married to Octoroons. -M. G.
N.B. Since the signing of the letter to the Attorney General, Ge has been twice defeated for election as Alderman.

KEEPING THE NEGRO DOWN

My enemies, and those opposed to the liberation of the Negro t are so incompetent and incapable of meeting argument with arg tolerance with tolerance that they have cowardly sought the pov Government to combat and destroy me; and, even there they ha because Government has no power to destroy the spiritual urge can only succeed through persecution to expose its acts of injus to serve the interest of one class of its citizenry against that of a cowards have forced their friends and associates who happen to Government to the use majesty of such a Government against m their weakness and inability to stand up under the onward marc redemption and real Negro freedom. They are all afraid of the bl They try to hold him down and yet claim his interiority. A large have to stay down him if the show goes on. The white man pres by a foul, he cannot, or will not, play a straight game.

38

Supreme Court of the United States

SLAUGHTER-HOUSE CASES.
THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS
v.
THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.
PAUL ESTEBEN, L. RUCH, J. P. ROUEDE, W. MAYLIE, S. FIRMBERG, B. BEAUBAY,
WILLIAM FAGAN, J. D. BRODERICK, N. SEIBEL, M. LANNES, J. GITZINGER, J. P.
AYCOCK, D. VERGES, THE LIVE-STOCK DEALERS' AND BUTCHERS' ASSOCIATION OF NEW ORLEANS, AND CHARLES CAVAROC
v.
THE STATE OF Louisiana, *ex rel.* S. BELDEN, ATTORNEY-GENERAL.
THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS
v.
THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

December Term, 1872

ERROR to the Supreme Court of Louisiana.

The three cases--the parties to which as plaintiffs and defendants in error, are given specifically as a sub-title, at the head of this report, but which are reported together also under the general name which, in common parlance, they had acquired--grew out of an act of the legislature of the State of Louisiana, entitled: *'An act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company,''* which was approved on the 8th of March, 1869, and went into operation on the 1st of June following; and the three cases were argued together.

The act was as follows:

'SECTION 1. *Be it enacted, &c.*, That from and after the first day of June, A.D. 1869, it shall not be lawful to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, pens, slaughter-houses, or abattoirs at any point or place within the city of New Orleans, *or the parishes of Orleans, Jefferson, and St. Bernard,* or at any point or place on the *east* bank of the Mississippi River within the corporate limits of the city of New Orleans, or at any point on the west bank of the Mississippi River, above the present depot of the New Orleans, Opelousas, and Great

Western Railroad Company, *except* that the 'Crescent City Stock Landing and Slaughter-House Company' may establish *themselves* at any point or place as hereinafter provided. Any person or persons, or corporation or company carrying on any business or doing any act in contravention of this act, or landing, slaughtering or keeping any animal or animals in violation of this act, shall be liable to a fine of $250, for each and *39 every violation, the same to be recoverable, with costs of suit, before any court of competent jurisdiction.'

The second section of the act created one Sanger and sixteen other persons named, a corporation, with the usual privileges of a corporation, and including power to appoint officers, and fix their compensation and term of office, and to fix the amount of the capital stock of the corporation and the number of shares thereof.

The act then went on:

'SECTION 3. *Be it further enacted, &c.*, That said company or corporation is hereby authorized to establish and erect at its own expense, at any point or place on the east bank of the Mississippi River within the parish of St. Bernard, or in the corporate limits of the city of New Orleans, below the United States Barracks, or at any point or place on the west bank of the Mississippi River below the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals; and from and after the time such buildings, yards, &c., are ready and complete for business, and notice thereof is given in the official journal of the State, the said Crescent City Live-Stock Landing and Slaughter-House Company shall have *the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the provisions of this act;* and cattle and other animals destined for sale or slaughter in the city of New Orleans, or its environs, shall be landed at the live-stock landings and yards of said company, and shall be yarded, sheltered, and protected, if necessary, by said company or corporation; and said company or corporation shall be entitled to have and receive for each steamship landing at the wharves of the said company or corporation, $10; for each steamboat or other water craft, $5; and for each horse, mule, bull, ox, or cow landed at their wharves, for each and every day kept, 10 cents; for each and every hog, calf, sheep, or goat, for each and every day kept, 5 cents, all without including the feed; and said company or corporation shall be entitled to keep and detain each and all of said animals until said charges are fully paid. But *40 if the charges of landing, keeping, and feeding any of the aforesaid animals shall not be paid by the owners thereof after fifteen days of their being landed and placed in the custody of the said company or corporation, then the said company or corporation, in order to reimburse themselves for charges and expenses incurred, shall have power, by resorting to judicial proceedings, to advertise said animals for sale by auction, in any two newspapers published in the city of New Orleans, for five days; and after the expiration of said five days, the said company or corporation may proceed to sell by auction, as advertised, the said animals, and the proceeds of such sales shall be taken by the said company or corporation, and applied to the payment of the charges and expenses aforesaid, and other additional costs; and the balance, if any, remaining from such sales, shall be held to the credit of and paid to the order or receipt of the owner of said animals. Any person or persons, firm or corporation violating any of the provisions of this act, or interfering with the privileges herein granted, or landing, yarding, or keeping any animals in violation of the provisions of this act, or to the injury of said company or corporation, shall be liable to a fine or penalty of $250, to be recovered with costs of suit before any court of competent jurisdiction.

'The company shall, before the first of June, 1869, build and complete A GRAND SLAUGHTER-HOUSE of sufficient capacity to accommodate all butchers, and in which to slaughter 500 animals per day; also a

sufficient number of sheds and stables shall be erected before the date aforementioned, to accommodate all the stock received at this port, all of which to be accomplished before the date fixed for the removal of the stock landing, as provided in the first section of this act, under penalty of a forfeiture of their charter.

'SECTION 4. *Be it further enacted, &c.*, That the said company or corporation is hereby authorized to erect, at its own expense, one or more landing-places for live stock, as aforesaid, at any points or places consistent with the provisions of this act, and to have and enjoy from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having landed at their wharves or landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson;* and are hereby also authorized (in connection) to erect at its own expense one or more slaughter- houses, at any points or places *41 consistent with the provisions of this act, and to have and enjoy, from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having slaughtered therein all animals, the meat of which is destined for sale in the parishes of Orleans and Jefferson.*

'SECTION 5. *Be it further enacted, &c.*, That whenever said slaughter-houses and accessory buildings shall be completed and thrown open for the use of the public, said company or corporation shall immediately give public notice for thirty days, in the official journal of the State, and within said thirty days' notice, and within, from and after the first day of June, A.D. 1869, *all other stock landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined for sale within the parishes aforesaid, under a penalty of* $100, *for each and every offence, recoverable, with costs of suit, before any court of competent jurisdiction; that all animals to be slaughtered, the meat whereof is determined for sale in the parishes of Orleans or Jefferson, must be slaughtered in the slaughter-houses erected by the said company or corporation;* and upon a refusal of said company or corporation to allow and animal or animals to be slaughtered after the same has been certified by the inspector, as hereinafter provided, to be fit for human food, the said company or corporation shall be subject to a fine in each case of $250, recoverable, with costs of suit, before any court of competent jurisdiction; said fines and penalties to be paid over to the auditor of public accounts, which sum or sums shall be credited to the educational fund.

'SECTION 6. *Be it further enacted, &c.*, That the governor of the State of Louisiana shall appoint a competent person, clothed with police powers, to act as inspector of all stock that is to be slaughtered, and whose duty it will be to examine closely all animals intended to be slaughtered, to ascertain whether they are sound and fit for human food or not; and if sound and fit for human food, to furnish a certificate stating that fact, to the owners of the animals inspected; and without said certificate no animals can be slaughtered for sale in the slaughter-houses of said company or corporation. The owner of said animals so inspected to pay the inspector 10 cents for each and every animal so inspected, one-half of which fee the said inspector shall retain for his services, and the other half of said fee shall be *42 paid over to the auditor of public accounts, said payment to be made quarterly. Said inspector shall give a good and sufficient bond to the State, in the sum of $5000, with sureties subject to the approval of the governor of the State of Louisiana, for the faithful performance of his duties. Said inspector shall be fined for dereliction of duty $50 for each neglect. Said inspector may appoint as many deputies as may be necessary. The half of the fees collected as provided above, and paid over to the auditor of public accounts, shall be placed to the credit of the educational fund.

'SECTION 7. *Be it further enacted, &c.*, That all persons slaughtering or causing to be slaughtered, cattle or other animals in said slaughter-houses, shall pay to the said company or corporation the following rates or perquisites, viz.: For all beeves, $1 each; for all hogs and calves, 50 cents each; for all sheep, goats, and lambs, 30 cents each; *and the*

said company or corporation shall be entitled to the head, feet, gore, and entrails of all animals excepting hogs, entering the slaughter-houses and killed therein, it being understood that the heart and liver are not considered as a part of the gore and entrails, and that the said heart and liver of all animals slaughtered in the slaughter-houses of the said company or corporation shall belong, in all cases, to the owners of the animals slaughtered.

'SECTION 8. *Be it further enacted, &c.*, That all the fines and penalties incurred for violations of this act shall be recoverable in a civil suit before any court of competent jurisdiction, said suit to be brought and prosecuted by said company or corporation in all cases where the privileges granted to the said company or corporation by the provisions of this act are violated or interfered with; that one-half of all the fines and penalties recovered by the said company or corporation [*Sic* in copy--REP.], in consideration of their prosecuting the violation of this act, and the other half shall be paid over to the auditor of public accounts, to the credit of the educational fund.

'SECTION 9. *Be it further enacted, &c.*, That said Crescent City Live-Stock Landing and Slaughter-House Company shall have the right to construct a railroad from their buildings to the limits of the city of New Orleans, and shall have the right to run cars thereon, drawn by horses or other locomotive power, as they may see fit; said railroad to be built on either of the public roads running along the levee on each side of the Mississippi *43 River. The said company or corporation shall also have the right to establish such steam ferries as they may see fit to run on the Mississippi River between their buildings and any points or places on either side of said river.

'SECTION 10. *Be it further enacted, &c.*, That at the expiration of twenty-five years from and after the passage of this act the privileges herein granted shall expire.'

The parish of Orleans containing (as was said [FN1]) an area of 150 square miles; the parish of Jefferson of 384; and the parish of St. Bernard of 620; the three parishes together 1154 square miles, and they having between two and three hundred thousand people resident therein, and prior to the passage of the act above quoted, about, 100 persons employed daily in the business of procuring, preparing, and selling animal food, the passage of the act necessarily produced great feeling. Some hundreds of suits were brought on the one side or on the other; the butchers, not included in the 'monopoly' as it was called, acting sometimes in combinations, in corporations, and companies, and sometimes by themselves; the same counsel, however, apparently representing pretty much all of them. The ground of the opposition to the slaughter-house compeny's pretensions, so far as any cases were finally passed on in this court was, that the act of the Louisiana legislature made a monopoly and was a violation of the most important provisions of the thirteenth and fourteenth Articles of Amendment to the Constitution of the United States. The language relied on of these articles is thus:

West Headnotes

Appeal and Error ⇐781(6)
30k781(6) Most Cited Cases

The motion of defendant to dismiss appeal from decision of State Supreme Court on ground that the contest between the parties had been adjusted by agreement made since records came into United States Supreme Court was denied, where evidence failed to show that agreement was binding upon all the parties to the record who were named as plaintiffs in the several writs of error.

Citizens ⇐11
77k11 Most Cited Cases

Citizenship of the United States and citizenship of a state are distinct from each other.

Slaves ⇐24
356k24 Most Cited Cases

The thirteenth amendment to the United

States constitution, abolishing slavery, equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude.

Health and Environment ⇐ 20
199k20 Most Cited Cases

The legislative body has the right and duty to prescribe and determine the locality where slaughter-houses for a city may be conducted, and to do such effectively it is indispensable to have power to require that all persons who slaughter animals for food shall do it in places prescribed and no where else.

Health and Environment ⇐ 27
199k27 Most Cited Cases

Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the principle that every person ought to use his property so as not to injure his neighbors.

Constitutional Law ⇐ 64
92k64 Most Cited Cases

Wherever a legislature has the right to accomplish a certain result, it has the right to endow a corporation with the powers necessary to effect the desired and lawful purposes.

Constitutional Law ⇐ 81
92k81 Most Cited Cases

The "police power" of the legislature extends to the protection of lives, limbs, health, comfort and quiet of all persons, and protection of all property within the State.

Constitutional Law ⇐ 206(4)
92k206(4) Most Cited Cases

Act La.1869, granting to a corporation the exclusive right to have and maintain slaughter houses and yards inclosing cattle intended for sale or slaughter, and prohibiting all other persons from having such establishments within certain limits, and requiring all cattle and other animals intended for sale or slaughter in that district to be brought to the yards and slaughter house of the corporation, and authorizing the exaction of certain fees for the use of its wharves, and for each animal landed and slaughtered, is not unconstitutional, as abridging the privileges of citizens of the United States.

Constitutional Law ⇐ 205(1)
92k205(1) Most Cited Cases

The act of the legislature of Louisiana passed March 8, 1869, granting to a corporation created by it the exclusive right, for 25 years, to have and maintain slaughter houses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within the parishes of Orleans, Jefferson, and St. Bernard, and prohibiting all other persons from building, keeping, or having such establishments within those limits, and requiring that all cattle and other animals intended for sale or slaughter in that district should be brought to the yards and slaughter houses of the corporation, and authorizing the corporation to exact fees for the use of its wharves, and for each animal landed and slaughtered, although a grant of an exclusive right or privilege, is, notwithstanding, a police regulation which it was within the power of the state to enact, and does not contravene the constitution of the United States.

Constitutional Law ⇐ 205(1)
92k205(1) Most Cited Cases

The power to grant exclusive rights and privileges which has always been conceded to state legislatures when necessary to the public health and comfort, has not been impaired by the thirteenth and fourteenth amendments to the constitution.

Constitutional Law ⇐ 206(1)
92k206(1) Most Cited Cases

The privileges and immunities of citizens of

the United States referred to in the second clause of the fourteenth amendment of the United States constitution are those which arise out of the nature and essential character of the national government, the provisions of its constitution or its laws, and treaties made in pursuance thereof.

Constitutional Law ⇐ 206(1)
92k206(1) Most Cited Cases

Provision in 14th amendment of Federal Constitution, U.S.C.A. providing that no State shall make or enforce any law which shall abridge privileges or immunities of citizens of United States, is intended to apply only to privileges and immunities of citizens of United States, as such, and not to privileges and immunities of citizens of the states.

Constitutional Law ⇐ 207(1)
92k207(1) Most Cited Cases

The constitutional provision that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States has no application to the state's own citizens.

Constitutional Law ⇐ 207(1)
92k207(1) Most Cited Cases

The "privileges and immunities of citizens of the States" embrace generally those civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in Federal Constitution, under the care of the State Governments.

Constitutional Law ⇐ 215
92k215 Most Cited Cases

The main purpose of the thirteenth, fourteenth, and fifteenth amendments to the United States constitution was the freedom of the African race.

Constitutional Law ⇐ 240(1)
92k240(1) Most Cited Cases

Act La. 1869, granting to a corporation the exclusive right to have and maintain slaughter houses and yards inclosing cattle intended for sale or slaughter, and prohibiting all other persons having such establishments within certain limits, and requiring all cattle and other animals intended for sale or slaughter in that district to be brought to the yards and slaughter house of the corporation, and authorizing the exaction of certain fees for the use of its wharves, and for each animal landed and slaughtered, is not unconstitutional, as denying to plaintiffs, who are butchers, the equal protection under laws.

Constitutional Law ⇐ 278(1.3)
92k278(1.3) Most Cited Cases
(Formerly 92k278(1.2))

Act La. 1869, granting to a corporation the exclusive right to have and maintain slaughter houses and yards inclosing cattle intended for sale or slaughter, and prohibiting all other persons having such establishments within certain limits, and requiring all cattle and other animals intended for sale or slaughter in that district to be brought to the yards and slaughter houses of the corporation, and authorizing the exaction of certain fees for the use of its wharves, and for each animal landed and slaughtered, is not unconstitutional, as depriving plaintiffs, who are butchers, of their property without due process of law.

Courts ⇐ 394(3)
106k394(3) k.

Where issue whether any restraint on power of State Legislature to grant exclusive rights and privileges exists in State Constitution, was passed on by State Supreme Court, such question would not be open to review in the United States Supreme Court.

Courts ⇐ 394(10)
106k394(10) k.

Where plaintiffs in error asserted throughout entire course of litigation in State Courts that grant of exclusive privilege by State Legislature to a corporation to maintain slaughter-houses and yards enclosing cattle

intended for sale or slaughter was a violation of the 13th and 14th amendments of the United States Constitution, U.S.C.A., the jurisdiction and duty of the United States Supreme Court to review judgment of State Court on such question was clear. Act Louisiana, March 8, 1869.

Constitutional Law ⇐ 83(2)
92k83(2) Most Cited Cases

Act La.1869, granting to a corporation the exclusive right to have and maintain slaughter houses and yards inclosing cattle intended for sale or slaughter, and prohibiting all other persons from having such establishments within certain limits, and requiring all cattle and other animals intended for sale or slaughter in that district to be brought to the yards and slaughter house of the corporation, and authorizing the exaction of certain fees for the use of its wharves, and for each animal landed and slaughtered, is not unconstitutional, as creating an involuntary servitude, forbidden by the thirteenth amendment to the constitution.

FN1 See *infra*, pp. 85, 86.

AMENDMENT XIII.

'Neither slavery nor *involuntary servitude* except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction.'

AMENDMENT XIV.

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, *are citizens of the United States* and of the State wherein they reside.*44

'No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States*, nor shall any State deprive any person of life, *liberty, or property*, without due process of law, nor deny to any person within its jurisdiction the *equal protection of the laws.*'

The Supreme Court of Louisiana decided in favor of the company, and five of the cases came into this court under the 25th section of the Judiciary Act in December, 1870; where they were the subject of a preliminary motion by the plaintiffs in error for an order in the nature of a supersedeas. After this, that is to say, in March, 1871, a compromise was sought to be effected, and certain parties professing, apparently, to act in a representative way in behalf of the opponents to the company, referring to a compromise that they assumed had been effected, agreed to discontinue '*all* writs of error concerning the said company, now pending in the Supreme Court of the United States;' stipulating further 'that their agreement should be sufficient authority for any attorney to appear and move for the dismissal of *all* said suits.' Some of the cases were thus confessedly dismissed. But the three of which the names are given as a sub-title at the head of this report were, by certain of the butchers, asserted not to have been *dismissed.* And *Messrs. M. H. Carpenter, J. S. Black, and T. J. Durant, in behalf of the new corporation,* having moved to dismiss them also as embraced in the agreement, affidavits were filed on the one side and on the other; the affidavits of the butchers opposed to the 'monopoly' affirming that they were plaintiffs in error in these three cases, and that they never consented to what had been done, and that no proper authority had been given to do it. This matter was directed to be heard with the merits. The case being advanced was first heard on these, January 11th, 1872; Mr. Justice Nelson being indisposed and not in his seat. Being ordered for reargument, it was heard again, February 3d, 4th, and 5th, 1873.

*Mr. John A. Campbell, and also Mr. J. Q. A. Fellows, argued the case at much length and on the authorities, in behalf of *45 the plaintiffs in error.* The reporter cannot pretend to give more than such an abstract of the argument as may show to what the opinion of the court was meant to be responsive.

I. The learned counsel quoting Thiers, [FN2] contended that 'the right to one's self, to one's own faculties, physical and intellectual, one's own brain, eyes, hands, feet, in a word to his

soul and body, was an incontestable right; one of whose enjoyment and exercise by its owner no one could complain, and one which no one could take away. More than this, the obligation to labor was a duty, a thing ordained of God, and which if submitted to faithfully, secured a blessing to the human family.' Quoting further from Turgot, De Tocqueville, Buckle, Dalloz, Leiber, Sir G. C. Lewis, and others, the counsel gave a vivid and very interesting account of the condition and grievances of the lower orders in various countries of Europe, especially in France, with its *banalites* and *'seigneurs justiciers,'* during those days when 'the prying eye of the government followed the butcher to the shambles and the baker to the oven;' when 'the peasant could not cross a river without paying to some nobleman a toll, nor take the produce which he raised to market until he had bought leave to do so; nor consume what remained of his grain till he had sent it to the lord's mill to be ground, nor full his cloths on his own works, nor sharpen his tools at his own grindstone, nor make wine, oil, or cider at his own press;' the days of monopolies; monopolies which followed men in their daily avocations, troubled them with its meddling spirit, and worst of all diminished their responsibility to themselves. Passing from Scotland, in which the cultivators of each barony or regality were obliged to pay a 'multure' on each stack of hay or straw reaped by the farmer--'thirlage' or 'thraldom,' as it was called--and when lands were subject to an 'astriction' astricting them and their inhabitants to particular mills for the grinding of grain that was raised on them, and coming to Great Britain, the counsel adverted to the reigns of Edward III, and Richard *46 II, and their successors, when the price of labor was fixed by law, and when every able-bodied man and woman, not being a merchant or craftsman, was 'bounden' to serve at the wages fixed, and when to prevent the rural laborer from seeking the towns he was forbidden to leave his own village. It was in England that the earliest battle for civil liberty had been made. Macaulay thus described it: [FN3]

FN2 De la Propriete, 36, 47.

FN3 History of England, vol. 1, p. 58.

'It was in the Parliament of 1601, that the opposition which had, during forty years, been silently gathering and husbanding strength, fought its first great battle and won its first victory. The ground was well chosen. The English sovereigns had always been intrusted with the supreme direction of commercial police. It was their undoubted prerogative to regulate coins, weights, measures, and to appoint fairs, markets, and ports. The line which bounded their authority over trade, had, as usual, been but loosely drawn. They therefore, as usual, encroached on the province which rightfully belonged to the legislature. The encroachment was, as usual, patiently borne, till it became serious. But at length the Queen took upon herself to grant patents of monopoly by scores. There was scarcely a family in the realm that did not feel itself aggrieved by the oppression and extortion which the abuse naturally caused. Iron, oil, vinegar, coal, lead, starch, yarn, leather, glass, could be bought only at exorbitant prices. The House of Commons met in an angry and determined mood. It was in vain that a courtly minority blamed the speaker for suffering the acts of the Queen's highness to be called in question. The language of the discontented party was high and menacing, and was echoed by the voice of the whole nation. The coach of the chief minister of the crown was surrounded by an indignant populace, who cursed *monopolies,* and exclaimed that the prerogative should not be allowed to touch the old liberties of England.'

Macaulay proceeded to say that the Queen's reign was in danger of a shameful and disgraceful end, but that she, with admirable judgment, declined the contest and redressed the grievance, and in touching language thanked the Commons for their tender care of the common weal.*47

The great grievance of our ancestors about the time that they largely left England, was this very subject. Sir John Culpeper, in a speech in the Long Parliament, thus spoke of these monopolies and pollers of the people:

'They are a nest of wasps--a swarm of vermin which have overcrept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering- tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker! I have echoed to you the cries of the Kingdom. I will tell you their hopes. They look to Heaven for a blessing on this Parliament.'

Monopolies concerning wine, coal, salt, starch, the dressing of meat in taverns, beavers, belts, bone-lace, leather, pins, and other things, to the gathering of rags, are referred to in this speech.

But more important than these discussions in Parliament were the solemn judgments of the courts of Great Britain. The great and leading case was that reported by Lord Coke, *The Case of Monopolies.* [FN4] The patent was granted to Darcy to buy beyond the sea all such playing-cards as he thought good, and to utter and sell them within the kingdom, and that he and his agents and deputies should have the whole trade, traffic, and merchandise of playing-cards, and that another person and none other should have the making of playing-cards within the realm. A suit was brought against a citizen of London for selling playing-cards, and he pleaded that being a citizen free of the city he had a right to do so. And----

FN4 11 Reports, 85.

'Resolved (Popham, C.J.) *per totam Curiam,* that the said grant of the plaintiff of the sole making of cards within the realm, was utterly void, and for two reasons: *48

'1. That it is a monopoly and against the common law.

'2. That it is against divers acts of Parliament.'

[The learned counsel read Sir Edward Coke's report of the judgment in this case, which was given fully in the brief at length, seeking to apply it to the cases before the court.]

It was from a country which had been thus oppressed by monopolies that our ancestors came. And a profound conviction of the truth of the sentiment already quoted from M. Thiers--that every man has a right to his own faculties, physical and intellectual, and that this is a right, one of which no one can complain, and no one deprive him--was at the bottom of the settlement of the country by them. Accordingly, free competition in business, free enterprise, the absence of all exactions by petty tyranny, of all spoliation of private right by public authority--the suppression of sinecures, monopolies, titles of nobility, and exemption from legal duties--were exactly what the colonists sought for and obtained by their settlement here, their long contest with physical evils that attended the colonial condition, their struggle for independence, and their efforts, exertions, and sacrifices since.

Now, the act of the Louisiana legislature was in the face of all these principles; it made it unlawful for men to use their own land for their own purposes; made it unlawful to any except the seventeen of this company to exercise a lawful and necessary business for which others were as competent as they, for which at least one thousand persons in the three parishes named had qualified themselves, had framed their arrangements in life, had invested their property, and had founded all their hopes of success on earth. The act was a pure MONOPOLY; as such against common right, and void at the common law of England. And it was equally void by our own law. The case of *The Norwich Gaslight Company* v. *The Norwich City Gaslight Company,* [FN5] a case in Connecticut, and more pointedly still, *The City of Chicago* v. *Rumpff,* [FN6] a case in Illinois, and *The Mayor of the City of Hudson* v. *Thorne,* [FN7] *49 a case in New York, were in entire harmony with Coke's great case, and declared that monopolies are against common right. [FN8]

FN5 25 Connecticut, 19.

FN6 45 Illinois, 90.

FN7 7 Paige, 261.

FN8 The statement of these cases being made, *infra*, pp. 106-109, in the dissenting opinion of Mr. Justice Field, is not here given.

How, indeed, do authors and inventors maintain a monopoly in even the works of their own brain? in that which in a large sense may be called their own. Only through a provision of the Constitution preserving such works to them. Many State constitutions have denounced monopolies by name, and it is certain that every species of exclusive privilege is an offence to the people, and that popular aversior to them does but increase the more largely that they are granted.

II. *But if this monopoly were not thus void at common law, would be so under both the thirteenth and the fourteenth amendments.*

The thirteenth amendment prohibits 'slavery and involuntary *servitude.*' The expressions are ancient ones, and were familiar even before the time when they appeared in the great Ordinance of 1787, for the government of our vast Northwestern Territory; a territory from which great States were to arise. In that ordinance that are associated with enactments affording comprehensive protection for life, liberty, and property; for the spread of religion, morality, and knowledge; for maintaining the inviolability of contracts, the freedom of navigation upon the public rivers, and the unrestrained conveyance of property by contract and devise, and for equality of children in the inheritance of patrimonial estates. The ordinance became a law after Great Britain, in form the most popular government in Europe, had been expelled from that territory because of 'injuries and usurpations having in direct object the establishment of an absolute tyranny over the States.' Feudalism at that time prevailed in nearly all the kingdoms of Europe, and serfdom and servitude and feudal service depressed their people to the level of slaves. The prohibition of 'slavery and involuntary servitude' in every form and degree, except as a *50 sentence upon a conviction for crime, comprises much more than the abolition or prohibition of African slavery. Slavery in the annals of the world had been the ultimate solution of controversies between the creditor and debtor; the conqueror and his captive; the father and his child; the state and an offender against its laws. The laws might enslave a man to the soil. The whole of Europe in 1787 was crowded with persons who were held as vassals to their landlord, and serfs on his dominions. The American constitution for that great territory was framed to abolish slavery and involuntary servitude in all forms, and in all degrees in which they have existed among men, except as a punishment for crime duly proved and adjudged.

Now, the act of which we complain has made of three parishes of Louisiana 'enthralled ground.' 'The seventeen' have *astricted* not only the inhabitants of those parishes, but of all other portions of the earth who may have cattle or animals for sale or for food, to land them at the wharves of that company (if brought to that territory), to keep them in their pens, yards, or stables, and to prepare them for market in their abattoir or slaughter-house. Lest some competitor may present more tempting or convenient arrangements, the act directs that all of these shall be closed on a particular day, and prohibits any one from having, keeping, or establishing any other; and a peremptory command is given that all animals shall be sheltered, preserved, and protected by this corporation, and by none other, under heavy penalties.

Is not this 'a servitude?' Might it not be so considered in a strict sense? It is like the 'thirlage' of the old Scotch law and the *banalites* of seignioral France; which were servitudes undoubtedly. But, if not strictly a servitude, it is certainly a servitude in a more popular sense, and, being an enforced one, it is an involuntary servitude. Men are surely subjected to a servitude when, throughout three parishes, embracing 1200 square miles, every man and every woman in them is compelled to refrain from the use of their own

land and exercise of their own industry and the improvement *51 of their own property, in a way confessedly lawful and necessary in itself, and made unlawful and unnecessary only because, at their cost, an exclusive privilege is granted to seventeen other persons to improve and exercise it for them. We have here the 'servients' and the 'dominants' and the 'thraldom' of the old seignioral system. The servients in this case are all the inhabitants in any manner using animals brought to the markets for sale or for slaughter. The dominants are 'the seventeen' made into a corporation, with these seignioral rights and privileges. The masters are these seventeen, who alone can admit or refuse other members to their corporation. The abused persons are the community, who are deprived of what was a common right and bound under a thraldom.

III. *The act is even more plainly in the face of the fourteenth amendment.* That amendment was a development of the thirteenth, and is a more comprehensive exposition of the principles which lie at the foundation of the thirteenth.

Slavery had been abolished as the issue of the civil war. More than three millions of a population lately servile, were liberated without preparation for any political or civil duty. Besides this population of emancipated slaves, there was a large and growing population who came to this country without education in the laws and constitution of the country, and who had begun to exert a perceptible influence over our government. There were also a large number of unsettled and difficult questions of State and National right that had no other settlement or solution but what the war had afforded. It had been maintained from the origin of the Constitution, by one political party--men of a high order of ability, and who exerted a great influence--that the *State* was the highest political organization in the United States; that through the consent of the separate States the Union had been formed for limited purposes; that there was no social union except by and through the States, and that in extreme cases the several States might cancel the obligations to the Federal government and reclaim the allegiance and fidelity of its members. Such were the doctrines of Mr. *52 Calhoun, and of others; both those who preceded and those who have followed him. It is nowhere declared in the Constitution what 'a citizen' is, or what constitutes citizenship; and what ideas were entertained of citizenship by one class in our country may be seen in the South Carolina case of *Hunt* v. *The State,* where Harper, J., referring to the arguments of Messrs. Petigru, Blanding, McWillie, and Williams--men eminent in the South as jurists--who were opposing nullification, says:

'It has been *admitted* in argument by all the counsel except one, that in case of a secession by the State from the Union, the citizens and constituted authorities would be bound to obey and give effect to the act.'

But the fourteenth amendment does define citizenship and the relations of citizens to the State and Federal government. It ordains that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State where they reside.' Citizenship in a State is made by residence and without reference to the consent of the State. Yet, by the same amendment, when it exists, no State can abridge its privileges or immunities. The doctrine of the 'States-Rights party,' led in modern times by Mr. Calhoun, was, that there was no citizenship in the whole United States, except *sub modo* and by the permission of the States. According to their theory the United States had no integral existence except as an incomplete combination among several integers. The fourteenth amendment struck at, and forever destroyed, all such doctrines. It seems to have been made under an apprehension of a destructive faculty in the State governments. It consolidated the several 'integers' into a consistent whole. Were there Brahmans in Massachusetts, 'the chief of all creatures, and with the universe held in charge for them,' and Soudras in Pennsylvania, 'who simply had life through the benevolence of the other,' this amendment places them on the same footing. By it the national principle has received an indefinite enlargement. *53 The tie between the United

States and every citizen in every part of its own jurisdiction has been made intimate and familiar. To the same extent the confederate features of the government have been obliterated. The States in their closest connection with the members of the State, have been placed under the oversight and restraining and enforcing hand of Congress. The purpose is manifest, to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority; that State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all. Thus, as the great personal rights of each and every person were established and guarded, a reasonable confidence that there would be good government might seem to be justified. The amendment embodies all that the statesmanship of the country has conceived for accommodating the Constitution and the institutions of the country to the vast additions of territory, increase of the population, multiplication of States and Territorial governments, the annual influx of aliens, and the mighty changes produced by revolutionary events, and by social, industrial, commercial development. It is an act of Union, an act to determine the reciprocal relations of the millions of population within the bounds of the United States--the numerous State governments and the entire United States administered by a common government--that they might mutually sustain, support, and co-operate for the promotion of peace, security, and the assurance of property and liberty.

Under it the fact of citizenship does not depend upon parentage, family, nor upon the historical division of the land into separate States, some of whom had a glorious history, of which its members were justly proud. Citizenship is assigned to nativity in any portion of the United States, and every person so born is a citizen. The naturalized person acquires citizenship of the same kind without any action of the State at all. So either may by this title of citizenship *54 make his residence at any place in the United States, and under whatever form of State administration, he must be treated as a citizen of that State. His 'privileges and immunities' must not be impaired, and all the privileges of the English Magna Charta in favor of freemen are collected upon him and overshadow him as derived from this amendment. The States must not weaken nor destroy them. The comprehensiveness of this amendment, the natural and necessary breadth of the language, the history of some of the clauses; their connection with discussions, contests, and domestic commotions that form landmarks in the annals of constitutional government, the circumstances under which it became part of the Constitution, demonstrate that the weighty import of what it ordains is not to be misunderstood.

From whatever cause originating, or with whatever special and present or pressing purpose passed, the fourteenth amendment is not confined to the population that had been servile, or to that which had any of the disabilities or disqualifications arising from race or from contract. The vast number of laborers in mines, manufactories, commerce, as well as the laborers on the plantations, are defended against the unequal legislation of the States. Nor is the amendment confined in its application to laboring men. The mandate is universal in its application to persons of every class and every condition. There are forty millions of population who may refer to it to determine their rank in the United States, and in any particular State. There are thirty-seven governments among the States to which it directs command, and the States that may be hereafter admitted, and the persons hereafter to be born or naturalized will find here declarations of the same weighty import to them all. To the State governments is says: 'Let there be no law made or enforced to diminish one of the privileges and immunities of the people of the United States;' nor law to deprive them of their life, liberty, property, or protection without trial. To the people the declaration is: 'Take and hold this your certificate of status and of *55 capacity, the Magna Charta of your rights and liberties.' To the Congress it says: 'Take care to enforce this article by suitable laws.'

The only question then is this: 'When a State passes a law depriving a thousand people, who have acquired valuable property, and who, through its instrumentality, are engaged in an honest and necessary business, which they understand, of their right to use such their own property, and to labor in such their honest and necessary business, and gives a monopoly, embracing the whole subject, including the right to labor in such business, to seventeen other persons--whether the State has abridged any of the privileges or immunities of these thousand persons?'

Now, what are 'privileges and immunities' in the sense of the Constitution? They are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country. The first clause in the fourteenth amendment does not deal with any interstate relations, nor relations that depend in any manner upon State laws, nor is any standard among the States referred to for the ascertainment of these privileges and immunities. It assumes that there were privileges and immunities that belong to an American citizen, and the State is commanded neither to make nor to enforce any law that will abridge them.

The case of *Ward* v. *Maryland* [FN9] bears upon the matter. That case involved the validity of a statute of Maryland which imposed a tax in the form of a license to sell the agricultural and manufactured articles of other States than Maryland by card, sample, or printed lists, or catalogue. The purpose of the tax was to prohibit sales in the mode, and to relieve the resident merchant from the competition of these itinerant or transient dealers. This court decided that the power to carry on commerce in this form was 'a privilege or immunity' of the sojourner.

FN9 12 Wallace, 419.*56

2. *The act in question is equally in the face of the fourteenth amendment in that it denies to the plaintiffs the equal protection of the laws.* By an act of legislative partiality it enriches seventeen persons and deprives nearly a thousand others of the same class, and as upright and competent as the seventeen, of the means by which they earn their daily bread.

3. *It is equally in violation of it, since it deprives them of their property without due process of law.* The right to labor, the right to one's self physically and intellectually, and to the product of one's own faculties, is past doubt property, and property of a sacred kind. Yet *this* property is destroyed by the act; destroyed not by due process of law, but by charter; a grant of privilege, of monopoly; which allows such rights in this matter to no one but to a favored 'seventeen.'

It will of course be sought to justify the act as an exercise of the police power; a matter confessedly, in its general scope, within the jurisdiction of the States. Without doubt, in that general scope, the subject of sanitary laws belong to the exercise of the power set up; but it does not follow there is no restraint on State power of legislation in police matters. The police power was invoked in the case of *Gibbons* v. *Ogden*. [FN10] New York had granted to eminent citizens a monopoly of steamboat navigation in her waters as compensation for their enterprise and invention. They set up that Gibbons should not have, keep, establish, or land with a steamboat to carry passengers and freight on the navigable waters of New York. Of course the State had a great jurisdiction over its waters for all purposes of police, but none to control navigation and intercourse between the United States and foreign nations, or among the States. Suppose the grant to Fulton and Livingston had been that all persons coming to the United States, or from the States around, should, because of their services to the State, land on one of their lots and pass through their gates. This would abridge the rights secured in the fourteenth amendment. *57 The right to move with freedom, to choose his highway, and to be exempt from impositions, belongs to the citizen. He must have this power to move freely to perform his duties as a citizen.

FN10 9 Wheaton, 203.

The *Passenger Cases,* in 7 Howard, are replete with discussions on the police powers of the States. The arguments in that case appeal to the various titles in which the freedom of State action had been supposed to be unlimited. Immigrants, it was said, would bring pauperism, crime, idleness, increased expenditures, disorderly conduct. The acts, it was said, were in the nature of health acts. But the court said that the police power would not be invoked to justify even the small tax there disputed.

Messrs. M. H. Carpenter and J. S. Black (a brief of Mr. Charles Allen being filed on the same side), and Mr. T. J. Durant, representing in addition the State of Louisiana, contra.

Mr. Justice MILLER, now, April 14th, 1873, delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They aries out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

The cases named on a preceding page, [FN11] with others which have been brought here and dismissed by agreement, were all decided by the Supreme Court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions.

FN11 See *supra*, p. 36, sub-title.

The records were filed in this court in 1870, and were argued before it as length on a motion made by plaintiffs in error for an order in the nature of an injunction or supersedeas, *58 pending the action of the court on the merits. The opinion on that motion is reported in 10 Wallace, 273.

On account of the importance of the questions involved in these cases they were, by permission of the court, taken up out of their order on the docket and argued in January, 1872. At that hearing one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present. Impressed with the gravity of the questions raised in the argument, the court under these circumstances ordered that the cases be placed on the calendar and reargued before a full bench. This argument was had early in February last.

Preliminary to the consideration of those questions is a motion by the defendant to dismiss the cases, on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases, the names of which appear on a preceding page, [FN12] who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

FN12 See subtitle, *supra*, p. 36.--REP.

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court *59 to review the judgment of the State court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional

was passed March 8th, 1869, and is entitled 'An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company.'

The first section forbids the landing or slaughtering of animals whose flesh is intended for tood, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter- houses or *abattoirs* within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and imposes upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings *60 and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens--the whole of the butchers of the city--of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The act divides itself into two main grants of privilege,--the one in reference to stock-landings and stock-yards, and *61 the other to slaughter- houses. That the landing of

livestock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successully controverted, that it is both the right and the duty of the legislative body--the supreme power of the State or municipality--to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it is those places *and nowhere else.*

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit and person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the *62 duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details.

'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says Chancellor Kent, [FN13] 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.' This is called the police power; and it is declared by Chief Justice Shaw [FN14] that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

FN13 2 Commentaries, 340.

FN14 Commonwealth *v.* Alger, 7 Cushing, 84.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another aminent judge, [FN15] 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no

question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'

FN15 Thorpe *v.* Rutland and Burlington Railroad Co., 27 Vermont, 149.

***63** The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

In *Gibbons* v. *Ogden*, [FN16] Chief Justice Marshall, speaking of inspection laws passed by the States, says: 'They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government--all which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation.'

FN16 9 Wheaton, 203.

The exclusive authority of State legislation over this subject is strikingly illustrated in the case of the *City of New York* v. *Miln*. [FN17] In that case the defendant was prosecuted for failing to comply with a statute of New York which required of every master of a vessel arriving from a foreign port, in that of New York City, to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of Congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this it was held to be an exercise of the police power properly within the control of the State, and unaffected by the clause of the Constitution which conferred on Congress the right to regulate commerce.

FN17 11 Peters, 102.

***64** To the same purpose are the recent cases of the *The License Tax* [FN18] and *United States* v. *De Witt*. [FN19] In the latter case an act of Congress which undertook as a part of the internal revenue laws to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because as a police regulation the power to make such a law belonged to the States, and did not belong to Congress.

FN18 5 Wallace, 471.

FN19 9 Id. 41.

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter- houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges-- privileges which it is said constitute a monopoly--the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the

legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch* v. *The State of Maryland*, [FN20] in relation to the power of Congress to organize *65 the Bank of the United States to aid in the fiscal operations of the government.

FN20 4 Wheaton, 316.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation, is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question, has displayed a research into the history of monopolies in England, and the European continent, only equalled by the eloquence with which they are denounced.

But it is to be observed, that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly *66 establishes that the contest was between the crown, and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges--privileges denied to other citizens--privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme

Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

*67 This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; *68 additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less

than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. *69 Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

'1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

'2. Congress shall have power to enforce this article by appropriate legislation.'

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government--a declaration designed to establish the freedom of four millions of slaves--and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word 'involuntary,' which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation. [FN21] And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

FN21 Matter of Turner, 1 Abbott United States Reports, 84.

*70 The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear

in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they *71 ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the fifteenth amendment, which declares that 'the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude.' The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, *72 mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African

descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship--not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether *73 this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. *74 Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument,

however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States.*' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

*75 If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words 'privileges and immunities' in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares 'that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.'

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823. [FN22]

FN22 4 Washington's Circuit Court, 371.

*76 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints

as the government may prescribe for the general good of the whole.'

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward* v. *The State of Maryland*, [FN23] while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which the fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

FN23 12 Wallace, 430.

In the case of *Paul* v. *Virginia*, [FN24] the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter *77 States under their constitution and laws by virtue of their being citizens.'

FN24 8 Id. 180.

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States--such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the *78 plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this

court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges *79 and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of *Crandall* v. *Nevada.* [FN25] It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice Taney in another case, it is said 'that *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;*' and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada.*

FN25 6 Wallace, 36.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus,* are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, *80 are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the

fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

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

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it *81 is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

'Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statemen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has *82 never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many

patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statemen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights--the rights of person and of property--was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

*83 The judgments of the Supreme Court of Louisiana in these cases are

AFFIRMED.

Mr. Justice FIELD, dissenting:

I am unable to agree with the majority of the court in these cases, and will proceed to state the reasons of my dissent from their judgment.

The cases grow out of the act of the legislature of the State of Louisiana, entitled 'An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate "The Crescent City Live-Stock Landing and Slaughter-House Company," which was approved on the eighth of March, 1869, and went into operation on the first of June following. The act creates the corporation mentioned in its title, which is composed of seventeen persons designated by name, and invests them and their successors with the powers usually conferred upon corporations in addition to their special and exclusive privileges. It first declares that it shall not be lawful, after the first day of June, 1869, to 'land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, slaughter-houses, or abattoirs within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard,' except as provided in the act; and imposes a penalty of two hundred and fifty dollars for each violation of its provisions. It then authorizes the corporation mentioned to establish and erect within the parish of St. Bernard and the corporate limits of New Orleans, below the United States barracks, on the east side of the Mississippi, or at any point below a designated railroad depot on the west side of the river, 'wharves, stables, sheds, yards, and buildings, necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals,' and provides that cattle and other animals, destined for sale or slaughter in the city of New Orleans or its environs, shall be landed at the landings and yards of the company, and be there *84 yarded, sheltered, and plotected, if necessary; and that the company shall be entitled to certain prescribed fees for the use of its wharves, and for each animal landed, and be authorized to detain the animals until the fees are paid, and if not paid within fifteen days to take proceedings for their sale. Every person violating any of these provisions, of any of these provisions, or elsewhere, is subjected to

a fine of two hundred and fifty dollars.

The act then requires the corporation to erect a grand slaughter-house of sufficient dimensions to accommodate all butchers, and in which five hundred animals may be slaughtered a day, with a sufficient number of sheds and stables for the stock received at the port of New Orleans, at the same time authorizing the company to erect other landing-places and other slaughter-houses at any points consistent with the provisions of the act.

The act then provides that when the slaughter-houses and accessory buildings have been completed and thrown open for use, public notice thereof shall be given for thirty days, and within that time 'all other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it shall no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined [destined] for sale within the parishes aforesaid, under a penalty of one hundred dollars for each and every offence.'

The act then provides that the company shall receive for every animal slaughtered in its buildings certain prescribed fees, besides the head, feet, gore, and entrails of all animals except of swine.

Other provisions of the act require the inspection of the animals before they are slaughtered, and allow the construction of railways to facilitate communication with the buildings of the company and the city of New Orleans.

But it is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. These privileges are granted for the period of twenty-five years. Their exclusive character not only follows *85 from the provisions I have cited, but it is declared in express terms in the act. In the third section the language is that the corporation 'shall have the *sole and exclusive privilege* of conducting and carrying on the live-stock, landing, and slaughter-house business within the limits and privileges granted by the provisions of the act.' And in the fourth section the language is, that after the first of June, 1869, the company shall have 'the exclusive privilege of having landed at their landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson,' and 'the exclusive privilege of having slaughtered' in its slaughter-houses all animals, the meat of which is intended for sale in these parishes.

In order to understand the real character of these special privileges, it is necessary to know the extent of country and of population which they affect. The parish of Orleans contains an area of country of 150 square miles; the parish of Jefferson, 384 square miles; and the parish of St. Bernard, 620 square miles. The three parishes together contain an area of 1154 square miles, and they have a population of between two and three hundred thousand people.

The plaintiffs in error deny the validity of the act in question, so far as it confers the special and exclusive privileges mentioned. The first case before us was brought by an association of butchers in the three parishes against the corporation, to prevent the assertion and enforcement of these privileges. The second case was instituted by the attorney-general of the State, in the name of the State, to protect the corporation in the enjoyment of these privileges, and to prevent an association of stock-dealers and butchers from acquiring a tract of land in the same district with the corporation, upon which to erect suitable buildings for receiving, keeping, and slaughtering cattle, and preparing animal food for market. The third case was commenced by the corporation itself, to restrain the defendants from carrying on a business similar to its own, in violation of its alleged exclusive privileges.

The substance of the averments of the plaintiffs in error *86 is this: That prior to the passage of the act in question they were engaged in the lawful and necessary business of procuring and bringing to the parishes of Orleans, Jefferson, and St. Bernard, animals

suitable for human food, and in preparing such food for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping, and slaughtering cattle and the sale of meat; that with their association about four hundred persons were connected, and that in the parishes named about a thousand persons were thus engaged in procuring, preparing, and selling animal food. And they complain that the business of landing, yarding, and keeping, within the parishes named, cattle intended for sale or slaughter, which was lawful for them to pursue before the first day of June, 1869, is made by that act unlawful for any one except the corporation named; and that the business of slaughtering cattle and preparing animal food for market, which it was lawful for them to pursue in these parishes before that day, is made by that act unlawful for them to pursue afterwards, except in the buildings of the company, and upon payment of certain prescribed fees, and a surrender of a valuable portion of each animal slaughtered. And they contend that the lawful business of landing, yarding, sheltering, and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of 1154 square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body.

No one will deny the abstract justice which lies in the position of the plaintiffs in error; and I shall endeavor to *87 show that the position has some support in the fundamental law of the country.

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the State and its legitimate exercise I shall not differ from the majority of the court. But under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.

In the law in question there are only two provisions which can properly be called police regulations--the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such *88 object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation. The pretence of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges, of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.

Nor is there any analogy between this act of Louisiana and the legislation which confers upon the inventor of a new and useful improvement an exclusive right to make and sell to others his invention. The government in this way only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain.

The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively *89 for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature, be equally granted to single individual. If they may be granted for twenty-five years they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter they may be equally granted for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it.

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the thirteenth amendment.

That amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form of slavery which had *90 previously prevailed in this country, and to which the recent civil war owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. Still it is evidence that the language of the amendment

is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

The words 'involuntary servitude' have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the Civil Rights Act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, *91 and would equally constitute an element of servitude. The counsel of the plaintiffs in error therefore contend that 'wherever a law of a State, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others,' there involuntary servitude exists within the meaning of the thirteenth amendment.

It is not necessary, in my judgment, for the disposition of the present case in favor of the plaintiffs in error, to accept as entirely correct this conclusion of counsel. It, however, finds support in the act of Congress known as the Civil Rights Act, which was framed and adopted upon a construction of the thirteenth amendment, giving to its language a similar breadth. That amendment was ratified on the eighteenth of December, 1865, [FN26] and in April of the following year the Civil Rights Act was passed. [FN27] Its first section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are 'citizens of the United States,' and that 'such citizens, of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens.'

FN26 The proclamation of its ratification was made on that day (13 Stat. at Large, 774).

FN27 14 Id. 27.

This legislation was supported upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary *92 servitude. Senator Trumbull, who drew the act and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the

amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the Southern States, discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the Senator said: 'I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited.' [FN28]

FN28 Congressional Globe, 1st Session, 39th Congress, part 1, page 474

By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand people, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company, and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale, must carry him to the yards and stables of this company, and for their use pay a like tribute. He is not allowed to do his work in his own buildings, or to take his animals to his own stables or keep them in his own yards, even though they should be erected in the same district as the buildings, stables, and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France, where, as says a French *93 writer, the peasant was prohibted 'to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press, . . . or to sell his commodities at the public market.' The exclusive right to all these privileges was vested in the lords of the vicinage. 'The history of the most execrable tyranny of ancient times,' says the same writer, 'offers nothing like this. This category of oppressions cannot be applied to a free man, or to the peasant, except in violation of his rights.'

But if the exclusive privileges conferred upon the Louisiana corporation can be sustained, it is not perceived why exclusive privileges for the construction and keeping of ovens, machines, grindstones, wine-presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations or private individuals, and for periods of indefinite duration.

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the thirteenth amendment. The provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government. It first declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' It then declares that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due *94 process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

The first clause of this amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity

of opinion among jurists and statesmen whether there was any such citizenship independent of that of the State, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the State. Such was the opinion of Mr. Calhoun and the class represented by him. In his celebrated speech in the Senate upon the Force Bill, in 1833, referring to the reliance expressed by a senator upon the fact that we are citizens of the United States, he said: 'If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States.' [FN29]

FN29 Calhoun's Works, vol. 2, p. 242.

In the Dred Scott case this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several States, under their constitutions and laws.

*95 The Chief Justice, in that case, and a majority of the court with him, held that the words 'people of the United States' and 'citizens' were synonymous terms; that the people of the respective States were the parties to the Constitution; that these people consisted of the free inhabitants of those States; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any State to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be citizens within the meaning of the Constitution.

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the officiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. They do not derive *96 their existence from its legislation, and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong

of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What, then, are the privileges and immunities which are secured against abridgment by State legislation?

In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right 'to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.' That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation *97 of a similar character, extending the protection of the National government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment. [FN30]

FN30 May 31st, 1870; 16 Stat. at Large, 144.

The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' and they have been the subject of frequent consideration in judicial decisions. In *Corfield* v. *Coryell,* [FN31] Mr. Justice Washington said he had 'no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;' and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be 'all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.' This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments.* Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions *98 in Congress upon the passage of the Civil Rights Act repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the first section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would

thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act; and that they were set forth 'as appertaining to every freeman.'

FN31 4 Washington's Circuit Court, 380.

The privileges and immunities designated in the second section of the fourth article of the Constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each State in the several States upon the same terms and conditions as they are enjoyed by the citizens of the latter States. No discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several States whilst in the same State.

Nor is there anything in the opinion in the case of *Paul* v. *Virginia,* [FN32] which at all militates against these views, as is supposed by the majority of the court. The act of Virginia, of 1866, which was under consideration in that case, provided that no insurance company, not incorporated under the laws of the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars. No such deposit was required of insurance companies incorporated by the State, for carrying on *99 their business within the State; and in the case cited the validity of the discriminating provisions of the statute of Virginia between her own corporations and the corporations of other States, was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' But the court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed; that though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State, under the laws of which it was created, and to this extent would treat a corporation was a citizen within the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States, it had never been held in any case which had come under its observation, either in the State or Federal courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each State to the privileges and immunities of citizens in the several States. And the court observed, that the privileges and immunities secured by that provision were those privileges and immunities which were common to the citizens in the latter States, under their constitution and laws, by virtue of their being citizens; that special privileges enjoyed by citizens in their own States were not secured in other States by the provision; that it was not intended by it to give to the laws of one State any operation in other States; that they could have no such operation except by the permission, expressed or implied, of those States; and that the special privileges which they conferred must, therefore, be enjoyed at home unless the assent *100 of other States to their enjoyment therein were given. And so the court held, that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other States, and the enforcement of its contracts made therein, depended purely upon the assent of those States, which could be granted upon such terms and conditions as those States might think proper to impose.

FN32 8 Wallace, 168.

The whole purport of the decision was, that citizens of one State do not carry with them into other States any special privileges or immunities, conferred by the laws of their own States, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens, stand on a very different footing. These the citizens of each State do carry with them into other States and are secured by the clause in question, in their enjoyment upon terms of equality with citizens of the latter States. This equality in one particular was enforced by this court in the recent case of *Ward* v. *The State of Maryland*, reported in the 12th of Wallace. A statute of that State required the payment of a larger sum from a non-resident trader for a license to enable him to sell his merchandise in the State, than it did of a resident trader, and the court held, that the statute in thus discriminating against the non-resident trader contravened the clause securing to the citizens of each State the privileges and immunities of citizens of the several States. The privilege of disposing of his property, which was an essential incident to his ownership, possessed by the non-resident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the non-resident were in this particular abridged by that legislation.

What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for *101 the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.

It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other States. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the State so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the State exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the State to exclude at any time the citizens of other States from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

Now, what the clause in question does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were *102 held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth.

A monopoly is defined 'to be an institution or allowance from the sovereign power of the State by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be

restrained of any freedom or liberty they had before, or hindered in their lawful trade.' All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables, and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential to the free and successful prosecution by any butcher of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings, and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade.

The reasons given for the judgment in the *Case of Monopolies* apply with equal force to the case at bar. In that case a patent had been granted to the plaintiff giving him the sole ***103** right to import playing-cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and as such had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of Parliament. 'All trades,' said the court, 'as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is *against the common law and the benefit and liberty of the subject.*' [FN33] The case of Davenant and Hurdis was cited in support of this position. In that case a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a cloth-worker, not being a brother of the society, should put one-half of his cloth to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting ten shillings, 'and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law, *because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly,* and, therefore, such ordinance, by color of a charter or any grant by charter to such effect, would be void.'

FN33 Coke's Reports, part 11, page 86.

***104** Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman.

The struggle of the English people against monopolies forms one of the most interesting

and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I, by which it was declared 'that all monopolies and all commissions, grants, licenses, charters, and letters-patent, to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything' within the realm or the dominion of Wales were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their 'indubitable rights and liberties.' [FN34] *105 Of the statutes, the benefits of which was thus claimed, the statute of James I against monopolies was one of the most important. And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men 'with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men.'

FN34 Journals of Congress, vol. i, pp. 28-30.

If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that State against any abridgment of their common rights, as in other States. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every *106 citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for

the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void. When a case under the same law, under which the present cases have arisen, came before the Circuit Court of the United States in the District of Louisiana, there was no hesitation on the part of the court in declaring the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen. [FN35] The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States, which a State could not by its laws invade, but that so far as the question under consideration was concerned, it might be safely said that 'it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments.' And again: 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.'

FN35 Live-Stock, &c., Association *v.* The Crescent City, &c., Company (1 Abbott's United States Reports, 398).

In the *City of Chicago* v. *Rumpff*, [FN36] which was before the Supreme Court of Illinois, we have a case similar in all its *107 features to the one at bar. That city being authorized by its charter to regulate and license the slaughtering of animals within its corporate limits, the common council passed what was termed an ordinance in reference thereto, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege of slaughtering there by all persons exercising it. The validity of this action of the corporate authorities was assailed on the ground of the grant of exclusive privileges, and the court said: 'The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations, required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the General Assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner be paid a specific sum for the privilege, what would prevent the making a *108 similar contract with some other person that all of the vegetables, or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle.'

FN36 45 Illinois, 90.

It is true that the court in this opinion was speaking of a municipal ordinance and not of

an act of the legislature of a State. But, as it is justly observed by counsel, a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.

In the case of the *Norwich Gaslight Company* v. *The Norwich City Gas Company*, [FN37] which was before the Supreme Court of Connecticut, it appeared that the common council of the city of Norwich had passed a resolution purporting to grant to one Treadway, his heirs and assigns, for the period of fifteen years, the right to lay gas-pipes in the streets of that city, declaring that no other person or corporation should, by the consent of the common council, lay gas-pipes in the streets during that time. The plaintiffs having purchased of Treadway, undertook to assert an exclusive right to use the streets for their purposes, as against another company which was using the streets for the same purposes. And the court said: 'As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, *109 yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the first section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void.'

FN37 25 Connecticut, 19.

In the *Mayor of the City of Hudson* v. *Thorne*, [FN38] an application was made to the chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them, intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect, or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions, within certain specified limits in the city, without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city, but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the chancellor said: 'If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business.'

FN38 7 Paige, 261.

In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, *110 throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but

when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. [FN39] As stated by the Supreme Court of Connecticut, in *111 the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws. [FN40]

FN39 'The property which every man has in his own labor,' says Adam Smith, 'as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' (Smith's Wealth of Nations, b. 1, ch. 10, part 2.)
In the edict of Louis XVI, in 1776, giving freedom to trades and professions, prepared by his minister, Turgot, he recites the contributions that had been made by the guilds and trade companies, and says: 'It was the allurement of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. *This* illusion had extended so far that some persons asserted that the right to work was a royal privilege which the king might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all.' . . . He, therefore, regards it 'as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity.'

FN40 'Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws.' (1 Sharswood's Blackstone, 127, note 8.)

I am authorized by the CHIEF JUSTICE, Mr. Justice SWAYNE, and Mr. Justice BRADLEY, to state that they concur with me in this dissenting opinion.

Mr. Justice BRADLEY, also dissenting:

I concur in the opinion which has just been read by Mr. Justice Field; but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.

The fourteenth amendment to the Constitution of the United States, section 1, declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

The legislature of Louisiana, under pretence of making a police regulation for the promotion of the public health, passed an act conferring upon a corporation, created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for *112 confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St.

Bernard, a territory containing nearly twelve hundred square miles, including the city of New Orleans; and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter within the said limits; and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter-houses and works of the favored company to be slaughtered, and a payment of a fee to the company for such act.

It is contended that this prohibition abridges the privileges and immunities of citizens of the United States, especially of the plaintiffs in error, who were particularly affected thereby; and whether it does so or not is the simple question in this case. And the solution of this question depends upon the solution of two other questions, to wit:

First. Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?

Secondly. Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughter-houses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?

The first of these questions is one of vast importance, and lies at the very foundations of our government. The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, *113 and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a surt and undoubted title to equal rights in any and every States in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the State where he resides, what, in general, are the privileges and immunites of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them?

If a State legislature should pass a law prohibiting the inhabitants of a particular township, county, or city, from tanning leather or making shoes, would such a law violate any privileges or immunities of those inhabitants as citizens of the United States, or only their privileges and immunities as citizens of that particular State? Or if a State legislature should pass a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that which was pursued by his father, would such a law violate the privileges and immunities of the people of that State as citizens of the United States, or only as citizens of the State? Would they have no redress but to appeal to the courts of that particular State?

This seems to me to be the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to

adopt (submitting himself to all lawful regulations) is one of *114 his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not.

The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of any free government. Granting for the present that the citizens of one government cannot claim the privileges of citizens in another government; that prior to the union of our North American States the citizens of one State could not claim the privileges of citizens in another State; or, that after the union was formed the citizens of the United States, as such, could not claim the privileges of citizens in any particular State; yet the citizens of each of the States and the citizens of the United States would be entitled to certain privileges and immunities as citizens, at the hands of their own government--privileges and immunities which their own governments respectively would be bound to respect and maintain. In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the States.

The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was expressed in these words, found in Magna Charta: 'No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him or condemn *115 him but by lawful judgment of his peers or by the law of the land.' English constitutional writers expound this article as rendering life, liberty, and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of *habeas corpus*, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. And of the last he says: 'The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land.'

The privileges and immunities of Englishmen were established and secured by long usage and by various acts of Parliament. But it may be said that the Parliament of England has unlimited authority, and might repeal the laws which have from time to time been enacted. Theoretically this is so, but practically it is not. England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the Colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution.

This, it is true, was the violation of a political right; but personal rights were deemed equally sacred, and were claimed by the very first Congress of the Colonies, assembled in 1774, as the undoubted inheritance of the

people of this country; and the Declaration of Independence, which *116 was the first political act of the American people in their independent sovereign capacity, lays the foundation of our National existence upon this broad proposition: 'That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. And to say that these rights and immunities attach only to State citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people.

On this point the often-quoted language of Mr. Justice Washington, in *Corfield* v. *Coryell*, [FN41] is very instructive. Being *117 called upon to expound that clause in the fourth article of the Constitution, which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,' he says: 'The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental privileges are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through, or to reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.'

FN41 4 Washington, 380.

It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens *in* a State; not of citizens *of* a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says, 'privileges and immunities which are, in their

nature, fundamental; *118 which belong, of right, to the citizens of all free governments.'

It is true the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the State in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause is as I have stated it, and seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.

But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law*. These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities *119 of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any State or not. Inhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, though without any status as citizens of a State, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated; and among these none is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.

II. The next question to be determined in this case is: Is a monopoly or exclusive right, given to one person, or corporation, to the exclusion of all others, to keep slaughter-houses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose?

The keeping of a slaughter-house is part of, and incidental to, the trade of a butcher–one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughter-house and pay him a toll therefor, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. It has none of the *120 qualities of a police regulation. If it were really a police

regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, &c., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light.

The granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppression of such monopolies, and for abolishing the prerogative of creating them, was made and was successful. The statute of 21st James, abolishing monopolies, was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These have always been sustained as beneficial to the state. But all other monopolies were abolished, as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle no English-speaking people have ever endured such an odious badge of tyranny.

It has been suggested that this was a mere legislative act, and that the British Parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets, and other establishments of a public kind. It requires but a slight *121 acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.

Lastly: Can the Federal courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a State? Of this I entertain no doubt. Prior to the fourteenth amendment this could not be done, except in a few instances, for the want of the requisite authority.

As the great mass of citizens of the United States were also citizens of individual States, many of their general privileges and immunities would be the same in the one capacity as in the other. Having this double citizenship, and the great body of municipal laws intended for the protection of person and property being the laws of the State, and no provision being made, and no machinery provided by the Constitution, except in a few specified cases, for any interference by the General Government between a State and its citizens, the protection of the citizen in the enjoyment of his fundamental privileges and immunities (except where a citizen of one State went into another State) was largely left to State laws and State courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency of the State governments themselves.

Admitting, therefore, that formerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except *122 in a few specified cases, that cannot be said now,

since the adoption of the fourteenth amendment. In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.

The first section of this amendment, after declaring that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, proceeds to declare further, that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;' and that Congress shall have power to enforce by appropriate legislation the provisions of this article.

Now, here is a clear prohibition on the States against making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

The amendment also prohibits any State from depriving any person (citizen or otherwise) of life, liberty, or property, without due process of law.

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.

The constitutional question is distinctly raised in these cases; the constitutional right is expressly claimed; it was *123 violated by State law, which was sustained by the State court, and we are called upon in a legitimate and proper way to afford redress. Our jurisdiction and our duty are plain and imperative.

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.

The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

But great fears are expressed that this construction of the amendment will lead to enactments by Congress interfering with the internal affairs of the States, and establishing therein civil and criminal codes of law for the government of the citizens, and thus abolishing the State governments in everything but name; or else, that it will lead the Federal courts to draw to their cognizance the supervision of State tribunals on every subject of judicial inquiry, on the plea of ascertaining whether the privileges and immunities of citizens have not been abridged.

In my judgment no such practical inconveniences would arise. Very little, if any,

legislation on the part of Congress would be required to carry the amendment into effect. Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself. The point would *124 be regularly raised, in a suit at law, and settled by final reference to the Federal court. As the privileges and immunities protected are only those fundamental ones which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the Federal courts. Besides, the recognized existence of the law would prevent its frequent violation. But even if the business of the National courts should be increased, Congress could easily supply the remedy by increasing their number and efficiency. The great question is, What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The National will and National interest are of far greater importance.

In my opinion the judgment of the Supreme Court of Louisiana ought to be reversed.

Mr. Justice SWAYNE, dissenting:

I concur in the dissent in these cases and in the views expressed by my brethren, Mr. Justice Field and Mr. Justice Bradley. I desire, however, to submit a few additional remarks.

The first eleven amendments to the Constitution were intended to be checks and limitations upon the government which that instrument called into existence. They had their origin in a spirit of jealousy on the part of the States, which existed when the Constitution was adopted. The first ten were proposed in 1789 by the first Congress at its first session after the organization of the government. The eleventh was proposed in 1794, and the twelfth in 1803. The one last mentioned regulates the mode of electing the President and Vice-President. It neither increased nor diminished the power of the General Government, and may be said in that respect to occupy neutral ground. No further amendments were made until 1865, a period of more than sixty years. The thirteenth amendment was proposed by Congress on the 1st of February, 1865, the fourteenth on *125 the 16th of June, 1866, and the fifteenth on the 27th of February, 1869. These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. [FN42]

FN42 Barron *v.* Baltimore, 7 Peters, 243; Livingston *v.* Moore, Ib. 551; Fox *v.* Ohio, 5 Howard, 429; Smith *v.* Maryland, 18 Id. 71; Pervear *v.* Commonwealth, 5 Wallace, 476; Twitchell *v.* Commonwealth, 7 Id. 321.

Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery and forbade forever its restoration. It struck the fetters from four millions of human beings and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the Nation. Before the war it could have been done only by the States where the institution existed, acting severally and separately from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of Congress did not extend to the subject, except in the Territories.

The fourteenth amendment consists of five sections. The first is as follows: 'All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

The fifth section declares that Congress shall have power to enforce the provisions of this amendment by appropriate legislation.

The fifteenth amendment declares that the right to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude. Until this amendment was adopted the subject *126 to which it relates was wholly within the jurisdiction of the States. The General Government was excluded from participation.

The first section of the fourteenth amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.

(1.) Citizens of the States and of the United States are defined.

(2.) It is declared that no State shall, by law, abridge the privileges or immunities of citizens of the United States.

(3.) That no State shall deprive *any person*, whether a citizen or not, of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

A citizen of a State is *ipso facto* a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one State without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. 'The privileges and immunities' of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation. The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection. All those which belong to the citizen of a State, except as a bills of attainder, *ex post facto* *127 laws, and laws impairing the obligation of contracts, [FN43] are left to the guardianship of the bills of rights, constitutions, and laws of the States respectively. Those rights may all be enjoyed in every State by the citizens of every other State by virtue of clause 2, section 4, article 1, of the Constitution of the United States as it was originally framed. This section does not in anywise affect them; such was not its purpose.

FN43 Constitution of the United States, Article I, Section 10.

In the next category, obviously *ex industria*, to prevent, as far as may be, the possibility of misinterpretation, either as to persons or things, the phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted. The substitutes are 'any person,' and 'life,' 'liberty,' and 'property,' and 'the equal protection of the laws.' Life, liberty, and property are forbidden to be taken 'without due process of law,' and 'equal protection of the laws' is guaranteed to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. 'Due process of law' is the application of the law as it exists in the fair and regular course of administrative procedure. 'The equal protection of the laws' places all upon a footing of legal equality and

gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness. [FN44]

FN44 Corfield *v.* Coryell, 4 Washington, 380; Lemmon *v.* The People, 26 Barbour, 274, and 20 New York, 626; Conner *v.* Elliott, 18 Howard, 593; Murray *v.* McCarty, 2 Mumford, 399; Campbell *v.* Morris, 3 Harris & McHenry, 554; Towles's Case, 5 Leigh, 748; State *v.* Medbury, 3 Rhode Island, 142; 1 Tucker's Blackstone, 145; 1 Cooley's Blackstone, 125, 128.

***128** It is admitted that the plaintiffs in error are citizens of the United States, and persons within the jurisdiction of Louisiana. The cases before us, therefore, present but two questions.

(1.) Does the act of the legislature creating the monopoly in question abridge the privileges and immunities of the plaintiffs in error as citizens of the United States?

(2.) Does it deprive them of liberty or property without due process of law, or deny them the equal protection of the laws of the State, they being *persons* 'within its jurisdiction?'

Both these inquiries I remit for their answer as to the facts to the opinions of my brethren, Mr. Justice Field and Mr. Justice Bradley. They are full and conclusive upon the subject. A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. The response to both inquiries should be in the affirmative. In my opinion the cases, as presented in the record, are clearly within the letter and meaning of both the negative categories of the sixth section. The judgments before us should, therefore, be reversed.

These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defence, and can never be made an engine of oppression. The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language 'citizens of the United States' was meant *all* such citizens; and by 'any person' ***129** was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men. It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such an should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it were, what was meant for bread into a stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment. Against the former this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given. Nowhere,

than in this court, ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed. This determination of the majority seems to me to lie far in the other direction.

*130 I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.

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Westlaw.

Supreme Court of the United States.

VIRGINIA
v.
RIVES.

October Term, 1879

PETITION for *mandamus.*

The facts are stated in the opinion of the court.

West Headnotes

Constitutional Law ⇐ 70.1(11)
92k70.1(11) Most Cited Cases

The mode of enforcement of the prohibition to the Fourteenth Amendment, U.S.C.A. Const., is left to the discretion of Congress.

Constitutional Law ⇐ 206(1)
92k206(1) Most Cited Cases

Constitutional Law ⇐ 211(2)
92k211(2) Most Cited Cases

The mode of enforcement of the prohibition to the Fourteenth Amendment, U.S.C.A., is left to the discretion of Congress.

Constitutional Law ⇐ 206(1)
92k206(1) Most Cited Cases

Constitutional Law ⇐ 213(4)
92k213(4) Most Cited Cases
(Formerly 92k213(2))

Constitutional Law ⇐ 254(4)
92k254(4) Most Cited Cases

The provisions of the Fourteenth Amendment to the Constitution U.S.C.A. have reference to state action exclusively and not to any action of private individuals.

Constitutional Law ⇐ 213(2)
92k213(2) Most Cited Cases

The prohibitions of the Fourteenth Amendment, U.S.C.A., extend to all action of the state denying equal protection of the laws whether it be action by one of the agencies of the state or by another.

Constitutional Law ⇐ 250.2(4)
92k250.2(4) Most Cited Cases

A denial of a motion made by a colored man in a state court, on his being indicted for murder, that some portion of the jury be composed of his own race, is not a denial of a right secured to him by any law providing for the equal civil

rights of citizens of the United States, or by any statute, or by the fourteenth amendment, U.S.C.A. A mixed jury in a particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled, that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of his color. But that is a different thing from a right to have the jury composed in part of colored men.

Constitutional Law ⇐ 250.2(4)
92k250.2(4) Most Cited Cases

Discrimination by law against the colored race because of their color in the selection of jurors is a denial of equal protection of the laws to a negro put on trial for an alleged criminal offense against the state.

Constitutional Law ⇐ 250.2(4)
92k250.2(4) Most Cited Cases

Every colored man has a right under the Fourteenth Amendment to the constitution, U.S.C.A., that in the selection of jurors to pass on his life, liberty or property, there shall be no exclusion of his race and no discrimination against them because of their color.

Mandamus ⇐ 26
250k26 Most Cited Cases

Mandamus may be used to restrain inferior courts to keep them within their lawful bounds.

Mandamus ⇐ 26
250k26 Most Cited Cases

Mandamus is an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty and by the virtue of their office, bound to do.

Mandamus ⇐ 28
250k28 Most Cited Cases

Mandamus does not lie to control judicial discretion, except when that discretion has been abused; but it may be used as a remedy where the case is outside that discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is directed.

Mandamus ⇐ 61
250k61 Most Cited Cases

Where murder prosecution was improperly removed to federal district court, state was entitled to writ of mandamus in Supreme Court commanding judge of district court to cause to be delivered to the proper officers of the state, the body of the defendant to be dealt with according to the laws of the state.

Removal of Cases ⇐ 70
334k70 Most Cited Cases

Rev.St. § 641, 28 U.S.C.A. § 74, providing for removal into the federal court of any prosecution in the state court against any person who is denied any right secured to him by law, does not apply to a case where two colored men were jointly indicted for murder, and moved that the venire be modified so as to allow one-third of the jury to be composed of colored men, which motion was overruled on the ground that the court had no authority to change the venire, it appearing that it had been regularly drawn.

Removal of Cases ⇐ 70
334k70 Most Cited Cases

Rev.St. § 641, 28 U.S.C.A. § 74, providing for removal when any civil suit or prosecution is commenced in a state court for any cause against the person who is denied or cannot enforce in the judicial tribunals of the state any rights secured to him by any law providing for the equal civil rights of citizens of United States was intended for the protection of rights against state action and against that alone.

Removal of Cases ⇐ 70
334k70 Most Cited Cases

When a statute of the state denies the right of a defendant or interposes a bar to his enforcing it, in the judicial tribunals,

presumption is proper that the tribunals will be controlled by it in their decisions in which case the defendant may affirm on oath what is necessary for removal under statute.

Removal of Cases ⇐ 70
334k70 Most Cited Cases

Rev.St. § 641, 28 U.S.C.A. § 74, providing for removal when suit or prosecution is commenced in state court against person who is denied or cannot enforce in the judicial tribunals of the state any rights secured to him by any law providing for equal civil rights of citizens had reference to a legislative denial of equality of rights or an inability resulting from it.

Removal of Cases ⇐ 70
334k70 Most Cited Cases

To entitle defendant in prosecution in state court to removal to federal court, because of denial or impossibility of enforcement of equal civil rights, it must appear before trial that defendant is denied or cannot enforce his equal civil rights in judicial tribunals of the state.

Removal of Cases ⇐ 70
334k70 Most Cited Cases

The privilege of modification of venire by which one-third of jury or a portion of it should be composed of defendant's race was not a right given or secured to defendant by the law of the state or by any act of Congress or by the Fourteenth Amendment, U.S.C.A., for denial of which defendant would be entitled to removal to federal court under statute.

Removal of Cases ⇐ 79(11)
334k79(11) Most Cited Cases

Under Rev.St. § 641, 28 U.S.C.A. § 74, providing for removal when any prosecution is commenced in the state court for any cause against any person who is denied or cannot enforce in the state judicial tribunals any right secured to him by any law providing for the equal civil rights of citizens, authorizes a removal of the case only before trial and not after trial has commenced.

Removal of Cases ⇐ 95
334k95 Most Cited Cases

When an application to remove a cause which is removable is made in the proper form and no objection is made to the facts on which it is found it is the duty of the state court to proceed no further in the cause and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the reviewing court is coram non judice.

Jury ⇐ 38
230k38 Most Cited Cases

Under Virginia statute, providing that all male citizens 21 years of age and not over 60 who are entitled to vote and hold office are made liable to serve as jurors, members of the negro race have the right and duty to serve as jurors.

**314 Mr. James G. Field,* Attorney-General of Virginia, and *Mr William J. Robertson* for the petitioner.

Mr. Charles Devens and *Mr. W. Willoughby, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The questions presented in this case arise out of the following facts:---

Burwell Reynolds and Lee Reynolds, two colored men, were jointly indicted for murder in the county court of Patrick County, Virginia, at its January Term, 1878. The case having been removed into the Circuit Court of the State, and brought on for trial, the defendants moved the court that the *venire,* which was composed entirely of the white race, be modified so as to allow one-third thereof to be composed of colored ***315** men. This motion was overruled on the ground that the court 'had no authority to change the *venire,* it appearing (as the record stated) to the satisfaction of the court that the *venire* had

been regularly drawn from the jury-box according to law.' Thereupon the defendants, before the trial, filed their petition, duly verified, praying for a removal of the case into the Circuit Court of the United States for the Western District of Virginia. This petition represented that the petitioners were negroes, aged respectively seventeen and nineteen years, and that the man whom they were charged with having murdered was a white man. It further alleged that the right secured to the petitioners by the law providing for the equal civil rights of all the citizens of the United States was denied to them in the judicial tribunals of the county of Patrick, of which county they are natives and citizens; that by the laws of Virginia all male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State, are made liable to serve as jurors; that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors; yet that the grand jury who found the indictment against them, as well as the jurors summoned to try them, were composed entirely of the white race. The petitioners further represented that they had applied to the judge of the court, to the prosecuting attorney, and to his assistant counsel, that a portion of the jury by which they were to be tried should be composed in part of competent jurors of their own race and color, but that this right had been refused them. The petition further alleged that a strong prejudice existed in the community of the county against them, independent of the merits of the case, and based solely upon the fact that they are negroes, and that the man they were accused of having murdered was a white man. From that fact alone they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race. The petitioners further represented that their race had never been allowed the right to serve as jurors, either in civil or criminal cases, in the county of Patrick, in any case, civil or criminal, in which their race had been in any way interested. They therefore prayed that the prosecution might be removed *316 into the Circuit Court of the United States. The State court denied this prayer, and proceeded with the trial, when each of the defendants was convicted. The verdicts and judgments were, however, set aside, and a motion for a removal of the case was renewed on the same petition, and again denied. The defendants were then tried again separately. One was convicted and sentenced, and a bill of exceptions was duly signed and made part of the record. In the other case the jury disagreed.

In this stage of the proceedings a copy of the record was obtained, the cases were, upon petition, ordered to be docketed in the Circuit Court of the United States, Nov. 18, 1878, which was at its next succeeding term after the first application for removal, and a writ of *habeas corpus cum causa* was issued, by virtue of which the defendants were taken from the jail of Patrick County into the custody of the United States marshal, and they are now held in jail subject to the control of that court.

No motion has been made in the Circuit Court to remand the prosecutions to the State court, but the Commonwealth of Virginia has applied to this court for a rule to show cause why a *mandamus* should not issue commanding the judge of the District Court of the Western District of Virginia, the Hon. Alexander Rives, to cause to be redelivered by the marshal of said district to the jailer of Patrick County the bodies of the said Lee and Burwell Reynolds, to be dealt with according to the laws of the said Commonwealth. The rule has been granted, and Judge Rives has returned an answer setting forth substantially the facts hereinbefore stated, and averring that the indictments were removed into the Circuit Court of the United States by virtue of sect. 641 of the Revised Statutes.

If the petition filed in the State court before trial, and duly verified by the oath of the defendants, exhibited a sufficient ground for a removal of the prosecutions into the Circuit Court of the United States, they were in legal effect thus removed, and the writ of *habeas corpus* was properly issued. All proceedings in the State court subsequent to the removals were *coram non judice* and absolutely void. This, by virtue of the express declaration of

sect. 641 of the Revised Statutes, which enacts that, 'upon the filing of such petition, all further *317 proceedings in the State court shall cease, and shall not be resumed except as thereinafter provided.' In *Gordon* v. *Longest* (16 Pet. 97), it was ruled by this court that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, 'it is the duty of the State court to 'proceed no further in the cause,' and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the Court of Appeals, is *coram non judice.*' To the same effect is *Insurance Company* v. *Dunn*, 19 Wall. 214.

It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the State court and transferred it to the Federal court. Sect. 641 of the Revised Statutes provides for a removal 'when any civil suit or prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States,' &c. It declares that such a case may be removed before trial or final hearing.

Was the case of Lee and Burwell Reynolds such a one? Before examining their petition for removal, it is necessary to understand clearly the scope and meaning of this act of Congress. It rests upon the Fourteenth Amendment of the Constitution and the legislation to enforce its provisions. That amendment declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. It was in pursuance of these constitutional provisions that the civil rights statutes were enacted. Sects. 1977, 1978, Rev. Stat. They enact that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *318 as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Sect. 1978 enacts that all citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights. Sect. 641 was also intended for their protection against State action, and against that alone.

It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is,

enforce its recognition, by removing the case from a State court in which it is denied, into a Federal court where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from State courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. But it is still a *319 question whether the remedy of removal of cases from State courts into the courts of the United States, given by sect. 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not. The constitutional amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals.

It is obvious, therefore, that to such a case-- that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced-- sect. 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the State, and ultimately to the review of this court. We do not say that Congress could not have authorized the removal of such a case into the Federal courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm any thing. It is sufficient to say now that sect. 641 does not.

It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference *320 to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.

The petition of the two colored men for the removal of their case into the Federal court does not appear to have made any case for removal, if we are correct in our reading of the act of Congress. It did not assert, nor is it

claimed now, that the Constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The petition expressly admitted that by the laws of the State all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as *321 well as requires the duty, of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

Now, conceding as we do, and as we endeavored to maintain in the case of *Strauder* v. *West Virginia* (*supra*, p. 303), that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offence against a State, the laws of Virginia make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as of the act of Congress of March 1, 1875, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional amendment. But inasmuch as it was a criminal misuse of the State law, it cannot be said to have been such a 'denial or disability to enforce *in the judicial tribunals of the State*' the rights of colored men, as is contemplated by the removal act. Sect. 641. It is to be observed that act gives the right of removal only to a person 'who is denied, or cannot enforce, in *the judicial tribunals of the State* his equal civil rights.' And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641. But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed *322 the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a *venire* is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,--it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of sect. 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court.

The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the county of Patrick in any case in which a colored man

was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected.

Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the *venire*, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioners own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them, or to any person, by the law of the State, or by any act of Congress, or by the Fourteenth Amendment of the Constitution. It *is* a right to which ***323** every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment, or within the purview of sect. 641.

It follows that the petition for a removal stated no facts that brought the case within the provisions of this section, and, consequently, no jurisdiction of the case was acquired by the Circuit Court of the United States. In the absence of such jurisdiction the writ of *habeas corpus*, by which the petitioners were taken from the custody of the State authorities, should not have been issued. The Circuit Court has now no authority to hold them, and they should be remanded.

Upon the question whether a writ of *mandamus* is a proper proceeding to enforce the return of the men indicted to the custody of the State authorities, little need be said, in view of former decisions of this court. Sect. 688 of the Revised Statutes enacts that the Supreme Court shall have power to issue . . . writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State or an ambassador, or other public minister, or a consul or vice-consul, is a party. In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is ***324** addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds. Bacon's Abridgment, Mandamus, Letter D; Tapping on Mandamus, 105; 3 Bl. Com. 110. This subject was discussed at length in *Ex parte Bradley* (7 Wall. 364), and what was there said renders unnecessary any discussion of it now. To that discussion we refer. In our judgment it vindicates the use of a writ of *mandamus* in such a case as the present.

The writ will, therefore, be awarded; and it is

So ordered.

Separate opinion of MR. JUSTICE FIELD, in which MR. JUSTICE CLIFFORD concurred.

I concur in the judgment of the court that the prisoners, Lee and Burwell Reynolds, must be returned to the officers of Virginia, from whose custody they were taken; that the prosecution against them must be remanded to the State court from which it was removed; and that a *mandamus* to the district judge of the Western District of Virginia is the appropriate

remedy to effect these ends. But as I do not agree with all the views expressed in the opinion of the court, and there are other reasons equally cogent with those given for the decision rendered, I deem it proper to state at length the grounds of my concurrence.

The prisoners were jointly indicted in a county court for the crime of murder. They are colored men, and the person alleged to have been murdered was a white man. On being arraigned they pleaded not guilty, and on their demand were remanded to the Circuit Court of the county for trial. When brought before that court, at the April Term of 1878, they moved that the *venire* of jurors, then composed entirely of persons of the white race, should be modified so as to allow one-third of the *venire* to be composed of persons of their own race. This motion was denied, on the ground that the court had no authority to change the *venire*, and that it satisfactorily appeared that the jurors had been regularly drawn from the jury-box according to law. The accused then presented a petition for the removal of the prosecution to the Circuit Court *325 of the United States for the Western District of Virginia, setting forth the pendency of the criminal prosecution against them, and alleging, in substance, that rights, secured by the law providing for the equal civil rights of all citizens of the United States, were denied to them by the judicial tribunals of the county, inasmuch as their application for a mixed jury had been refused. It further alleged that a strong prejudice existed in the community of the county against them, independent of the merits of their case, on the ground that they were colored persons, and the one whom they were charged to have murdered was a white man; and that from this fact alone they were satisfied they could not obtain an impartial trial before a jury composed exclusively of persons of the white race.

The prayer of this petition was denied and the prisoners were tried separately and convicted of murder, one in the first and the other in the second degree. Both obtained new trials, one by the action of the court of original jurisdiction, and the other by that of the Court of Appeals on a writ of error.

At the October Term of 1878 they were a second time brought up for trial, and before the jury were impanelled again moved the court to remove the prosecution to the Circuit Court of the United States, upon the petition presented at the April Term; but the motion, as before, was denied. They were then tried separately. In one case, the jury disagreed, and the prisoner was remanded to jail to await another trial. In the other case, the prisoner was convicted of murder in the second degree, and his punishment was fixed by the jury at eighteen years' confinement in the penitentiary.

While the prisoners were held in jail, one of them to be again tried, and the other until he could be removed to the penitentiary under his sentence, they procured from the clerk of the court a copy of the record of the proceedings against them, which they presented to the Circuit Court of the United States for the Western District of Virginia, then held by Alexander Rives, the district judge, with the petition for removal presented to the State court, and prayed that the prosecutions should be there docketed and proceeded with. That court granted the petition, directed the cases to be placed *326 on its docket, and authorized the clerk to issue a writ of *habeas corpus cum causa* to the marshal of the district, requiring him to take the petitioners into his custody, and summon for their trial twenty-five jurors to attend at the next term of the court. A writ of *habeas corpus cum causa* was accordingly issued. Pursuant to its command, the prisoners were removed from the custody of the jailer and taken into the custody of the marshal. Thereupon the Commonwealth of Virginia presented a petition to this court praying for a writ of *mandamus* to be directed to the district judge, commanding him to order the marshal to redeliver the prisoners to her authorities, upon the ground that the judge in his proceedings had transcended the jurisdiction of his court, and undertaken the exercise of powers not vested by any law of the United States in him or the court held by him. Upon its presentation at the last term an order was issued to the judge to show cause why the writ

should not issue as prayed. His return admits the facts as stated, and justifies his action on the ground that the refusal of the State court to set aside the *venire* summoned for the trial of the prisoners, and to give them a jury composed in part of their own race and color, was a denial to them of 'the equal protection of the laws,' and brought their cases within the provisions of the Revised Statutes for the removal of criminal prosecutions from the State to the Federal courts. The Attorney-General of the Commonwealth contending that the return is insufficient to justify his action, now moves that the writ be issued a prayed.

The application of Virginia is resisted by a denial of the jurisdiction of this court to issue a writ to the district judge in the case; a denial made not only by the counsel for the prisoners, who has been permitted to appear in their behalf, though the proceeding is one directly between the Commonwealth and the district judge, but by the Attorney-General, who has appeared, though not officially, for that officer. The ground of the denial is that the writ can be issued by this court only in the exercise or in aid of its appellate jurisdiction, and that the writ is here prayed in a proceeding which is not appellate but original, because it has its commencement in the presentation of the petition of the Commonwealth.*327

It is undoubtedly true that, except in cases where, under the Constitution, this court has original jurisdiction, the writ can be issued only in the exercise or in aid of its appellate authority. This was held as long ago as the case of *Marbury* v. *Madison*, decided in 1803, and the doctrine has been adhered to ever since; for the obvious reason that, the jurisdiction of the court being original in only a few enumerated cases, all exercise of power in other cases must be in virtue of its appellate jurisdiction. That jurisdiction may, however, be called into exercise in various ways. The term 'appellate' in the Constitution is not used in a restricted sense, but in the broadest sense, as embracing the power to review and correct the proceedings of subordinate tribunals brought before it for examination in the modes provided by law. Congress has prescribed the mode or process by which such proceedings shall be brought before the court. In equity cases, it is by a simple notice that an appeal is taken from the decree or proceeding sought to be reviewed; in common- law cases, it is generally by writ of error; in some cases it is by a writ of prohibition, and in some by that of *certiorari*, or of *mandamus*. The mode is one resting entirely in the discretion of Congress. The Judiciary Act of 1789, passed at the first session of Congress after the adoption of the Constitution, declared that the Supreme Court should have appellate jurisdiction from the circuit courts and from courts of the several States in certain cases, and should 'have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States.'

In *Marbury* v. *Madison* it was held that the authority given by the act to issue the writ of *mandamus* to public officers was not warranted by the Constitution, the court observing that it was an essential criterion of appellate jurisdiction that it revises and corrects proceedings in a cause already instituted, and does not create the cause; and that although the writ might be directed to courts, yet to issue it to an officer for the delivery of a paper was in effect the same as to sustain *328 an original action for that paper; and, therefore, seemed to belong not to appellate, but to original jurisdiction. The case in which this language was used was an application to the court to compel Mr. Madison, then Secretary of State, to deliver to Mr. Marbury, as justice of the peace, a commission which had been signed by President Adams and transmitted to the predecessor in office of the Secretary, to be delivered to the appointee. There was, therefore, no action of an inferior tribunal brought up for review, the proceeding being merely to compel an executive officer to perform a ministerial act in which a citizen was interested. The language must, therefore, be limited by the facts of the case. It was not

intended to deny the authority of this court to issue the writ to public officers, when the case is one in which it can exercise original jurisdiction; and probably to avoid such an inference the addition was made to the clause we have cited which now appears in the Revised Statutes, so as to allow the writ to issue to public officers only 'where a State or an ambassador or other public minister or a consul or vice-consul is a party,'--that is, in cases where the court has original jurisdiction. Indeed, it is only by such writ that the original jurisdiction of this court can in many cases be exercised. *Commonwealth of Kentucky* v. *Dennison* , 24 How. 66. Nor was the language intended to deny that this court can issue the writ to judicial officers where the object is to revise and correct their action in legal proceedings pending in the courts held by them. Though the writ to a subordinate or inferior court may be addressed to the court as such, it is usually directed to the judge thereof, or, if the court is composed of several judges, to such one or more of them as may be authorized to hold its sessions or participate in holding them. The reason assigned is that, in case of disobedience to the writ, the authority to enforce it is exercised over the judges personally who are vested with the power of exercising the functions of the court. High, Extraordinary Legal Remedies, sect. 275. In the present case, the writ is asked against the district judge who, whilst holding the Circuit Court of the Western District of Virginia, made the order which is the subject of complaint, and who, if the writ be granted, will be able to hold that court and carry out its command. There is no sound objection to its issue in this form.*329

The writ being one of the modes provided by Congress for the exercise of our appellate jurisdiction, the question whether it should be issued in this case is not difficult of solution if, as contended by the Commonwealth of Virginia, the Circuit Court, in taking the prisoners from the custody of her authorities, transcended its jurisdiction. To review that action and set aside what was done under it, the writ is sought. The jurisdiction invoked is, in its nature, appellate; and there is no other mode provided for its exercise in the case at bar than by the writ prayed. Though the petition is the first step taken by the Commonwealth against the judge, the proceeding is not on that account an original suit. The petition is merely the process by which our appellate jurisdiction is invoked.

It is well settled that the writ of *mandamus* will issue to correct the action of subordinate or inferior courts or judicial officers, where they have exceeded their jurisdiction, and there is no other adequate remedy. 'It issues,' says Blackstone, 'to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence and obviating the denial of justice.' 3 Bl. Com. 110.

It is in accordance, therefore, with the principles and usages of law that this court should issue a *mandamus* in the cases here enumerated, and thus supervise the proceedings of inferior courts where there is a legal right and there is no other existing legal remedy. 'It is upon this ground,' says Mr. Justice Nelson, 'that the remedy has been applied from an early day,--indeed, since the organization of courts and the admission of attorneys to practise therein down to the present time,--to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the courts. The order disbarring them, or subjecting them to fine or imprisonment, is not reviewable by writ *330 of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of *mandamus*, however flagrant the wrong committed against these officers, they would be destitute of any redress.' *Ex parte Bradley*, 7 Wall. 364. See also *Ex parte Robinson*, 19 id. 505.

And so in the case at bar, without the use of

this writ the greatest possible injury would be inflicted upon the Commonwealth of Virginia, without any redress, if the Circuit Court, as contended, transcended its jurisdiction. In no case, therefore, could the writ be more properly issued in the interests of justice, order, and good government. Nor was there any necessity for a previous demand upon that court, in the way of a motion to remand the prisoners. While the authorities, says Mr. High, in his valuable treatise on the law of *mandamus*, are not altogether reconcilable as to the necessity of a previous demand and refusal to perform the act which it is sought to coerce, a distinction is made between the cases where the duties to be enforced are of a public nature, affecting the public at large, and those where the duties are of a private nature, affecting only the rights of individuals. 'And while,' continues the author, 'in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by *mandamus;* in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal.' Extraordinary Legal Remedies, sect. 13.

In this case not only was the duty required of the Circuit Court one of a public nature, in which the Commonwealth of Virginia is interested, but it would have been a useless ceremony to move for an order remanding the prisoners to her authorities, in the face of its direction to the marshal to take them into custody, and its order to docket and proceed with the prosecution against them in the Circuit Court of the United *331 States, and the justification of this action contained in the return of the judge.

The preliminary objections to the exercise of our jurisdiction being disposed of, we are brought to the important inquiry, whether the action of the Circuit Court, in taking the prisoners from the custody of the authorities of Virginia, was authorized under the laws of the United States. The *mandamus* prayed is to compel the return of the prisoners, as already stated; but the validity of the order directing the marshal to take them into his custody depends upon the legality of the removal of the prosecution from the State to the Federal court. The order to the marshal was the necessary sequence of assuming jurisdiction of the prosecution. The legality of the removal is, therefore, the question for determination. Its legality is denied by Virginia on two grounds: 1st, that the act of Congress (Rev. Stat., sect. 641), upon the provisions of which the respondent relies, does not authorize the removal; and, 2d, that the act, in authorizing a criminal prosecution for an offence against a law of the State to be, before trial, removed from a State court to a Federal court, is unconstitutional and void. In my opinion, both of these grounds are well taken.

Sect. 641 of the Revised Statutes, re-enacting provisions of previous statutes, in terms provides in certain cases for the removal to the circuit courts of the United States of criminal prosecutions commenced in a State court. It declares that 'when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in any part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespass, or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant filed in said State court, at any time before the trial *332 or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such

petition all further proceedings in the State courts shall cease.' The section also provides for furnishing the Circuit Court with copies of the process, pleadings, and proceeding of the State court. A subsequent section provides for the issue in such cases of a writ of *habeas corpus cum causa* to remove the accused, when in actual custody upon process of the State court, to the custody of the marshal of the United States.

By this enactment it appears that, in order to obtain a removal of a prosecution from a State to a Federal court,--except where it is against a public officer or other person for certain trespasses or conduct not material to consider in this connection,--the petition of the accused must show a denial of, or an inability to enforce in the tribunals of the State, or of that part of the State where the prosecution is pending, some right secured to him by the law providing for the equal rights of citizens or persons within the jurisdiction of the United States. But how must the denial of a right under such a law, or the accused's inability to enforce it in the judicial tribunals of the State, be made to appear? So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; if it were so, few prosecutions would be retained in a State court for insufficient allegations when the accused imagined he would gain by the removal. *Texas* v. *Gaines*, 2 Woods, 344. There must be such a presentation of facts as to lead the court to the conclusion that the averments of the accused are well founded. There are many ways in which a person may be denied his rights, or be unable to enforce them in the tribunals of a State. The denial or inability may arise from direct legislation, depriving him of their enjoyment or the means of their enforcement, or discriminating against him or the class, sect, or race to which he belongs. And it may arise from popular prejudices, passions, or excitement, biassing the minds of jurors and judges. Religious ***333** animosities, political controversies, antagonisms of race, and a multitude of other causes will always operate, in a greater or less degree, as impediments to the full enjoyment and enforcement of civil rights. We cannot think that the act of Congress contemplated a denial of, or an inability to enforce, one's rights from these latter and similar causes, and intended to authorize a removal of a prosecution by reason of them from a State to a Federal court. Some of these causes have always existed in some localities in every State, and the remedy for them has been found in a change of the place of trial to other localities where like impediments to impartial action of the tribunals did not exist. The Civil Rights Act, to which reference is made in the section in question, was only intended to secure to the colored race the same rights and privileges as are enjoyed by white persons: it was not designed to relieve them from those obstacles in the enjoyment of their rights to which all other persons are subject, and which grow out of popular prejudices and passions.

The denial of rights or the inability to enforce them, to which the section refers, is, in my opinion, such as arises from legislative action of the State, as, for example, an act excluding colored persons from being witnesses, making contracts, acquiring property, and the like. With respect to obstacles to the enjoyment of rights arising from other causes, persons of the colored race must take their chances of removing or providing against them with the rest of the community.

This conclusion is strengthened by the provisions of the Fourteenth Amendment to the Constitution. The original Civil Rights Act was passed, it is true, before the adoption of that amendment; but great doubt was expressed as to its validity, and to obtain authority for similar legislation, and thus obviate the objections which had been raised to its first section, was one of the objects of the amendment. After its adoption the Civil Rights Act was re-enacted, and upon the first section of that amendment it rests. That section is directed against the State. Its language is that *'no State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any person of life, liberty, or property without due ***334** process

of law, nor deny to any person within its jurisdiction the equal protection of the laws.' As the State, in the administration of its government, acts through its executive, legislative, and judicial departments, the inhibition applies to them. But the executive and judicial departments only construe and enforce the laws of the State; the inhibition, therefore, is in effect against passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court: it cannot be imputed to the State, so as to make it evidence that she in her sovereign or legislative capacity denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. Nor can the unauthorized action of an executive officer, impinging upon the rights of the citizen, be taken as evidence of her intention or policy so as to charge upon her a denial of such rights.

If these views are correct, no cause is shown in the petition of the prisoners that justified a removal of the prosecutions against them to the Federal court. No law of Virginia makes any discrimination against persons of the colored race, or excludes them from the jury. The law respecting jurors provides that 'all male citizens, twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State,' with certain exemptions not material to the question presented, may be jurors; and it authorizes an annual selection in each county, by the county judge, from the citizens at large, of from one to three hundred persons, whose names are to be placed in a box, and from them the jurors, grand and petit, of the county are to be drawn. There is no restriction placed upon the county judge in selecting them, except that they shall be such as he shall think 'well qualified to serve as jurors, being persons of sound judgment and free from legal exception.' The mode thus provided, properly carried out, cannot fail to secure competent jurors. *335 Certain it is that no rights of the prisoners are denied by this legislation. The application to the State court, upon the refusal of which the petition was presented, was for a *venire* composed of one-third of their race,--a proceeding wholly inadmissible in any jury system which obtains in the several States.

From the return of the district judge it would seem that in his judgment the presence of persons of the colored race on the jury is essential to secure to them the 'equal protection of the laws;' but how this conclusion is reached is not apparent, except upon the general theory that such protection can only be afforded to parties when persons of the class to which they belong are allowed to sit on their juries. The correctness of this theory is contradicted by every day's experience. Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws? Foreigners resident in the country are not permitted to act as jurors, yet they are protected in their rights equally with citizens. Persons over sixty years of age in Virginia are disqualified as jurors, yet no one will pretend that they do not enjoy the equal protection of the laws. If when a colored person is indicted for a criminal offence it is essential, to secure to him the equal protection of the laws, that persons of his race should be on the jury by which he is tried, it would seem that the presence of such persons on the bench should be equally essential where the court consists of more than one judge; and that if it should consist of only a single judge, such protection would be impossible. To such an absurd result does the doctrine lead, which the Circuit Court announced as controlling its action.

The equality of protection assured by the Fourteenth Amendment to all persons in the State does not imply that they shall be allowed to participate in the administration of its laws, or to hold any of its offices, or to discharge any duties of a public trust. The universality of the protection intended excludes any such inference. Were this not so, aliens resident in the country, or temporarily

here, of whom there are many thousands in each State, would be without that equal protection which the amendment declares that no State shall deny to any person within its jurisdiction.*336

It follows from these views as to the meaning and purpose of the act of Congress that the removal of the prosecution in this case from the State to the Federal court is unauthorized by it; and that the order of the Circuit Court to the marshal to take the prisoners from the custody of the State authorities is illegal and void.

The second objection of the Commonwealth to the legality of the removal is equally conclusive. The prosecution is for the crime of murder, committed within her limits, by persons and at a place subject to her jurisdiction. The offence charged is against her authority and laws, and she alone has the right to inquire into its commission, and to punish the offender. Murder is not an offence against the United States, except when committed on an American vessel on the high seas, or in some port or haven without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. The offence within the limits of a State, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as though it had been committed on another continent. The prosecution of the offence in such a case does not, therefore, arise under the Constitution and laws of the United States; and the act of Congress which attempts to give the Federal courts jurisdiction of it is, to my mind, a clear infraction of the Constitution. That instrument defines and limits the judicial power of the United States.

It declares, among other things, that the judicial power shall extend to cases in law and equity arising under the Constitution, laws, and treaties of the United States, and to various controversies to which a State is a party; but it does not include in its enumeration controversies between a State and its own citizens. There can be no ground, therefore, for the assumption by a Federal court of jurisdiction of offences against the laws of a State. The judicial power granted by the Constitution does not cover any such case or controversy. And whilst it is well settled that the exercise of the power granted may be extended to new cases as they arise under the Constitution and laws, the power itself cannot be enlarged by *337 Congress. The Constitution creating a government of limited powers puts a bound upon those which are judicial as well as those which are legislative, which cannot be lawfully passed.

This view would seem to be conclusive against the validity of the attempted removal of the prosecution in this case from the State court. The Federal court could not in the first instance have taken jurisdiction of the offence charged, and summoned a grand jury to present an indictment against the accused; and if it could not have taken jurisdiction at first, it cannot do so upon a removal of the prosecution to it. The jurisdiction exercised upon the removal is original and not appellate, as is sometimes erroneously asserted; for, as stated by Chief Justice Marshall in *Marbury* v. *Madison*, already cited, it is of the essence of appellate jurisdiction that it revises and corrects proceedings already had. The removal is only an indirect mode by which the Federal court acquires original jurisdiction. *Railway Company* v. *Whitton*, 13 Wall. 270.

The Constitution, it is to be observed, in the distribution of the judicial power, declares that in the cases enumerated in which a State is a party the Supreme Court shall have original jurisdiction. Its framers seemed to have entertained great respect for the dignity of a State which was to remain sovereign, at least in its reserved powers, notwithstanding the new government, and therefore provided that when a State should have occasion to seek the aid of the judicial power of the new government, or should be brought under its subjection, that power should be invoked only in its highest tribunal. It is difficult to believe that the wise men who sat in the convention which framed the Constitution and advocated its adoption ever contemplated the possibility

of a State being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and least of all in an inferior tribunal of the new government. I do not think I am going too far in asserting that had it been supposed a power so dangerous to the independence of the States, and so calculated to humiliate and degrade them, lurked in any of the provisions of the Constitution, that instrument would never have been adopted.

There are many other difficulties in maintaining the position *338 of the Circuit Court, which the counsel of the accused and the Attorney-General have earnestly defended. If a criminal prosecution of an offender against the laws of a State can be transferred to a Federal court, what officer is to prosecute the case? Is the attorney of the Commonwealth to follow the case from his county, or will the United States district attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it,--the Governor of the State, or the President of the United States? Can the President pardon for an offence against the State? Can the Governor release from the judgment of a Federal court? These and other questions which might be asked show, as justly observed by the counsel of Virginia, the incongruity and absurdity of the attempted proceeding.

Undoubtedly, if in the progress of a criminal prosecution, as well as in the progress of a civil action, a question arise as to any matter under the Constitution and laws of the United States, upon which the defendant may claim protection, or any benefit in the case, the decision thereon may be reviewed by the Federal judiciary, which can examine the case so far, and so far only, as to determine the correctness of the ruling. If the decision be erroneous in that respect, it may be reversed and a new trial had. Provision for such revision was made in the twenty-fifth section of the Judiciary Act of 1789, and is retained in the Revised Statutes. That great act was penned by Oliver Ellsworth, a member of the convention which framed the Constitution, and one of the early chief justices of this court. It may be said to reflect the views of the founders of the Republic as to the proper relations between the Federal and State courts. It gives to the Federal courts the ultimate decision of Federal questions, without infringing upon the dignity and independence of the State courts. By it harmony between them is secured, the rights of both Federal and State governments maintained, and every privilege and immunity which the accused could assert under either can be enforced.

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Supreme Court of the United States

ALLGEYER et al.
v.
STATE OF LOUISIANA.

No. 446.

March 1, 1897.

In Error to the Supreme Court of the State of Louisiana.

****427 *579** The legislature of Louisiana, in the year 1894, passed an act known as Act No. 66 of the acts of that year. It is entitled 'An act to prevent persons, corporations or firms from dealing with marine insurance companies that have not complied with law.'

The act reads as follows: 'Be it enacted by the general assembly of the state of Louisiana, that any person, firm or corporation who shall fill up, sign or issue in this state any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this state to effect for himself, or for another, insurance on property then in this state, in any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of one thousand dollars for each offense, which shall be sued for in any competent court by the attorney general for the benefit of the charity hospitals in New Orleans and Shreveport.'

By reason of the provisions of this act, the state of Louisiana on the 21st of December, 1894, filed its petition in one of the courts of first instance for the parish of Orleans, and alleged, in substance, that the defendants, E. Allgeyer & Co., had violated the statute by mailing in New Orleans a letter of advice or certificate of marine insurance on the 27th of October, 1894, to the Atlantic Mutual Insurance Company of New York, advising that company of the shipment of 100 bales of cotton to foreign ports in accordance with the terms of an open marine policy, etc. The state sought to recover for three violations of the act the sum of $3,000.

The defendants filed an answer, in which, among other things, they averred that the above-named act was unconstitutional, in that it deprived them of their property without due process of law, and denied them the equal protection of ***580** the laws, in violation of the constitution of the state of Louisiana and also of the constitution of the United States. They also set up that the business concerning which defendants were sought to be made liable, and the contracts made in reference to such business, were beyond the jurisdiction of the

state of Louisiana, and that the defendants were not amendable to any penalties imposed by its laws; that the contracts of insurance made by defendants were made with an insurance company in the state of New York, where the premiums were paid, and where the losses thereunder, if any, were also to be paid; that the contracts were New York contracts, and that under the constitution of the United States the defendants had the right to do and perform any act or acts within the state of Louisiana which might be necessary and proper for the execution of those contracts; and that, in so far as Act No. 66 of the general assembly of the state of Louisiana of the year 1894 might be construed to prevent or interfere with the execution of such contracts, the same was unconstitutional, and in violation of the constitution of both the state of Louisiana and the United States.

The case was tried upon an agreed statement of facts, as follows: The Atlantic Mutual Insurance Company is a corporation, created by the laws of the state of New York and domiciled and carrying on business in that state, and the defendants made a contract with that company for an open policy of marine insurance for $200,000, on account of themselves, and to cover cotton in bales purchased and shipped by them on which drafts might be drawn for the purchaser upon 'Whom it might Concern.' By the terms of the policy, among other things, it was stated: 'Shipments applicable to this policy, to be reported to this company by mail or telegraph the day purchased, warranted not to cover cotton in charge of carriers on shore or during inland transportation. No risk is to be insured by this policy until a letter signed by ____, and addressed to the president of this company, detailing the name of the vessel, particulars of the shipment, with description of the property and amount to be insured, is deposited in the post office at ____, which must be done *581 while the property is in good safety, and in all cases prior to the departure of the risk from ____; a duplicate of such letter to be sent by the following mail. A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to E. Allgeyer & Company.'

The Atlantic Mutual Insurance Company is engaged in the business of marine insurance, and has appointed no agent in the state of Louisiana, and has not complied with the conditions required by the laws of that state for the doing of business within the same by insurance companies incorporated and domiciled out of the state.

On the 23d of October, 1894, the defendants mailed to that company a communication, stating insurance was wanted by defendants for account of same (the open policy); loss, if any, payable at Paris, in French currency, etc., for $3,400 on 100 bales of cotton, which, at the time of the communication, were within the state of Louisiana. The premiums to be paid under the contract of insurance, and the loss or losses under the same, were payable in the city of New York, the premiums being remitted by the defendants from New Orleans by exchange.

Defendants are exporters of cotton from the port of New Orleans to ports in Great Britain and on the continent of Europe. They sell cotton in New Orleans to purchasers at said ports. For the price of every sale of cotton made by them they, in accordance with the general custom of business, draw a bill of exchange against the purchaser, attaching to the same the bill of lading for the cotton and an order on the Atlantic Mutual Insurance Company for a new and separate policy of insurance, spoken of in the open policy, and the form of the said order is as follows:

'Attached to draft No. ___ on ____, from E. Allgeyer & Co., New Orleans, 189, to Atlantic Mutual Ins. Co., New York.

'Marks and numbers, ___.

'Please deliver to ____ or order special policy for*582 $____ on ____ bales cotton, per ____, from New Orleans to ____.

'Respectfully,

'[Signed] E. Allgeyer & Co.,

'Per _____.'

This bill of exchange, with the bill of lading attached, is sometimes negotiated with banks in the city of New York; sometimes it is not negotiated at all, but forwarded direct for collection from the purchaser of the cotton. The bill of exchange, with bill of lading and order for insurance attached, in either case is sent from New Orleans first to New York, where, after its negotiation or before being forwarded from thence for collection, the order for insurance is presented to the Atlantic Mutual Insurance Company. Upon this showing the insurance company in New York issues and delivers to the holder of the exchange and bill of lading when the former has been negotiated, or to the agent of defendant when the exchange has not been negotiated, a new and a separate policy of insurance for the cotton, in accordance with the contract made with the defendants and evidenced by the policy above mentioned and described. This new and separate policy, when received, is attached to the bill of exchange. The exchange cannot be negotiated in New York, unless it is accompanied by both the bill of lading and order for insurance, and unless the new and separate policy issued by the company is attached to it the purchaser of the cotton is under no obligation to pay the bill drawn on him for the price of the cotton. The new and separate policy delivered to the holder of the exchange and bill of lading in New York, or to defendants' agent there, as the case may be, is for the benefit of the holder of the latter, or of defendants, according as the exchange has been negotiated or not. The holder of the exchange becomes the **429 owner of the cotton covered by the bill of lading attached, and is the owner of the policy of insurance covering the same, in the event of a loss within the terms of the policy.

The business thus described is conducted as above by the general custom and agreement of all parties concerned.

*583 The court of first instance before which the trial was had ordered that plaintiff's demand be rejected, and that judgment in favor of the defendants be given. An appeal was taken from that judgment to the supreme court of the state, which, after argument before it and due consideration, reversed the judgment of the court below, and gave judgment in favor of the plaintiff for $1,000, as for one violation of the statute, being the only one which was proved. State v. Allegeyer, 48 La. Ann. 104, 18 South. 904. The plaintiffs in error ask a review in this court of the judgment entered against them by directions of the supreme court of Louisiana.

West Headnotes

Insurance ⇐ 1165
217k1165 Most Cited Cases
(Formerly 217k4(2), 217k4.1)

Acts La.1894, No. 66, prohibiting citizen of state, under open policy of marine insurance, effected outside state, in foreign insurance company which had not complied with state laws, from sending by mail or telegraph, while in state, a notice describing particular goods then within state, upon which he desires insurance under open policy to attach, is unconstitutional.

Constitutional Law ⇐ 255(1)
92k255(1) Most Cited Cases

"Liberty," as used in the provision of the fourteenth amendment to the federal constitution, forbidding the states to deprive any person of life, liberty, or property without due process of law, includes, it seems, not merely the right of a person to be free from physical restraint, but to be free in the enjoyment of all his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to carrying out the purposes above mentioned.

Constitutional Law ⇐ 296(1)
92k296(1) Most Cited Cases

A state statute which, as construed by the highest state court, prohibits a citizen of the state, under an open policy of marine

insurance, effected outside the state, in a foreign insurance company which has not complied with the state laws, from sending by mail or telegraph, while in the state, a notice describing particular goods then within the state, upon which he desires the insurance under the open policy to attach (Acts La. 1894, No. 66), operates to deprive such citizen of his liberty without due process of law.
Branch K. Miller, for plaintiffs in error.

M. J. Cunningham and E. Howard McCaleb, for defendant in error.

Mr. Justice PECKHAM, after stating the facts, delivered the opinion of the court.

There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute. The cases upon this subject are cited in the opinion of the court in Hooper v. State of California, 155 U. S. 648, 15 Sup. Ct. 207.

A conditional prohibition in regard to foreign insurance compaines doing business within the state of Louisiana is to be found in article 236 of the constitution of that state, which reads as follows: 'No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served.'

It is not claimed in this suit that the Atlantic Mutual Insurance Company has violated this provision of the constitution by doing business withing the state.

*584 In State of Louisiana v. Williams, 46 La. Ann. 922, 15 South. 290, the supreme court of that state held that an open policy of marine insurance, similar in all respects to the one herein described, and made by a foreign insurance company, not doing business within the state and having no agent therein, must be considered as made at the domicile of the company issuing the open policy, and that where in such case the insurance company had no agent in Louisiana it could not be considered as doing an insurance business within the state.

The learned counsel for the state also admits in his brief the fact that the contract (i. e. the open policy) was entered into at New York City.

In the course of the opinion delivered in this case by the supreme court of Louisiana that court said:

'The open policy in this case is conceded to be a New York contract; hence the special insurance effected on the cotton complained of here was a New York contract.

'The question presented is the simple proposition whether under the act a party while in the state can insure property in Louisiana in a foreign insurance company, which has not complied with the laws of the state, under an open policy,--the special contract of insurance and the open policy being contracts made and entered into beyond the limits of the state.

* * *

'We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. We are concerned only with the fact of its having been entered into by a citizen of Louisiana while within her limits affecting property within her territorial limits. It is the act of the party, and not the contract, which we are to consider. The defendants who made the contract did so while they were in the state, and it had reference to property located within the state. Such a contract is in violation of the laws of the state, and the defendants who made it were within the jurisdiction of the state, and must be necessarily subject to its penalties, unless there is some inhibition in the federal or state constitution, or that it violates, one of those inalienable rights elating *585 to persons and property that are inherent, although not expressed, in the organic law. It does not forbid the carrying on by the insurance company of its legalized

business within the state. It is a means of preventing its doing so without subscribing to certain conditions which are recognized as legitimate and proper. It does not destroy the constitutional right of the citizens of New York to do business within the state of Louisiana or of the citizens of Louisiana from insuring property. It says to the citizens of New York engaged in insurance business that they must, like its own citizens, pay a license and have an authorized agent in the state as prerequisite to their doing said business within its state, and says to its own citizens: You shall not make a contract while in the state with any foreign insurance company which has not complied with the laws. You shall not in this manner contravene the public policy of the state in aiding and assisting in the violation of the laws of the state. The sovereignty of the state would be a mockery if it had not the power to compel its citizens to respect its laws.

* * *

'The defendants while in the state undoubtedly insured their property located in the state in a foreign insurance company under an open policy. The instant the letter or ommunication was mailed or telegraphed the property **430 was insured. The act of insurance was done within the state, and the offense denounced by the statute was complete.

* * *

'There is in the statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired, but in exercising this liberty they would interfere with the policy of the state that forbids insurance companies which have not complied with the laws of the state from doing business within its limits. Individual liberty of action must give way to the greater right of the collective peopel in the assertion of well-defined policy, designed and intended for the general welfare.'

The general contract contained in the open policy, as well *586 as the special insurance upon each shipment of goods of which notice is given to the insurance company, being contracts made in New York and valid there, the state of Louisiana claims notwithstanding such facts that the defendants have violated the act of 1894, by doing an act in that state to effect for themselves insurance on their property then in that state in a marine insurance company which had not complied in all respects with the laws of that state, and that such violation consisted in the act of mailing a letter or sending a telegram to the insurance company in New York describing the cotton upon which the defendants desired the insurance under the open marine policy to attach. It is claimed on the part of the state that its legislature had the power to provide that such an act should be illegal, and to subject the offender to the penalties provided in the statute. It is said by the supreme court that the validity of such a statute has been decided in principle in this court in the case of Hooper v. State of California, 155 U. S. 648, 15 Sup. Ct. 207.

We think the distinction between that case and the one at bar is plain and material. The state of California made it a misdemeanor for a person in that state to procure insurance for a resident of the state from an insurance company not incorporated under its laws, and which had not filed a bond required by those laws relative to insurance. Hooper was a resident of San Francisco, and was the agent of the firm of Johnson & Higgins, who were insurance brokers residing and having their principal place of business in the city of New York, but having also a place of business in the city and county of San Francisco, of which the defendant had charge as their employe and agent. In response to a request from a Mr. Mott, a resident of the state of California, the defendant Hooper procured through his principals, Johnson & Higgins, an insurance upon the steamer Alliance, belonging to said Mott, in the China Mutual Insurance Company, which was a company not then and there incorporated under the laws of California, and not having itself or by its agent filed the bond required by those laws relating to insurance. The policy was

delivered by the defendant Hooper to Mott, the insured, at *587 San Francisco, who thereupon paid Hooper, as agent of Johnson & Higgins, the premium for the insurance. The case states that 'all the verbal acts of Mott, the insured, and also of the defendant, and all his acts as agent in procuring said insurance, were done in the city and county of San Francisco.' The court held that the whole transaction amounted to procuring insurance within the state of California by Hooper, residing there and for a resident in the state, from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the state relative to insurance; that Hooper, the defendant, acted as the agent of his principals in New York City, who were average adjusters and brekers there, and who had a place of business in San Francisco; and that Hooper, as such broker, having applied for the insurance to his principals in New York City, received the policy from them for delivery in San Francisco, and the premium was there paid.

Upon the question as to the place where the contract was made, Mr. Justice White, speaking for the court, said: 'It is claimed, however, that, irrespective of this [commerce] clause, the conviction here was illegal--First, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the state; and, secondly, because the evidence shows that the contract was in fact entered into without the territory of California. The language of the Statute is not fairly open to this construction. It punishes 'every person who in this state procures or agrees to procure for a resident of this state any insurance,' etc. The words 'who in this state' cannot be read out of the law in order to nullify it under the constitution.'

In the case before us the contract was made beyond the territory of the state of Louisiana, and the only thing that the facts show was done within that state was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made.

The distinction between a contract made within and that made without the state is again referred to by Mr. Justice White in the same case, as follows: 'It is said that the *588 right of a citizen to contract for insurance for himself is guarantied by the fourteenth amendment, and that, therefore, he cannot be deprived by the state of the capacity to so contract through an agent. The fourteenth amendment, however, does not guaranty the citizen the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear non **431 sequitur, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction.'

We do not intend to throw any doubt upon or in the least to shake the authority of the Hooper Case, but the facts of that case and the principle therein decided are totally different from the case before us. In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the state of Louisiana, being made and to be performed within the state of New York, where the premiums were to be paid, and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

It is natural that the state court should have

remarked that there is in this 'statute an apparent interference with the liberty of defendants in restricting their rights to place *589 insurance on property of their own whenever and in what company they desired.' Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy with regard to foreign insurance companies which had not complied with the laws of the state for doing business within its limits. In this case the company did no business within the state, and the contracts were not therein made.

The supreme court of Louisiana says that the act of writing within that state the letter of notification was an act therein done to effect an insurance on property then in the state, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the fourteenth amendment of the federal constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the constitution of the Union. The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to br free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley, in Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, at page 762, 4 Sup. Ct. 657, in the course of his concurring opinion in that case, that 'the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, *590 liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, 111 U. S., and on page 658, 4 Sup. Ct., the learned justice said: 'I hold that the liberty of pursuit--the right to follow any of the ordinary callings of life--is one of the privileges of a citizen of the United States.' And again, on page 765, 111 U. S., and on page 658, 4 Sup. Ct.: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty,' as contained in the fourteenth amendment.

Again, in Powell v. Pennsylvania, 127 U. S. 678, 684, 8 Sup. Ct. 995, 1257, Mr. Justice Harlan, in stating the opinion of the court, said: 'The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guarantied by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.' It was there held, however, that the legislation under consideration in that case did not violate any of the constitutional rights of the plaintiff in error.

The foregoing extracts have been made for the purpose of showing what general

definitions **432 have been given in regard to the meaning of the word 'liberty' as used in the amendment, but we do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.

Has not a citizen of a state, under the provisions of the federal constitution above mentioned, a right to contract outside *591 of the state for insurance on his property,--a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper Case, supra, and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act,--one which the defendants were at liberty to perform, and which the state legislature had no right to prevent, at least with reference to the federal constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution.

In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the *592 state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. Milliken v. Pratt, 125 Mass. 374; Tilson v. Blair, 21 Wall. 241. The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract, upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter. It is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizen from making outside the limits of the state.

The Atlantic Mutual Insurance Company of New York has done no business of insurance within the state of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the

property of its citizens, even if that property were in the state of Louisiana, and correlatively the citizens of Louisiana had the right without the state of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the state of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to *593 carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state.

In such a case as the facts here present, the policy of the state in forbidding insurance companies which had not complied with the laws of the state from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the state of Louisiana, when it is written pursuant to a valid contract made outside the state, and with reference to a company which is not doing business within its limits.

For these reasons we think the statute in question (No. 66, Laws La. 1894) was a violation of the federal constitution, and afforded no justification for the judgment **433 awarded by that court against the plaintiffs in error. That judgment must therefore be reversed, and the case remanded to the supreme court of Louisiana for further proceedings not inconsistent with his opinion.

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Westlaw.

Court of Appeals of Maryland.

THE ST. MARY'S INDUSTRIAL SCHOOL FOR BOYS
v.
GEORGE S BROWN, WILLIAM G. HARRISON and others.
THE MARYLAND INDUSTRIAL SCHOOL FOR GIRLS
v.
GEORGE S BROWN, WILLIAM G. HARRISON and others.
THE ST. VINCENT'S INFANT ASYLUM OF THE CITY OF BALTIMORE
v.
GEORGE S BROWN, WILLIAM G. HARRISON and others.
THE MARYLAND INSTITUTE FOR THE PROMOTION OF THE MECHANIC ARTS
v.
GEORGE S BROWN, WILLIAM G. HARRISON and others.

Decided Jun. 22, 1876.

West Headnotes

Charities ⇐ 41
75k41 Most Cited Cases

Benevolent and charitable institutions such as the St. Mary's Industrial School for Boys, the Maryland Industrial School for Girls, the St. Vincent's Infant Asylum of the City of Baltimore, and the Maryland Institute for the Promotion of Mechanic Arts, are not public or municipal agencies, such as the city of Baltimore has the right, by appropriation or otherwise, to maintain, assist, or promote by the exercise of the taxing power, as such institutions are separate and distinct corporations, composed of private individuals, and managed and controlled by officers and agents of their own, and over whom the city has no supervision or control, and for the management of which there is no accountability to the city, notwithstanding the governor and mayor each appoint at stated intervals persons to represent the state and city in the board of trustees and directors of the industrial schools for boys and girls, and that the city owns the ground upon which the buildings are erected, and in its deed to the institution reserved, as part of the consideration of the grant, certain privileges in the use of the hall.

Corporations ⇐ 370(2)
101k370(2) Most Cited Cases

A corporation created by statute can exercise no powers except those expressed, or necessarily implied, in its charter.

Municipal Corporations ⇐ 57
268k57 Most Cited Cases

Municipal powers are delegated, and depend upon legislative charter or grant; and the corporate authorities can exercise no power which is not, in express terms, or by fair and reasonable implication, conferred upon the corporation.

Municipal Corporations ⇐ 871
268k871 Most Cited Cases

While the City of Baltimore has ample power delegated to it to provide for the foundlings, the insane, the indigent, infirm and helpless, and for the correction of the vicious and vagrant portions of its population, such provision when made, must be under the control, and subject to the supervision, of municipal authority.

Municipal Corporations ⇐ 871
268k871 Most Cited Cases

But the City may contract with private institutions for their care, maintenance and training.

Municipal Corporations ⇐ 871
268k871 Most Cited Cases

The Mayor and City Council of Baltimore has no authority to make appropriations, by the exercise of the taxing power, to sustain or aid institutions, however benevolent and charitable in their character, which do not owe their creation to the municipal power conferred on the City of Baltimore, and were not created for the City by the Legislature of the State, as instruments of municipal administration, but which are separate and distinct corporations, composed of private individuals and managed and controlled by officers and agents of their own, and over which the City has no supervision or control, and for the management of which there is no accountability to the city whatever.

Municipal Corporations ⇐ 956(1)
268k956(1) Most Cited Cases

Municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. The authority must be given either in express words, or by necessary implication, and it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience or advantage.

Municipal Corporations ⇐ 993(1)
268k993(1) Most Cited Cases

Tax-payers of a municipal corporation may invoke the restraining powers of a Court of Equity, and the court will entertain jurisdiction of their suit against such corporation and its officers, whenever the latter are shown to be acting ultra vires, or are assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such unauthorized acts may affect injuriously the rights and property of the parties complaining.

Schools ⇐ 1
345k1 Most Cited Cases

As far as the City is concerned, these corporations are entirely separate and independent of it, in all corporate action and control.

Schools ⇐ 1
345k1 Most Cited Cases

The mere fact that the City of Baltimore may own the ground upon which the building is erected, or that the City, in its deed to the institution, has reserved certain privileges in the use of the hall, as part of the consideration for the grant, cannot constitute The Maryland Institute for the Promotion of the Mechanic Arts, a municipal agency.

Schools ⇐ 1
345k1 Most Cited Cases

Such trustees and directors do not control the institutions; nor are they clothed with any State or municipal authority, to be exercised in the management of the affairs of the institutions, and cannot be directed,

controlled, limited or restrained, in the powers and duties as prescribed in the charters and by-laws of the corporations in whose proceedings they participate. They simply exercise, in common with the other trustees and directors, the authority conferred by the Acts of incorporation, and nothing more.

Schools ⇐ 1
345k1 Most Cited Cases

The fact that the Governor of the State and the Mayor of the City of Baltimore each appoints, every two years, three persons to represent the State and City in the Board of Trustees of the St. Mary's Industrial School for Boys under the amendment of its charter, by the Act of 1874, ch. 288, in no manner changes the nature of the institution, nor makes it a municipal agency.

Schools ⇐ 1
345k1 Most Cited Cases

The fact that the Governor of the State is empowered (Act of 1870, ch. 391,) to appoint ten, and the Mayor of the City of Baltimore five of the directors of the Maryland Industrial School for Boys, the Board being composed of thirty, does not put the State nor the City in such relation to the corporation as to make it either a public, State or municipal institution.

Schools ⇐ 11
345k11 Most Cited Cases

The Maryland Institute forms no part of the public school system.

*1 APPEALS from the Circuit Court of Baltimore City.

On the bill of complaint of the appellees, the Circuit Court of Baltimore City on the 28th of June, 1875, passed an order directing a preliminary injunction to be issued restraining the Mayor and City Council of Baltimore from paying, and certain corporations and associations (including the appellants) from demanding certain sums of money appropriated for the benefit of the latter by the city ordinance, approved on the 12th of June, 1875, making general appropriations for that year. The injunction was issued as ordered. Nearly all of the institutions which were made defendants appeared and answered, as also the Mayor and City Council of Baltimore. After the coming in of the answers, on the motion to dissolve the injunction, the Court (PINKNEY, J.) on the 18th of February, 1876, ordered that the injunction previously issued, except as to three of the defendants, as to which it had been dissolved, be continued until the final hearing or further order. From this order these appeals were taken.

The causes were argued before BARTOL, C. J., BOWIE, GRASON and ALVEY, J.

Charles J. Bonaparte and *William M. Merrick*, for the St. Mary's Industrial School for Boys.

The bill charges that the respondent institutions are not public agencies, but are private corporations managed for private ends. If these allegations could be sustained as to this appellant, it would be needless to consider whether the city has been authorized to use the taxing power in its aid, for the State cannot itself tax for any other than a public purpose, and consequently cannot delegate such a power to the city.

A public agency is one which discharges some function which, by the custom of communities governed by the common law, has always been matter of public concern; in other words, if the State could itself establish and support an institution similar to this appellant with the proceeds of taxation, it may use the same funds to aid this appellant and authorize the city to do likewise. *Loan Association vs. Topeka*, 20 *Wall.*, 653; *St. Joseph's Township vs. Rogers*, 16 *Wall.*, 644; *Railroad Co. vs. County of Otoe*, 16 *Wall.*, 667; *Olcott vs. The Supervisors*, 16 *Wall.*, 678; *O. C. & F. R. R. R. Co. vs. County of Plymouth*, 14 *Gray*, 155.

If this definition be admitted as a test, the public character of this appellant is undoubted, for no one will question the right of the State to maintain a house of reformation. *Roth vs. The House of Refuge*, 31

Md., 329; *Boyle vs. Same*, 31 *Md.*, 329; *Ex parte Crouse*, 4 *Whart.*, 11; *McKim vs. Odom*, 3 *Bland*, 407, 417.

If, however, some other test be sought, none can be found at all supported by authority, which will not make this respondent a public agency. *Sharpless vs. The Mayor, &c.*, 21 *Penn. R.*, 147; *Booth vs. The Town of Woodbury*, 32 *Conn.*, 118; *Broadhead vs. The City of Milwaukie*, 19 *Wis.*, 624; *Spear vs. Sch. Dir., &c., of Blairsville*, 50 *Pa.*, 150; *Schenley vs. The City of Allegheny*, 1 *Casey*, 130; *Cooley on Const. Limitations*, 67, 89.

*2 If the State has authority itself to aid this appellant by taxation, there can be no doubt of its right to delegate that authority to the city. *In re Oliver*, 17 *Wis.*, 681, *and cases there cited; Mayor and City Council vs. The State*, 15 *Md.*, 376, 398.

We are then brought to what the Court below calls "the real question in the case," *i. e.*, whether the State has authorized the city corporation to use its taxing powers in aid of this appellant? The question whether this appellant is a public or a private *corporation* is wholly immaterial. A private corporation, as a private individual, may be the recipient of the proceeds of taxation, provided that the *use* or *purpose* for which such proceeds are expended is a public one. *Spear vs. Sch. Dir., &c., of Blairsville*, 50 *Penn.*, 150; *The Regents, &c., vs. Williams*, 9 *G. & J.*, 365, 401; *Visitors, &c., of St. John's College vs. State*, 15 *Md.*, 330, 375; *Mayor and City Council of Baltimore vs. State*, 15 *Md.*, 376, 462.

If the use for which these funds were to be expended by the appellant were not a public one, the State could not itself tax in its aid. *Loan Association vs. Topeka*, 20 *Wall.*, 653. And of course could not delegate a power which it did not possess; so that, in order that the authority of the city may be matter of argument at all, it must be assumed that the use to which these funds will finally be put is a public one, and if *it* is public the private character of the corporation which will serve as the channel of its expenditure, cannot invalidate the appropriation.

To call the appropriation to this appellant "a gratuity, a bounty or a gift," is inaccurate, or, at least, misleading; the sum given would be expended neither for its benefit as a corporation nor for the benefit of its members individually, but for the benefit of the community, and in discharging duties which the municipal corporation must fulfil either directly or indirectly. In short, it is a fund entrusted to the appellant to be expended in the way contemplated by its charter.

The question of the city's authority really involves two considerations, *i. e.*, whether the city has power to expend the proceeds of taxation in order to "train to virtue, industry and learning orphans and other destitute boys," and especially such as have been legally committed to a reformatory, and whether the city has power to make the appellant its agent in expending its funds for such purposes?

The city can claim neither power unless it has been either expressly or by fair implication conferred upon it by the State, but it is submitted that each is sustained by both express and implied authority. The city is authorized "to pass ordinances ..... for promoting the great interests and insuring the good government of the city." *Code Public Local Laws, Art.* 4, *sec.* 32.

This is the equivalent, at least of a "general welfare" clause in its charter, and confers upon it all the usual powers of municipal corporations. 1 *Dillon on Mun. Cor., secs.* 58, 59, 334; *Shafer vs. Mumma*, 17 *Md.*, 331. And the care of paupers and reformation of youthful offenders have always been matters of municipal concern. *Spear vs. Sch. Dir., &c., of Blairsville*, 50 *Penn.*, 150.

*3 But the matter is put beyond all doubt by the authority conferred in the Code of Public Local Laws, Art. 4, sec. 31, "to erect or establish houses of correction." There can be no question that this appellant discharges the duties of a "house of correction," and if this could be disputed, the city has power under the Code of Public Local Laws, Art. 4, secs. 907, *et seq.*, to provide for the care of the very

persons which the appellant is intended to receive.

The city corporation having authority to expend the proceeds of taxation to support and reform youthful vagrants under the above Acts, is also empowered to use whatever agency may seem proper to it to conduct the expenditure. *Cooley on Const. Lim.*, 63, 64.

The Acts quoted in the answers which authorize the city to name a portion of the trustees of this appellant, confer by the clearest and fairest implication, authority to contribute to its support. Why otherwise should the city name these trustees? Were they not intended to supervise the expenditure of the appropriation from the city? *Curtis' Adm'rs vs. Whipple*, 24 *Wis.*, 350, 353.

Edward Otis Hinkley, for the Maryland Industrial School for Girls.

The appropriations by the City of Baltimore to this appellant are lawfully made, because by virtue of the Act of Assembly of 1870, ch. 391, it became a proper part of the government of the city itself, five directors on the part of the city, ten on the part of the State, and fifteen on the part of the members constituting the management.

Section 7 of Article 11 of the State Constitution, prohibits the City of Baltimore from *lending its credit* to corporations, &c., but it does not prevent appropriations to such as perform uses properly of a public nature, whether individuals or corporations.

There are two *criteria* of the appropriations, first, and principally, *the uses*, whether public in their nature, and such as concern the whole city and all its inhabitants; and secondly, the character of the *agency*, which the city may choose for the execution thereof. If *the uses* be purely public and the agency properly controllable--no danger can arise to the body politic--the appropriation is *infra vires*.

The real protection which the city has as to the proper disposition of its appropriation to this appellant, is the presence and control of the directors on the part of both city and State, whose duty is to protect the people and report, and by proper proceedings prevent abuse, misuse or diversion of funds or powers. Here the *uses* are purely public, and the organization is *controlled* by directors on the part of the city and State. The very fact of the enactment of a law by the State for the appointment of directors by city and State, creates the body an agency of a governmental nature. This agency then is to the extent of the directorship under the appointment of the government, distinctly and unequivocally a public agency--the directors are public agents--public officers. The only question then that can arise, is whether the addition of an equal number of directors elected by the members, vitiates in any manner. The answer is found in the Act of the Legislature itself. An examination of it shows that it does not in the case of this appellant.

Michael A. Mullin, for the St. Vincent's Infant Asylum of the City of Baltimore.

*4 The object of both appropriation and tax, in respect of this appellant is to feed, clothe and educate the helpless orphan children of the community, including the unfortunate class known as "foundlings." This is an object universally recognized as a charity, and one for which taxes have with the common approval of mankind, customarily and by long usage been levied. "All charities are in some sense public." *Fox vs. Phila.*, 64 *Pa. St. R.*, 182. "Taxes may be levied and collected for charitable purposes." *Curtis vs. Whipple*, 24 *Wis.*, 355; *Booth vs. Town of Woodberry*, 32 *Conn.*, 128.

Such a tax would be legal whether from a duty in the community to provide for those who cannot provide for themselves, or because, although not for the support of government, it would be one imposed with a political view for the good government and benefit of the community, (*Waters vs. The State*, 1 *Gill*, 302,) inasmuch as it would tend to a decrease of pauperism and crime, (particularly infanticide,) and to an increase in the probity and intelligence of those who must hereafter be a portion of the citizens of the State.

If a public object is to be accomplished, and it can be effected best and with least expense by the agency of an individual or a private corporation, what principle of right or dictate of policy forbids the public not to avail itself of such agency. *Sharpless vs. Philadelphia,* 21 *Penn.*, 169, &c.

"It is the thing done or sought to be accomplished which must determine the question of the power of the Mayor and City Council to pass the ordinance." *Gill vs. Mayor, &c.*, 31 *Md.*, 387. "The legality of laying a tax * * * * depends on the *object,* the *motive* of the corporation." *Mayor, &c., vs. Hughes,* 1 *G. & J.*, 480.

The legislative and judicial history of Maryland has settled, so far as this State is concerned, that private corporations may be used to accomplish public objects. For works of public improvement, the Baltimore and Ohio Railroad, the Chesapeake and Ohio Canal Company and other private corporations, have been used as the agencies of the State; for the purposes of education, St. John's and Washington Colleges and various private schools and academies; and for the purposes of charity, many private asylums and institutions, some of which are defendants in this action, have been the means through which the State has been accustomed to reach the objects proposed. Through all these agencies large sums of money raised by taxation have from the origin of the government customarily been expended, and although the rights and powers of such corporations have been repeatedly investigated by the Courts with the aid of the most learned counsel in the State, a doubt as to the power of the State to expend money through these agencies has never been suggested. That such powers should have been exercised without being questioned for such a long period of time ought to be deemed almost conclusive evidence of their being possessed by the Legislature. *State vs. Mayhew,* 2 *Gill,* 497; *Burgess vs. Pue,* 2 *Gill,* 19; *Mayor, &c., vs. State,* 15 *Md.*, 461.

*5 By Art. 4, sec. 31, of the Code of Public Local Laws, the Mayor and City Council of Baltimore "may erect or establish houses of correction, hospitals or pest houses." What is an hospital? "Hospital--a house for the reception of insane persons, * * * *foundlings,* &c., who are supported by public or private charity. A building appropriated for the reception of sick, infirm and helpless paupers."

The City may thus establish hospitals (note the plural) to an indefinite number, and the term "hospitals" covers institutions similar to St. Vincent's Infant Asylum. The City having thus the power of erecting a similar institution, the question remains whether if she be unable or unwilling to do so, she may avail herself of the assistance of this corporation to effect the same object.

The City Charter, sec. 33, enacts: "The Mayor and City Council shall have power to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the City of Baltimore." In *Harrison vs. Mayor and City Council of Baltimore,* 1 *Gill,* 264, 276, the Court of Appeals held that the power to pass all laws and ordinances necessary to preserve the health of the City, clothed the Mayor, &c., of Baltimore "with all the legislative powers which the General Assembly could have exerted. To their sound discretion was committed the selection of the means and manner (contributory to the end) of exercising the powers, which they might deem requisite to the accomplishment of the objects of which they were made the guardians."

It is impossible to conceive any essential difference between the power "to pass all laws and ordinances necessary" cited in that case, and the power in sec. 33, "to pass all ordinances necessary." If there be no essential difference between the powers so conferred, it follows that sec. 33, clothes the Mayor and City Council with all the legislative power the General Assembly could itself exert to carry into effect the corporate powers of said City, among which is the power to erect and establish hospitals, (sec. 31.) And if the General Assembly could, as asserted by Judge BLACK, in *Sharpless vs. Philadelphia,* above cited, and as the Court below practically

concedes, avail itself of the agency of a private corporation to effect a public object, it logically follows that the Mayor and City Council would do likewise. The selection of the means and manner (contributory to the end) being committed to their sound discretion, if they were unable or unwilling to erect and establish an hospital for the foundlings for whom it was their power and duty to provide, they were at liberty to avail themselves of this institution to effect their object. If the means employed *may* accomplish the object or contribute in any degree to its accomplishment, the Court should not interfere. *Mayor, &c. vs. Chase,* 2 *G. & J.,* 376.

John M. Carter, for the Maryland Institute for the Promotion of the Mechanic Arts.

*6 This appellant is a well recognized adjunct to the public school system of the State, and as such, constitutes one of the means of education, for the expense of which, the Mayor and City Council are authorized to levy and collect taxes under the Act of Assembly of 1872, ch. 377, subch. 16, sec. 4. The 43rd Article of the Bill of Rights, directs the Legislature to encourage the extension of a judicious system of general education and the promotion of the arts and sciences.

The 8th Article of the Constitution makes it mandatory upon the Legislature to pass laws for the establishment of a thorough and efficient system of free public schools, and for their maintenance by taxation.

The Act of Assembly of 1872, ch. 377, delegates this power to the Mayor and City Council so far as the City of Baltimore is concerned, and especially authorizes the levy and collection of "such amount of taxes as may be necessary to defray all expenses incurred for educational purposes by the Mayor and City Council."

Thus, to the municipal corporation, is delegated the power to legislate upon the subject of an educational system for the City, and where such power is delegated, every intendment and presumption ought to be made in favor of its acts in the premises. *Mayor, &c. of Baltimore vs. Clunet,* 23 *Md.,* 467.

The language of the 4th section of the Act of 1872, ch. 377, is broad and comprehensive. The City is authorized to levy and collect taxes to defray *all* expenses incurred for educational purposes by the Mayor and City Council.

Certainly then it is legitimate for the Mayor and City Council to levy and collect taxes for expenses incurred in this behalf by themselves directly, if they can do so for expenses incurred by the Commissioners. Some of the respondents below provide for the education of different classes of pupils than those who attend upon the schools organized and controlled by the School Commissioners, as for instance, the Institutions for the Blind and Deaf and Dumb. In the case of this appellant the course of instruction is different, and young mechanics, who have no opportunity of attending upon the daily sessions of the public schools, and where, even if they could, the course of instruction is not provided for them, are taught the theoretical branches of all those trades in which a knowledge of drawing and designing is essential. Hence the City avails itself of these agencies outside of the regular schools, to provide for the instruction of *different classes and in different branches of education.* And the wisdom of such a course is apparent. Instead of establishing at great expense schools for these specific purposes, the City avails itself of agencies already established by private enterprise.

The appellant is, in the conduct of its affairs, under the supervision of the State and City authorities, and is, therefore, such a public and municipal agency as entitles it to the public aid. By the Act of 1868, ch. 198, sec. 9, the Institute is required to report annually to the State Treasurer--just such an Act as the authorities agree, constitutes a recognition of the public agency or character of the corporation. If the State exercises the slightest act of supervision over a corporation, it makes its agency public. *Curtis' Adm'r vs. Whipple, et al.,* 24 *Wisconsin,* 355.

*7 The City actually owns and holds the title

to the property used by the Institute. The building was built in part with the City's money, under the immediate supervision of the City's officers. The ground floor is used and occupied by the City as a market house; and the City reserves the right to use the whole whenever desired.

The entire building is open to the public at all times, subject only to such restrictions as the board of directors may prescribe, and the Institute's *use* of the building is at best a qualified one. *Ordinance of the City of Baltimore, No.* 43, *approved June* 6*th,* 1850.

S. Teackle Wallis and *Fred. W. Brune,* for the appellees.

Assuming for the purposes of the argument in its principal aspect, that the General Assembly could have endowed the municipal authorities of Baltimore with ample power to make the appropriations in controversy, if it had seen fit to do so, the question is whether it has done so in fact.

Has the State authorized the City to burden the taxpayers with a levy for the purpose of supporting or encouraging the institutions whose claims are here set up?

The solicitors for the appellees will assume the law to be well established, that municipal corporations have no inherent right of legislation, and can exercise no powers which are not, in express terms or by fair implication, conferred upon them. These powers must be construed as confined in their exercise to the territorial limits of the municipality, and are not to be extended beyond the proper province of local self-government. Where they are not granted by express language, or fair or necessary implication, they must be either incident to the powers expressly granted, or essential--not simply convenient, but indispensable--to the objects and purposes of the corporation. When the power in dispute is that of taxation, it must especially be held not to exist, unless plainly and unmistakably conferred, and it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor can it be deduced from any consideration of convenience or advantage. The rule accepted by all the authorities is, that all powers to tax must be construed with strictness. *Minturn vs. Larue,* 23 *Howard,* 435, 6; *Thompson vs. Lee County,* 3 *Wallace,* 327, 330; *Thomas vs Richmond,* 12 *Wallace,* 349; *Booth vs. Woodberry,* 32 *Conn,* 124; *Spaulding vs. Lowell,* 23 *Pick.,* 71, 74; 2 *Dillon's Circuit Court Cases,* 354, 359, 360; *Cooley's Constit. Limit., (Ed.* 1874,) 211 *to* 213; *Sedgwick on Stat. and Constit. Law, (2 Edit,)* 397; 1 *Dillon on Municip. Corp., (Ed.* 1873,) *sec* 55; 2 *Dillon on Municip. Corp., sec.* 605; *Cooley on Taxation,* 209, 210; *Mayor, &c. vs. Clunet,* 23 *Md.,* 467; *Frederick vs. Groshon,* 30 *Md.,* 437; *Gill vs. Mayor, &c.,* 31 *Md.,* 395; *Mayor of Cumberland vs. Magruder,* 34 *Md.,* 386.

The appellants all claim to be public agencies: the St. Mary's Industrial School as a reformatory institution for juvenile offenders; the St. Vincent's Orphan Asylum as a school and infant asylum, the Maryland Industrial School as the female House of Refuge of the State, and the Maryland Institute as an agency of public education.

*8 No doubt is suggested or entertained by any one as to their usefulness and excellence in their several departments, whatever those may be, nor as to the benevolent and praiseworthy purposes which they labor to promote. The question raised is, not whether they deserve support and praise, but whether the municipal government of Baltimore has the right to tax the people to support them. It is a question of power and nothing else.

The City Council, in the ordinance in question, have not undertaken to classify the appellants, as they describe themselves. The ordinance assumes to provide for them as "City Poor" and not otherwise. It does not profess to derive the power which it assumes for their benefit, from any other source than that of pauperism. It does not assert, in their behalf, the special powers which they invoke, nor does it act under them. It does not deal with them as houses of correction, hospitals or schools. Now, while it is very clear that if a municipal corporation assumes to exercise a

power, without stating the particular basis of such exercise, the Courts will refer the same to any basis of authority, sufficient to support it, which the corporation may possess; yet if the act is rested, in terms, by the corporation, upon a basis which will not support it, the act must be held void. This proposition is sustained by two express opinions of this Court, and is adopted by the elementary writers as clear law. *Mayor vs. Moore,* 6 *Harr. & Johns.,* 380-381; *Method. Church vs. Mayor, &c.,* 6 *Gill,* 399; 1 *Dillon Municip. Corpor., sec.* 252.

The appellants must, consequently, stand upon the powers which the city may lawfully exercise for the support and care of its poor, and upon those only.

Under the powers conferred by law upon the city corporation in respect to its poor, the city has no authority to make provision for that class, except in its Almshouse, or in some other place erected, established or provided by the city and governed by its ordinances, or under the care and charge of the Trustees of the Almshouse, and regulated by such by-laws as they may enact. (Art. 4, sec. 45, 2 Code, 158.) Inasmuch as neither of the appellants derives its existence from the Mayor and City Council, or has been "established" or ""provided" by it in any sense, or--what is absolutely indispensable under the statute--is governed by its ordinances or is under the care, charge or administration of the Trustees of the Almshouse, it would seem to follow, of necessity, that the corporation is entirely without power to appropriate money for their benefit, as is sought to be done by the ordinance under discussion. Indeed, it would be difficult for legislation to make it more apparent than it is on the face of the Code, that the whole system of pauper support and government in the City of Baltimore was intended to be administered by the city itself, in its own municipal establishments, regulated exclusively by its own officers and laws.

*9 But the claims of the St. Mary's school, as well as the St. Vincent's Asylum and the Maryland Institute are urged upon the further ground that they are schools. But are these appellants or is either of them, as a school, within the scope of municipal support? St. Mary's Industrial School, unlike the other two, is situated outside of the corporate limits of the city, several miles in Baltimore County, and its inmates if they are scholars, may come from the whole State. It is plainly, therefore, in no sense a city school. Is either of the other appellants?

Art. 8, sec. 1, of the Constitution, requires the General Assembly, at its first session, to establish by law a thorough and efficient system of free public schools through the State, and to provide by taxation for their maintenance. Under the Acts of 1868, ch. 407, and 1872, ch. 377, the Mayor and City Council have conferred upon them full power and authority to establish such a "system" in the city, and to regulate the same and levy taxes for its support. The Treasurer is likewise directed to pay to the city its portion of the school fund. The Mayor and City Council have accordingly exercised their powers and established their "system" and a very complete one, by ordinances, which will be found in the City Code, pp. 658 to 668, and Supplement to City Code, pp. 238 to 240. The appellants are not, any of them, embraced in this system or connected with it, or governed by the ordinances or officers controlling it. In the very ordinance now under consideration, in which the appellants are classified among the "City Poor," the "Public Schools" are otherwise specifically provided for, and a separate and distinct appropriation of more than half a million of dollars is made for their support. It is submitted, therefore, that none of the appellants are schools, such as the city has a right to maintain or pretends to maintain, and that being no part of the "system" which alone the city may create and must govern, they are no more entitled to its support, through taxation, than any other private institutions, under the charge of private individuals. The powers of the city, in that direction, are exercisable only in the organization of the "system" required by the Constitution, and independent schools, under private control but supported by taxation, are in direct and pointed antagonism to the whole policy of the Constitution and the statutes.

Jenkins vs. Andover, 103 *Mass.,* 94, 96, 101, 103; *Curtis vs. Whipple,* 24 *Wisconsin,* 353; *Loan Association vs. Topeka,* 20 *Wal.,* 669; *Merrick vs. Amherst,* 12 *Allen,* 502.

ALVEY, J., delivered the opinion of the Court.

The question of jurisdiction was rather suggested than seriously argued by the counsel for the appellants. Since the case of the *Mayor and City Council of Baltimore vs. Gill,* 31 *Md.,* 375, the question of jurisdiction in a case like the present must be considered as settled in this Court. Parties in the position of the appellees in this case may invoke the restraining powers of a Court of equity, and that Court will entertain jurisdiction of their suit against municipal corporations and their officers whenever the latter are shown to be acting *ultra vires,* or are assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such unathorized acts may affect injuriously the rights and property of the parties complaining. This is the principle settled by the case to which we have referred, and in addition to the authorities therein cited, we may refer to the cases of *Mercer County vs. Pittsburgh and Erie R. Co.,* 27 *Penn. St.,* 404; *Mott vs. The Pennsylvania R. Co.,* 30 *Penn. St.,* 90; *Page vs. Allen,* 58 *Penn. St.,* 338, and *Newmeyer vs. The Missouri and Miss. R. Co.,* 52 *Mo.,* 81, and also to 2 *Dillon Mun. Corp., sec.* 731, in all of which the same proposition is maintained.

*10 The question of jurisdiction being clear, we must consider the question of the appellees' right to relief on the facts as charged in their bill of complaint. That they are tax-payers of the city, and would be affected by the appropriations stayed by the injunction, are facts not controverted by the appellants.

The record before us contains four appeals,--all from the same decree. The first, that of the "St. Mary's Industrial School for Boys;" second, that of the "Maryland Industrial School for Girls;" third, that of the "St. Vincent's Infant Asylum of the City of Baltimore;" and fourth, that of the "Maryland Institute for the Promotion of the Mechanic Arts." These appellants were among a number of other institutions to which appropriations were made by the City Ordinance, approved on the 12th of June, 1875, making general appropriations for that year. The appropriations to the appellants were classed under the head of "City Poor," and were of specific sums of money, without reference to or mention of any relation or agency between the city and those institutions.

The bill of the appellees was filed upon the theory that the Mayor and City Council in the administration of the municipal government, can exercise only the defined and limited powers, and perform the duties, prescribed in the charter of the city, and therefore cannot sustain or aid institutions, however beneficial in themselves, which are not created for or required in the exercise of the powers and performance of duties prescribed by law. The bill charges that the appellants were organized for the administration of private charities, mostly under the influence and control of churches or religious denominations, and are in no sense public institutions; that they are organized by and composed of private citizens and managed by them, and are not under the control or supervision of the City or of the State, nor were any of them formed or incorporated to aid or facilitate the municipal government of the City in the performance of any of the duties imposed by its charter. It is therefore insisted by the appellees, that such institutions are not in any sense public, or at all events not municipal agencies, such as the City is bound or has the right to maintain, assist, or promote by the exercise of the taxing power. The prayer of the bill is, that the appropriations in question may be declared inoperative and void, and that an injunction be issued to restrain the payment of the appropriations to the institutions to which they were made.

The appellants, in their several answers, controvert the positions of the appellees taken in their bill, and insist that they are now, and have been since their organization, performing

functions that properly pertain to the municipal government of the City. That they are charitable and benevolent institutions; the three first named appellants having been organized for the purpose of, and are devoted to, fostering, reforming and educating the pauper children of the City, and thus relieving the City of an expense that would otherwise be entailed upon it; while for the Maryland Institute for the Promotion of the Mechanic Arts it is claimed that it is an important adjunct to the Public School System of the City, and hence should receive aid from the City government. They all deny that they are private corporations, managed for private purposes; but claim, on the contrary, that they are public corporations, managed for public purposes, and are in fact municipal agencies, and therefore entitled to the appropriations made to them as of right.

*11 These institutions are all of the most benevolent and charitable character, and well deserve the patronage and support of all good citizens; but the question here is as to the authority on the part of the municipal government to make appropriations for their support, by the exercise of the taxing power.

Whether these institutions are strictly private, or *quasi* public corporations, it is unimportant here to inquire; it is enough to know that they do not owe their creation to the municipal power conferred on the City of Baltimore, and were not created for the City by the Legislature of the State, as instruments of municipal administration. They are separate and distinct corporations, composed of private individuals, and managed and controlled by officers and agents of their own, and over which the City has no supervision or control, and for the management of which there is no accountability to the City whatever. No ordinance or resolution of the City Council can control the powers and discretion vested in the managing boards of these institutions, nor have the Mayor and City Council the power to determine who shall or who shall not receive the benefits of the charities dispensed by them.

In the case of the St. Mary's Industrial School for Boys, the fact that the Governor of the State and the Mayor of the City of Baltimore each appoint every two years, three persons to represent the State and City in the board of trustees of that institution, under the amendment of its charter, by the Act of 1874, ch. 288, in no manner changes the nature of the institution, nor makes it a municipal agency. And the same may be said in regard to the amendment to the charter of the Maryland Industrial School for Girls, made by the Act of 1870, ch. 391. The fact that the Governor of the State is empowered to appoint ten, and the Mayor of the City five, of the directors of the institution, the board being composed of thirty, does not put the State nor the City in such relation to the corporation as to make it either a public, State or municipal institution. The object, manifestly, in providing such representation in those institutions, on the part of the State and City, was for the purpose of removing an objection to them, made by some portions of the community, that they were close corporations; that there were no means provided to give assurance to the public that the inmates of the institutions were properly treated; and insamuch as those institutions themselves applied for and obtained from the Legislature compulsory powers and control over the inmates, it was deemed proper that the State and the City should appoint the number of trustees and directors named. Such trustees and directors, however, do not control the institutions; nor are they clothed with any State or municipal authority, beyond their mere appointment, to be exercised in the management of the affairs of the institutions, and cannot, therefore, be directed, controlled, limited or restrained, in the exercise of the powers and duties as prescribed in the charters and by-laws of the corporations in whose proceedings they participate. They simply exercise, in common with the other trustees or directors, the special authority conferred by the Acts of incorporation, and nothing more. *Nelson vs. Cushing*, 2 *Cush. Rep.*, 529. So far, therefore, as the City is concerned, these corporations are entirely separate from and independent of it, in all corporate action and control. And as to the Maryland Institute for the Promotion of the Mechanic Arts, the

mere fact that the City may own the ground upon which the building is erected, or that the City, in its deed to the institution, has reserved certain privileges in the use of the Hall, as part of the consideration for the grant, cannot constitute that corporation a municipal agency. It is, like the other corporations just mentioned, without municipal relation, and is under no obligation to the City to discharge any mere municipal function for which it can legally claim compensation.

*12 Such, then, being the nature of these institutions and their relation to the municipal government of the City of Baltimore, the question is, upon what principle can the appropriations made to them be legally supported?

It is contended by the appellants, and with considerable force of argument, that though they are not under the control and supervision of the City, yet they have been performing functions and duties that rightfully pertain and belong to the City government, and have, to that extent, relieved the City from the duty and the expense of providing and maintaining agencies for the performance of those functions under its immediate control; that it was the duty of the municipal authorities to establish and maintain institutions of like character to those of the appellants, and inasmuch as no such institutions have been established by the City, it is competent for it to exercise the taxing power and apply the funds thus raised to enable or assist others to do what the City has been authorized but failed to do. And in support of this view of the subject, we are referred to Code, Local Laws, Art. 4, secs. 31, 32, 33, and 827, under title "City of Baltimore."

By sec. 31, just referred to, the Mayor and City Council are authorized to "erect or establish houses of correction, hospitals, or pest houses within or without the City, if necessary, and pass all ordinances *for the government of the same.*" By secs. 32 and 33, the Mayor and City Council are authorized to pass ordinances "for promoting the great interests and insuring the good government of the City," and also "all ordinances necessary to give effect and operation to all the powers vested in the Corporation of the City of Baltimore." And by section 827, as modified by Act of 1872, ch. 377, sub- ch. 16, secs. 1 and 4, the Mayor and City Council are authorized "to establish in the City a system of free public schools, under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe;" and are also authorized to levy and collect such amount of taxes as may be necessary to defray all the expenses of the system.

Before proceeding to determine what application these or any other provisions of the Code have to the subject under consideration, it will be proper to state some general rules as to the construction of municipal powers. And first and principally, we must bear in mind that all such powers are delegated, and depend upon legislative charter or grant; and that the corporate authorities can exercise no power which is not, in express terms, or by fair and reasonable implication, conferred upon the corporation. In construing a grant of municipal powers, in the case of *Minturn vs. Larue,* 23 *How.,* 435, the Supreme Court of the United States but announced a well established rule when it said, "It is a well settled rule of construction of grants by the Legislature to corporations, whether *public* or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities." This same rule of construction is stated by Judge COOLEY, (*Const. Lim.,* 211, 213,) and by Judge DILLON, (*Mun. Corp., sec.* 55,) as settled, and it is supported by a large number of decided cases, to which may be added cases decided by this Court. *Mayor & City Council vs. Clunet,* 23 *Md.,* 437; *Gill vs. Mayor & City Council,* 31 *Md.,* 395. And in respect to the power of taxation, Judge DILLON has summed up the result of the

authorities in a very clear and succinct form, (2 *Dillon Mun. Corp., sec.* 605,) which we cannot do better than give in his own words. He says: "It is a principle universally declared and admitted, that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the *power be plainly and unmistakably conferred.* It has, indeed, often been said that it must be specifically granted *in terms*; but all Courts agree that the authority must be given either in express words, or by necessary implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience or advantage. It is important to bear in mind that the authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and as its exercise may result in a divestiture and transfer of property, it must be clearly given and strictly pursued." This is according to the authorities, and is a most just and salutary rule of restriction against arbitrary and unauthorized taxation.

*13 Seeing, then, that there must be authority either plainly expressed in terms or necessarily implied for making the appropriations in question, we fail to perceive how that authority can be deduced from the sections of the Code to which we have been referred. The power to erect or establish houses of correction or hospitals exists, it is true, but those institutions, when erected or established, are required to be governed by the City. They must not only derive their existence from the authority of the City, but they are made municipal institutions, and become agencies in the administration of municipal power. Nor is there anything in sections 32 or 33 bearing upon this subject. They simply declare the authority of the City to pass ordinances for general regulation, and to carry into effect and operation the powers conferred upon the City government. And as to the power supposed to be conferred by the Act of 1872, ch. 377, that has reference alone to the free public school system of the City, established, regulated and governed by the Mayor and City Council, and does not at all contemplate support to institutions like the appellants. It is claimed for the Maryland Institute for the Promotion of the Mechanic Arts that it is a school of an important character, and is of great interest and value to the mechanics and others of the City; that it has accumulated a large circulating library, and has established and successfully maintained large and flourishing schools in the various branches of designing, book-keeping, writing, music and chemistry, all of which have been availed of by the youth of the City, and that the Institute is in truth an important adjunct of the school system established for the City. All this is doubtless true, and while the establishment of such an institution reflects great credit upon, and has justly become an object of interest and pride to, its founders and supporters, and indeed to the City, the difficulty here is, that it has not been legally embraced in the public school system, and made subject to the ordinances, rules and regulations that the Mayor and City Council may have adopted in pursuance of the Act of 1872, ch. 377. Until this difficulty be removed, the legality of the appropriation cannot be supported under the Act of 1872.

We have carefully examined all the statutes to which we have been referred, and all others in any manner relating to the subjects under consideration, and we have utterly failed to discover any express power, or any by fair implication, by which the appropriations to the appellants, in the manner in which they have been made, can be sustained. They are made without terms or conditions. The institutions could receive the money thus appropriated, and the day after, in the exercise of the powers completely in their control, discharge every inmate received from the City. We speak not of what would likely be done, but of the power to do. The City Council in making these appropriations entirely abdicate all discretion over the subject of their application. They become, therefore, mere donations. Who shall or who shall not be the objects of the charity, the City retains no power to determine. Whether the inmates really belong to the pauper class,--whether they be really objects of municipal care and protection,--are questions that the City

authorities do not determine, and have no means of determining. It is all left to the discretion of those who manage the institutions, and they, as we have shown, are not municipal agents, nor subject to any control or accountability as to the use and application of the money. It is certain, we suppose, that the City Council could have no power to make appropriations to these institutions simply as such, nor because merely of the very humane and laudable objects and purposes for which they were created by their founders and promoters; it is only because of the actual services and benefits rendered the City that any claim could be urged for their support from the City treasury. And if this be so, what guarantee has the City that services or benefits will accrue, commensurate with the appropriations that are made? The same principle that would sustain these appropriations, would equally sustain appropriations to every private school and private charity in the City. And once concede the power to make them, and it will be in vain to invoke the Courts to exercise a discretion as to any limit in the amount or extent of them.

*14 That the city has ample power delegated to it, and that it is a duty, to provide for the foundlings, the insane, the indigent infirm and helpless, and for the correction of the vicious and vagrant portions of its population, is beyond all question; but whatever provision may be made must be under the control and subject to the supervision of municipal authority. The authority that is held and exercised in this behalf is a trust, as well for those who become the objects of it, as those who support it by contribution in the form of taxes levied upon their property; and being an important public trust, it cannot be delegated beyond the power and discretion of those to whom it is confided. We do not design, however, to be understood as intimating that it would not be competent for the Mayor and City Council to contract for the care, maintenance and training of those subject to its power, or who have claims upon its charity, of the class of those cared for, maintained and trained, in the St. Mary's Industrial School for Boys, the Maryland Industrial School for Girls, and the St. Vincent's Infant Asylum of Baltimore. If the city has not provided for such persons, or if they can be better taken care of and trained in those, or such institutions, than in the institutions of the city, we can perceive no good reason why the city may not arrange and contract for such care and training. Such contracts appear to have been made in the cases of the "Maryland Lying-in-Asylum," and the "Eye and Ear Institutes;" and we think the power to make such contracts may well be conceded to exist. Its exercise, however, to be valid, must be with the limitation, that the subject-matter of the contract be kept within the power and control of municipal authority, and that complete accountability be provided for; and thus make the institutions contracted with, *pro hac vice,* municipal agencies.

The fact that the institutions may be under denominational or religious control, can in no manner affect their qualification for assuming such relation to the city, or for the full and faithful discharge of the duties that they may contract to perform. Charity, to say the least of the matter, is quite as likely to be fully and faithfully administered under such auspices as it could be under any other. It could, therefore, be no objection that the institutions are or may be under the control and influence of those belonging to any particular church or denomination.

Finding no warrant or authority to justify the appropriations to the appellants, we have no alternative but to declare them void, and must, therefore, affirm the decree as to those appropriations. We shall do so, however, without costs to the appellees.

Decree affirmed.

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Court of Appeals of Maryland.

THE REGENTS OF THE UNIVERSITY OF MARYLAND
v.
JOSEPH B. WILLIAMS.

June Term, 1838.

*1 A corporation may be *private,* and yet the act, or charter of incorporation, contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state.

If the acts of 1807, ch. 53, and 1812, ch. 159, by conferring authority to grant diplomas, may be regarded as repealing so much of the act of 1798, ch. 105, as provides for the payment of $10 for a license to practise, and imposes a fine for practising without license, and are therefore in violation of the rights conferred by the latter act; they are not for that reason wholly unconstitutional and void, but only so far as the authority to grant diplomas extends.

But the right to grant license to practise, for a fee, and to a portion of the penalty for practising without license, given to the Medical and Chirurgical Faculty, by the act of 1798, ch. 105, is not such an inviolable vested right, as to be beyond the reach of the legislature.

The act of 1798, in that respect, is penal and sanatory, looking to the health, and lives of the citizen, and as such might be revoked at the pleasure of the legislature.

The power in question is a political one, and in granting it to the corporation, the good of the public was the object contemplated, not the regulation, or promotion of private interests.

A corporation aggregate, is an artificial intellectual being, composed generally of persons in their natural capacity, but it may also be composed of persons in their political capacity, of members of other corporations.

The corporation of "The Regents of the College of Medicine of Maryland," created by the act of 1807, ch. 53, is not destroyed or merged in the corporation of "The Regents of the University of Maryland," created by the act of 1812, ch. 159, independently of the constitution of the United States, or of the bill of rights, and constitution of this state.

They exist as distinct and independent corporations, in possession of all the rights and franchises conferred upon them

respectively, by the acts of their incorporation; those rights and franchises, being entirely compatible, and the powers and authority of the one, not inconsistent with, or opposed to the powers and authority of the other.

The corporation of "The Regents of the University" is a private, and not a public corporation.

It was not created for political purposes, nor invested with political powers.

If a corporation be eleemosynary, and private at first, no subsequent endowment of it by the state can change its character.

It is not sufficient to render a corporation public, that its ends are public.

Whether a corporation be public or private, depends upon the nature of the franchises granted, and not the expected beneficial results to the community, from the possession and exercise of those franchises.

Public corporations are to be governed according to the laws of the land, and the government has the sole right as trustee, to inspect, regulate, and control them, whilst the same right, in reference to private corporations, appertains to the visitors alone, under the visitatorial power incident to such corporations.

*2 Colleges and academies, established for the promotion of piety and learning, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c. considered as private eleemosynary corporations. A charter, or act of incorporation, when accepted, is a contract, protected by that clause of the constitution of the United States, which declares, that "no state shall pass any law impairing the obligation of contracts."

The act, therefore, incorporating "The Regents of the University," having been accepted, constituted a contract, protected by the constitution of the United States, and the act of 1825, ch. 190, impairing the obligation of that contract, is repugnant to that instrument, and consequently void.

And independently of the constitution of the United States, and of this state, that act is void as opposed to the fundamental principles of right and justice, inherent in the nature and spirit of the social compact.

The legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property; not that a corporation is clothed with any peculiar sanctity, but because its property and franchises *are private property*, and under the safe-guard of the same principle, that protects the property and rights of individuals.

The act of 1825, professes to discontinue and abolish the corporation of the Regents of the University, and to appoint a board of trustees composed of different persons, and to transfer to them all the franchises and property of the corporation intended to be abolished. In this respect, if effectual, it would amount to a legislative ouster; a legislative judgment of dissolution, and as such in opposition to the 6th article of the bill of rights, which declares, "that the legislative, executive, and judicial powers of the government, ought to be forever separate and distinct from each other,"--and also to the 21st article of the same instrument, declaring "that no freeman ought to be taken, or imprisoned, or disseized of his freehold, &c. but by the judgment of his peers, or by the law of the land."

An act which only affects, or exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, is rather a sentence than a law.

It may be questioned whether an unconstitutional act of the legislature can be made constitutional and valid, by a subsequent acquiescence in it.

It is not necessary to the constitutionality of an act for altering a charter, to the passing of which, previous assent has not been given,

that it should by its *terms,* be made to depend upon subsequent assent.

The passing of it, with nothing more, amounts to an offer only for acceptance, and if afterwards accepted, either expressly, or by acting under it, it then receives life, and becomes an operative law.

*3 But the acts, from which the assent of an existing corporation, to an alteration of its charter, may, and can alone be inferred, must be corporate acts, or acts of its authorized agents, or officers. The acts, or declarations of particular members, do not bind the corporation.

Nor can the assent of a corporation to an act, altering, or destroying its charter, be inferred from the fact, that individual members, accepted, and held offices under the new corporation, which it was the object of the act to create.

Neither non-user or mis-user, of corporate franchises, has ever been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared.

An inference of assent by a corporation to an act of assembly after it has been passed, can no more be drawn from a subsequent non-user, or misuser of its franchises, than an inference of consent to its being passed, can be drawn from a previous non-user or mis-user.

Nor can the non-user by a corporation of its franchises, be considered as equivalent to a surrender of them--that can only be done by deed to the state.

Neither are courts warranted in presuming a surrender of the corporate rights, and a dissolution of the corporation, from a mere intentional abandonment of the franchises, unless there be something in the act of incorporation to justify it.

If either of the faculties of a corporation consisting of integral parts, is lost, and not restored at the time of bringing a suit by such corporation, the action cannot be maintained.

But the acceptance of office by the members of one of the faculties of an old, under a new corporation, does not in law amount to a resignation of their offices under the former, nor to a dissolution, or suspension of its franchises.

An office in a corporation may be resigned in two ways; by an express agreement between the officer and the corporation, or by an agreement implied from his being elected to another office *in the same corporation,* incompatible with it--and such resignation is not complete until the corporation shall have manifested its acceptance of the offer to resign, either by an entry in its books, or electing another person to fill the place, treating it as vacant.

When the fact of incorporation is shown by the plaintiff, the burden of showing a dissolution is thrown upon the defendant.

A corporation cannot be considered as being composed of distinct, definite, integral parts, unless the number of the members of each class is definite, and a majority of the members of each, is necessary to constitute a corporate meeting or assembly. No advantage can be taken of any non-user or mis-user on the part of a corporation, by any defendant, in any collateral action.

There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter. The one by *scire facias* when there is a *legally* existing body capable of acting, but who have abused their power; the other by information in nature of a *quo warranto,* which applies where there is a corporate body, *de facto* only, who take upon themselves to act, though from some defect in their constitution, or organization, they cannot legally exercise their powers. And the proceedings in both cases must be at the instance of the government, and in no other way.

*4 The defendant, the treasurer of the trustees of the University, was held liable to the corporation of the Regents, in an action for

money had and received, for any money to which, as Regents, they could shew themselves entitled, amounting to a sum within the jurisdiction of the court, remaining in the hands of the defendant at the time the suit was brought, and which was received by him, as such treasurer, at any time within the three antecedent years. The act of limitations relied on by the defendant, barring a recovery for previous receipts.

APPEAL from *Baltimore* county court.

THIS was an action of *assumpsit*, instituted by consent to December, 1837. The plaintiffs counted for money had and received to their use, and the defendant pleaded the general issue and limitations. On these pleas issues were joined.

It was agreed that either party shall be at liberty to have considered as offered in evidence in the case, any certified copies, by the proper keeper, of any original papers laid before the legislature, or any branch of it, relative to the University, from the year 1807 to the present time, to have the same effect and operation, and no other, as if said papers were actually produced at the trial, and open to all exceptions to which the same would be liable if so actually produced; and that the record or minute-book of the proceedings of the *Trustees of the University of Maryland*, offered in evidence by the defendant, and the record or minute-book of the Board of *Regents of the University of Maryland*, excepting the list of alleged donations at the end of the same, offered in evidence by the plaintiffs, or any part of either of said record books, may be read and used in the Court of Appeals on the trial of this case before said court, as if the same had been incorporated at large in the statement in the record of the evidence offered by the parties, and in like manner, that the diploma offered in evidence may be read from the original paper in the Court of Appeals. And it is further agreed, that all the evidence offered by either party shall be open to all exceptions in the Court of Appeals, in the same manner as if exceptions to the same had been taken to the same as offered. And it is also agreed, that any act of assembly, public or private, may be read from the statute book on said trial.

At the trial of the cause the plaintiffs, to prove the issue on their part, offered in evidence the act of the general assembly of Maryland, passed at November session of the year 1807, chapter 53, entitled, "An act for founding a College of Medicine in the city or precincts of *Baltimore*, for the instruction of students in the different branches of medicine," which, it was agreed, might be read from the printed statute book. And also offered in evidence, the petition upon which said act was passed.

And further, the plaintiffs offered in evidence, the act of the general assembly of Maryland, passed at November session of the year 1812, chapter 159, entitled, "An act for founding a University in the city or precincts of *Baltimore*, by the name of the University of Maryland;" and also offered in evidence the petition upon which the said act was passed. And also offered in evidence, the votes and proceedings of the house of delegates and senate of the general assembly of Maryland, of the sessions aforesaid, of the years 1807 and 1812, which, together with the last mentioned act of assembly, it was agreed might be read from the printed publication. And the plaintiffs further offered in evidence, the minute-book of the Regents of the University of Maryland, excepting, however, the entry or statement therein in relation to donations, which it was agreed should not be inserted in the record, but that the original book might be used at the hearing of this cause. And the plaintiffs, further to prove the issue on their part, read in evidence the first section of the act of said general assembly of Maryland, passed at November session, 1803, chapter 92, which it was agreed should be read from the printed statute book. And they further offered in evidence, that the said persons, claiming to be the corporation of "the Regents of the University of Maryland," entered upon and prosecuted the business and purposes of said corporation, and that lectures were delivered, and courses of instruction in medicine and law, and in the other faculties, were given regularly and constantly, by professors

appointed under the act aforesaid, creating the corporation aforesaid, of "the Regents of the University of Maryland," and that degrees from time to time, were conferred, as authorized by said act. And further offered in evidence, that the professors of the faculty of physic and the professors of law, of the said University, at an early period after the passage of the said last mentioned act, and before the year 1826, incurred at various times large personal responsibility, which is mentioned in the deeds given in evidence by the defendant, and which was discharged in the manner mentioned in said deeds by the trustees. And the plaintiffs further offered in evidence, that from time to time, after the corporation aforesaid went into operation under the act aforesaid, of the session of the year 1812, chapter 159, and before the year 1826, donations were made to the said corporation, for the uses and purposes thereof, of minerals and books, of the value of two thousand dollars. And the plaintiffs further offered in evidence, the act of the general assembly of Maryland, of December session, of the year 1821, chapter 88, entitled "An act relating to the University of Maryland," which, by agreement, may be read from the printed statute book. And also offered in evidence, that in pursuance of said act, the medical professors of the University of Maryland, entered into bonds for the interest, and paid the said interest from year to year, required of them by said act. And the plaintiffs further offered in evidence, that shortly after the passage of the act of the general assembly aforesaid, of December session of the year 1825, chapter 190, there was sent to the governor, as claiming to be president of the board of trustees, and to each of the persons then claiming to be trustees under the said act, a notification or protest, from a committee of the Regents of the University of Maryland, authorized and directed by said regents to give such notification.

*5 And the plaintiffs further read in evidence, the report of a joint committee of the house of delegates and senate of Maryland, at a session of the general assembly, of December session, 1825, and the documents accompanying the same.

And the plaintiffs further offered and read in evidence, the 5th of a series of resolutions, passed by the persons claiming to be the Trustees of the University of Maryland, on the 15th day of June, 1826, as the same are entered on the minute book of said trustees, offered in evidence by the defendant. "Resolved, that it shall be the duty of the treasurer, having given bond in the penalty of fifty thousand dollars, with such security as may hereafter be approved of by this board, to receive all the moneys and funds of the University, and to deposite the same in the Bank of Baltimore, in the name of 'the Trustees of the University of Maryland,' to keep exact accounts of all receipts and payments, but no payments shall be made except by checks of the treasurer, countersigned by one of the executive committee, and he shall report statements of the finances of the institution when thereto required by the executive committee, and at all regular meetings of the trustees." And also proved by *Samuel H. Bowly*, a bookkeeper in the Bank of Baltimore, that on the 1st December, 1837, there was a balance of cash in said bank, to the credit of the University of Maryland, of $2,360 11. That the ledger account of said University, which he kept as such book-keeper, is headed "The University of Maryland," and that the pass or bank book is headed, "Dr. The Bank of Baltimore in account with the Trustees of the University of Maryland," and that the first entry on the scratcher of money deposited under the said 5th resolution, which was on the 2d of August, 1826, is "Trustees of the University of Maryland." And the defendant proved by said *Bowly*, that he has no knowledge that the manner in which the ledger account is headed, as before stated, was known to the trustees of the University, or the treasurer.

And the plaintiffs further offered in evidence, from the minute books of the trustees of the University of Maryland, produced by the defendant, an account and report of the executive committee, dated May the 2d, 1836, from which it appeared, that there was a cash balance in the treasury on that day of $682 94.

The defendant thereupon offered in evidence, the act of assembly of December session, 1825, ch. 190, and the minutes of the proceedings of the trustees of the University of Maryland, appointed under said act, which (with all other acts of assembly offered in evidence by either party) is agreed may be read and referred to in the Court of Appeals, as if incorporated with the record of this cause. He likewise proved that the said minutes of proceedings were until the 11th day of April, 1836, made and entered by *Louis Eichelberger*, the secretary of said board of trustees, and that the letters of acceptance from the professors named in the resolution of the 12th July, 1826, except those produced by defendant, were destroyed by fire in the year 1834, and that the said *Louis Eichelberger* is since dead.

*6 He further offered in evidence, the letters of *Professor Pattison, Bishop Kemp*, and *Dr. Wyatt*, accepting professorships under the board of trustees.

The defendant then offered in evidence, the acts of assembly following, viz:

1798, ch. 105. 1826, ch. 261. 1827, ch. 68, 198. 1830, ch. 50. 1831, ch. 270.1832, ch. 315. 1833, ch. 62.

And the acts following, viz: 1807, ch. 111. 1809, ch. 96. 1813, ch. 125. 1816, ch. 78. 1817, ch. 154. 1819, ch. 105, 163. 1820, ch. 121. 1825, ch. 188. 1826, ch. 261. 1827, ch. 198.

The defendant further offered in evidence, that at the time the act of 1825 was passed, the board of Regents of the University of Maryland consisted of the persons and composed of the faculties, following, viz:

Provost--Rev. James Kemp.

Faculty of Physic--Alexander McDowell, John B. Davidge, Nathaniel Potter, Elisha De Butts, Samuel Baker, Granville Sharp Pattison, Richard W. Hall.

Faculty of Divinity--Rev. Dr. Wm. E. Wyatt, Rev. Wm. Nevins, Rev. J. D. Kurtz, Rev. Geo. Roberts, Rev. Dr. Williams, Rev. John Glendy, Rev. J. P. K. Henshaw.

Faculty of Law--David Hoffman, George Winchester, William Frick, Nathaniel Williams, Jonathan Meredith, Roger B. Taney, U. S. Heath.

Faculty of Arts and Sciences--Rev. John Allen, Edward C. Pinkney, Charles W. Hanson, Wm. Howard, John P. Kennedy, John D. Craig.

And that of the said persons authorized to compose the said faculties, the following named, viz: the Rev. Dr. Kemp was appointed, accepted and acted till the period of his death, as the Provost of the University of Maryland, under said act of 1825, ch. 190. That all the persons composing said faculty of physic as aforesaid, were re-appointed by the board of trustees of the University of Maryland, accepted and acted in fact, under said act of 1825, ch. 190, and are the persons mentioned by those names in the minutes of proceedings of the trustees aforesaid. That of the persons composing the faculty of divinity, the Rev. Dr. Wyatt and Rev. Dr. Williams were re-appointed by said board of trustees, accepted and acted under the act of 1825, ch. 190--and that of said faculty, the Rev. Dr. Roberts and the Rev. J. P. K. Henshaw, were by said act of 1825, ch. 190, appointed trustees of said University of Maryland, and acted in said capacity. That of the persons composing the faculty of law as aforesaid, David Hoffman, Esq. was re-appointed by said board of trustees, accepted and acted as professor of law under said act of 1825, ch. 190. And that Nathaniel Williams, William Frick, and Roger B. Taney, in said faculty named, were by said act of 1825, ch. 190, appointed members of said board of trustees of the University of Maryland, and acted as such. That of said faculty of arts and sciences, Messrs. Allen, Pinkney, Kennedy, Hanson, and Dr. Howard, were re-appointed by said board of trustees, professors, under said act of 1825, ch. 190, and acted as professors in pursuance of such appointment.

*7 The defendant then offered in evidence the following letters of nomination, to the trustees of the University of Maryland, to wit: a letter

from Professor N. Potter, of 3d October, 1826, nominating Dr. Wright for the chair of Surgery; a letter from Professor Samuel Baker, of the 7th July, 1827, nominating Dr. J. B. Davidge for the same chair; one from Professor Davidge, nominating Dr. Wright; one from Professor McDowell, nominating Dr. Dudley for the same post. And a letter from Professor Hall, of the 14th June, 1837, nominating several professors for chairs then vacant. And that after the organization of the board of trustees under said act of 1825, chap. 190, the professors and others, under the mandate of said trustees, annually signed and issued diplomas to graduates in said University. And that the board of Regents, the plaintiffs, at no time conferred degrees or discharged other duties incident to their office as Regents, from the period of the organization of the board of trustees under the act of 1825, chap. 190, until the 18th day of September, 1837.

The defendant further offered in evidence, a deed from John E. Howard to N. Potter and others, dated 15th May, 1815, conveying to the grantees a lot of ground in the western precincts of the city, reciting that the said grantees had borrowed for the use of the Regents of the University, the sum of $6,651, and conditioned that upon the payment of the same by the said Regents, the lot should be held for their use; and a deed from the executors of J. B. Davidge to the said trustees, for his interest in the University property, duly executed and recorded, dated 29th May, 1830. And the defendant also read to the jury a deed dated 14th of January, 1832, from Richard Hall and others, physicians, and on the 10th of July, 1823, professors of the faculty of medicine in the University of Maryland, to the trustees of the University of Maryland, conveying to the latter, for a valuable consideration, the lot of ground upon which the infirmary attached to the said University is erected. And a deed dated 14th January, 1834, from Nathaniel Potter and others, conveying to the said trustees, whom the deed recites to be the successors of the Regents under the act of 1825, ch. 190, the lot of ground conveyed as aforesaid by John E. Howard to them, by his deed of the 15th of May, 1815, together with the medical college and other buildings erected thereon. And the defendant also offered in evidence, a deed from the sheriff of Baltimore county, dated the 25th of May, 1832, conveying to the said trustees the interest of one of the professors of medicine in the University of Maryland, in the lot and infirmary, sold by the sheriff to satisfy a judgment against him.

The defendant then proved, that the full amount of the purchase money for the lot, upon which the infirmary is erected, has been paid by the said trustees, and that the judgments and premiums of insurance have, from time to time, as the same became due upon the property of the University, been paid by the said trustees. He further offered in evidence the accounts of the treasurer of the said board of trustees. The defendant further gave in evidence, the particular payments following, made at the several dates stated, and to the several professors receiving the same, and for the purposes stated opposite to each payment, comprising a period from 1826 to 1836; and proved, that under the provisions of the act of 1821, chap. 88, and since the organization of said board of trustees, under the act of 1825, chap. 190, the professors of the faculty of physic for the time being, gave and executed bond to the state of Maryland, according to the provisions of said act; and that since the resignation of said professors, herein before named, the bond given to the state has been executed by the professors of said faculty, newly appointed by said trustees.

*8 The defendant then read in evidence, the letters of resignation of the professors of the medical faculty, and of the professor of law, dated in 1836 and 1837; and proved that from the period of the organization of said board of trustees under said act of 1825, chap. 190, said trustees received, and have always since had, peaceable and exclusive possession of the buildings, grounds, and all other property and funds of said University.

The defendant also offered in evidence, two petitions of the medical faculty of the University of Maryland to the legislature, the first dated January 4th, 1834, praying to be

relieved from the payment of the interest on the sum of $30,000, loaned by the state to the University in the year 1821; the other dated the 30th of January, 1837, reiterating the above prayer; and also praying, that such modification might be made in the charter, as would admit the medical faculty to a limited participation with the trustees, in the government of their particular faculty.

The plaintiffs by their counsel object to the admissibility in evidence of the act of the general assembly of Maryland, passed at December session, 1825, chap. 190, entitled, &c. as offered in evidence by the defendant, because, that by the acts of 1807 and 1812, given in evidence by the plaintiff in this cause, the plaintiffs were at the institution of their suit, and still are entitled to all the rights and privileges conferred by said acts upon "the Regents of the University of Maryland," which said two acts are still in full force and effect, notwithstanding the said act of 1825, chapter 190, the same being unconstitutional and void. First, according to the provisions of the bill of rights, and constitution of the state of Maryland; and, secondly, according to the provisions of the constitution of the United States. But the court *pro forma,* admitted the evidence aforesaid. The plaintiffs excepted.

2D EXCEPTION.--And the plaintiffs further offered to prove, by *Richard Wilmot Hall,* that witness, and Dr. Pattison, and Dr. Baker, and Dr. De Butts, and Dr. McDowell, while professors of the medical faculty of the University of Maryland, and David Hoffman, while professor of the faculty of law, borrowed at sundry times large sums of money, for the purposes of construction of the buildings and the enclosure wall of said buildings of the University of Maryland, and for the purpose of procuring apparatus for the medical, and surgical, and chemical departments of the University, which sums were applied to said purposes; that the first amount of the sums raised as aforesaid, was borrowed from the City Bank of Baltimore, in the year 1813 or 1814, and was $7,000; the next sum was borrowed from the Mechanics Bank of Baltimore, in the year 1813, 1814, or 1815, and was about $2,000; that the next sum was borrowed from the Bank of Baltimore, in amount $3,000, about 1820, and before 1825; $2,000 about the year 1821; $7,000 or $8,000 about the year 1823; and that this last sum was mainly applied to the building of the infirmary belonging to said University; and that there was borrowed as aforesaid, from the Union Bank of Maryland, $5,000, about the year 1823 or 1824, and before the year 1825, which sum was applied to the repairs of the centre building of the University, and to the lateral building; that in the year 1825, the said professors of medicine and law contracted with workmen for the repairs of the centre building aforesaid, for stopping leaks of the roof; and in the spring of 1826, the said professors of medicine paid for said repairs about $480; and that there remains yet unpaid to said professors of the amount of their said advances, the sum of upwards of $14,000, principal and interest. The plaintiffs further offered to prove by the said Hall, that in the year 1813, Jeremiah Sullivan made a donation to the corporation of the Regents of the University of Maryland, an Encyclopedia; and that after the year 1813, and before the year 1825, John Spear Smith made a donation to said corporation of a valuable collection of minerals; and that between the same periods Robert Gilmor made a donation to said corporation of a collection of minerals; and that various other donations were made before the year 1825, to said corporation. But the defendant objected to the admissibility of said Hall's testimony, because of said Hall being one of the persons now, and at the institution of this suit claiming to be one of the Regents of the University of Maryland, and as such, one of the plaintiffs in this suit, and which facts were admitted by plaintiff's counsel at the time of offering said witness; which objection the court, *pro forma,* sustained, and rejected the said evidence. Whereupon the plaintiffs by their counsel excepted.

*9 3D EXCEPTION.--And the plaintiff further offered to prove, by Maxwell McDowell, that the professors of the medical faculty, and of the law faculty of the University of Maryland, before the year 1825, borrowed money to a large amount at different

times, upon their personal responsibility, for the purposes of the University, and to enable it to prosecute the objects of the University, as prescribed by the act aforesaid, incorporating the said University; and also, that there were made to the Regents of the University of Maryland, before the year 1825, various valuable donations for the benefit of said University, and in aid of its objects. But the defendant objected to the admission of said testimony, inasmuch, (as was admitted by the plaintiffs,) the said McDowell was a Regent of the University of Maryland at the time of the passage of the act of 1825, chap. 190, and at no time had resigned or been removed by the Regents, his situation as Regent. Whereupon the court, *pro forma,* rejected the evidence so as above in this exception offered. Whereupon the plaintiffs, by their counsel, excepted.

4TH EXCEPTION.--The plaintiffs then prayed the court to direct the jury, that notwithstanding the act of 1825, chap. 190, given in evidence, the plaintiffs are entitled to recover, if the jury shall believe the evidence given in the cause, and shall find that at any time within three years before the instituting of this suit, the defendant received moneys exceeding the amount of one hundred dollars, and not appropriated by him for any of the purposes of the University of Maryland, or in execution of any of the orders or resolutions of the persons or body, claiming under the act aforesaid, to be the trustees of the University of Maryland, and which shall have been claimed and received by the defendant, as treasurer of the said trustees.

2. That notwithstanding the act of 1825, chap. 190, the plaintiffs are entitled to recover, if the jury shall believe the evidence given in the cause, and shall find that at any time heretofore, the defendant received money exceeding the amount of $100, and not appropriated by him for any of the purposes of the University of Maryland, or in execution of any orders or resolutions of the persons or body claiming under the act aforesaid, to be the trustees of the University of Maryland, and which shall have been claimed and received by the defendant, as treasurer of the said trustees.

3. That, upon the evidence offered in this cause, if the jury find the same to be true, they are entitled to recover, because the act of the general assembly of Maryland, passed at the December session, in the year 1825, chap. 190, entitled, "An act supplementary to the act entitled an act for founding an University in the city or precincts of Baltimore, by the name of the University of Maryland," is unconstitutional, and therefore void.

Which said several prayers of the plaintiffs, and each of them, the court, *pro forma,* rejected, and refused to direct the jury as prayed. Whereupon the plaintiffs excepted.

*10 The verdict and judgment being for the defendant, the Regents appealed to this court.

At the argument of the cause in this court, before BUCHANAN, Chief Judge, and STEPHEN and SPENCE, Judges.

Under the agreement mentioned in the record, the proceedings of the board of Regents of the 17th of March, 1836, were read, appointing a committee to take the opinion of counsel in relation to the constitutionality of the act of 1825, ch. 190, with a resolution that, in case the said law should be considered unconstitutional by counsel, that an address should be presented to the governor, and to the trustees appointed to the government of the University by said law, asking them to defer acting thereunder, until the subject could be again brought before the legislature; and in case of their refusal, to adopt legal measures, to resist the execution of the law.

The counsel consulted by the committee, having given an opinion against the constitutionality of the law, they, in conformity with the resolution of the Regents, addressed a communication to the governor and trustees, on the 22d of May, 1836, (enclosing the opinion) asking them to suspend the execution of the law until the then next meeting of the legislature, when an application would be made for its repeal; and proposing, in case of refusal, that steps should be taken for a speedy judicial decision upon its constitutionality by the proper tribunal.

These documents were also read.

West Headnotes

Colleges and Universities ⇐ 7
81k7 Most Cited Cases

An action for money had and received was held to lie, by the corporation of the regents of the University of Maryland, against the treasurer of the trustees of the University, for the recovery of money received by him as treasurer, at any time within three antecedent years.

Colleges and Universities ⇐ 11
81k11 Most Cited Cases

The acceptance of office by the members of one of the faculties of an old, under a new, corporation, does not in law amount to a resignation of their offices under the former, nor to a dissolution or suspension of its franchises.

Constitutional Law ⇐ 39
92k39 Most Cited Cases

There are certain fundamental principles of right and justice inherent in the nature and spirit of the social compact, designed to protect the life, liberty, and property of the citizen from the unjust exercise of legislative power, which rise above and restrain the power and authority of the legislature.

Constitutional Law ⇐ 52
92k52 Most Cited Cases

An act which affects or exhausts itself on a particular person, or his rights and privileges, and has no relation to the community in general, is rather a judicial sentence than a law.

Constitutional Law ⇐ 125
92k125 Most Cited Cases

The Maryland act of 1812, incorporating the regents of the university, having been accepted, constituted a contract, protected by the constitution of the United States; and the act of 1825, c. 190, impairing the obligation of that contract, is repugnant to that instrument, and therefore void.

Constitutional Law ⇐ 125
92k125 Most Cited Cases

Act 1825, c. 190, purporting to abolish the corporation of "The Regents of the University," and to appoint a board of trustees different from those holding office under the act of incorporation, impairs the obligation of contracts.

Constitutional Law ⇐ 125
92k125 Most Cited Cases

The charter of a corporation created by the state, is a contract, and is in all particulars inviolable, unless in the charter itself, or in some general or special law to which it was taken subject, there is a power reserved to the legislature to alter or amend.

Constitutional Law ⇐ 129
92k129 Most Cited Cases

A charter of a university, when accepted, becomes a contract, within Const.U.S., prohibiting the impairment of the obligation of contracts.

Constitutional Law ⇐ 277(1)
92k277(1) Most Cited Cases

The property and franchises of an incorporated university are property which is entitled to the same protection under the constitution as the property of individuals.

Constitutional Law ⇐ 278.5(1)
92k278.5(1) Most Cited Cases

Act 1825, c. 190, purporting to abolish the corporation of the "Regents of the University," and to appoint a board of trustees different than those holding office under the act of incorporation, is repugnant to Bill of Rights, art. 2, prohibiting a disseisin of the freehold of a freeman but by the law of the land.

Corporations ⇐ 3

101k3 Most Cited Cases

Act Dec.1812, c. 159, founds "an university in the city precincts of Baltimore," and declares its faculties, with the provost, to be one corporation and body politic, with capacity to acquire, enjoy, and dispose of real and personal estate for the purposes and interests of the university, and empowers the faculty to appoint the instructors and professors, and to make their own rules of proceedings and fundamental regulations for the government and discipline of the university. Held, that the corporation created by the act is a private, and not a public, corporation.

Corporations ⇐ 3
101k3 Most Cited Cases

Public corporations are such only as are founded by the government for public purposes, where the whole interests belong to the government.

Corporations ⇐ 195
101k195 Most Cited Cases

A corporation cannot be considered as composed of distinct, definite, integral parts, unless the number of the members of each class is definite, and a majority of the members of each is necessary to constitute a corporate meeting or assembly.

Corporations ⇐ 292
101k292 Most Cited Cases

Acceptance by an officer of a corporation of a similar office in another corporation does not operate as a resignation of the office in the former, as a matter of law.

Corporations ⇐ 519(1)
101k519(1) Most Cited Cases

Where, in a suit by a corporation, its corporate existence is denied, and it has shown the fact of its incorporation, the burden of showing its dissolution is on defendant.

Corporations ⇐ 596
101k596 Most Cited Cases

The assent of a corporation to a forfeiture of its charter cannot be inferred from a mere nonuser of its franchises, where such nonuser was caused by the attempt of the legislature to forfeit the franchises.

Corporations ⇐ 607
101k607 Most Cited Cases

The sovereign which created a corporation may waive a right of forfeiture.

Corporations ⇐ 608
101k608 Most Cited Cases

Without authority, the legislature passed an act purporting to oust a corporation of its franchises, and created another, to which it transferred them, together with the property of the former. The first corporation protested against the act, but some of its members entered the service of the new corporation, and the old one thereafter ceased doing business. Held, that the old corporation had not assented to the forfeiture of its charter, not being bound by the acts of its members.

Corporations ⇐ 613(1)
101k613(1) Most Cited Cases

Proceedings to enforce the forfeiture of a corporation's charter can only be instituted by the state.

Quo Warranto ⇐ 19
319k19 Most Cited Cases

Proceedings to forfeit the charter of a legally organized corporation, because of its abuse of corporate power, must be instituted by scire facias; but where the cause of forfeiture is for a defect in the organization, the proceedings must be by information in the nature of quo warranto.
EVANS, MAYER, MARTIN, and MEREDITH, for the appellants, contended:

*11 1. That the corporation of the Regents of the University, is a private corporation. They cited on this point *Act* 1817, *ch.* 154, 210. 1807, *ch.* 153.1812, *ch.* 159. *Lightly vs. Clouston*, 1 *Taunt.* 112. *Dartmouth College vs. Woodward*, 4

Wheat. 518, 636, 671. *Ib.* 4 *Cond. Pet. S. C.* 539, 540, 557, 558. *Allen vs. McKeen,* 1 *Sumner,* 277, 296, 298, 299. 3 *Stor. Con. U. S.* 260. *Ang. and Ames,* 8, 21. *Act* 1812, *ch.* 159, *sec.* 9-19. 1803, *ch.* 92, *sec.* 1. 2 *Kent Com.* 300, 304, 305. *The People vs. Morris,* 13 *Wendell,* 337. *Rex vs. Cambridge, V. C.* 3 *Burr.* 1656. *Attorney General vs. Pearce,* 2 *Atk.* 87. *Stanley vs. Robinson,* 4 *Pet. C. C. R.* 544. *Case of St. Mary's Church,* 7 *Serg. and Raw.* 517. *Society, &c. vs. New Haven,* 8 *Wheat.* 464. 2 *Kent,* 275. 3 *B. Stat.* 213, *Hen.* 8. *Ib.* 794, *Hen.* 8. *Gilb. Law Evid.* 12, 13.

2. That the charter of such a corporation is a contract between the state and the corporators; and also, between the state, the corporators, and those persons who contributed to the endowment. *Dartmouth College vs. Woodward,* 4 *Pet. Con. S. C. R.* 553-4, 556, 579 *a* 583. *Ashby vs. White,* 2 *L. Ray.* 938. 14 *Law Lib.* 132. *The King vs. John Patterson,* 24 *Serg. and Low,* 1, 14. *Dartmouth College vs. Woodward,* 4 *Wheat.* 695, 629, 693, 689. *Jenk. Cent.* 270. *Plac.* 28. *Allen vs. McKeen,* 1 *Sum.* 300, 301. *Journal H. of D.* 1825, *p.* 152. *Mumma vs. the Potomac Co.* 8 *Peter,* 282. *Case of St. Mary's Church,* 7 *Serg. and Raw.* 530, 558, 559, 565. 1 *Trum. His. of Con.* 407. *Ang. and Ames,* 507, 510. *Slee vs. Bloom,* 19 *John.* 456. *Riddle vs. the County of Bedford,* 7 *Serg. and Raw.* 392.

3. That the act of 1825, ch. 190, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States. *Journal H. of D.* 1825, 152. 3 *Dall.* 388, 390. *Bill of Rights,* 21 *sec.* --*art.* 10 *sec. Con. U. S. Terrett, et al vs. Taylor, et al,* 9 *Cranch,* 43. *Fletcher vs. Peck,* 6 *Cranch,* 88. *State of New Jersey vs. Wilson,* 7 *Cranch,* 164. *The town of Pawlet vs. Clark,* 9 *Cranch,* 292. *Dartmouth College vs. Woodward,* 4 *Wheat.* 518. *Allen vs. McKeen,* 1 *Sumner,* 276. *Norris vs. Trustees of Abingdon Academy,* 7 *G. and J.* 7. *Adams vs. Storey,* 1 *Payne, C. C. R.* 107. 11 *Peters S. C. R.* 420. *Canal Company vs. Rail Road Company,* 4 *G. and J.* 108.

4. That the act of 1825, is unconstitutional and void. *Norris vs. Abingdon Academy,* 7 *G. and J.* 7. *The Canal Bridge Co. vs. Gordon,* 1 *Pick,* 304 . 2 *Kent,* 312. *Trustees of Vernon vs. Hills,* 6 *Cow.* 23. 1 *Hals.* 191. *Sutton vs. Johnstone,* 2 *Term Rep.* 513. *Canal Co. vs. Rail Road Co.* 4 *G. and J.* 107. *Allen vs. McKeen,* 1 *Sumner,* 276, 313. *Ehrenzeller vs. Union Land Co.* 1 *Rawl.* 181, 183. *Wellington, et al vs. Petitioners, &c.* 16 *Pick,* 96, 98, 99.3 *Sto. Com.* 262. *Ang. and Ames on Corp.* 504, 505. *Dartmouth College vs. Woodward,* 4 *Wheat.* 688. *Case of St. Mary's Church,* 7 *Serg. and Raw.* 559.

*12 5. That the individual members of the corporation of The Regents of the University of Maryland, have no individual interest in the corporate property of that institution, and are not individually liable for its corporate debts, and that Drs. Howard and McDowell are consequently competent witnesses in this cause. *The City Bank vs. Bateman,* 7 *Harr. and John.* 105. *Nor. Peake,* 219. 1 *Stark,* 126. *Weller vs. the Governor of the Foundling Hospital, Peake's Cases,* 153.

6. That assuming the act of 1825 to be unconstitutional, the appellant is entitled to recover in this action. *Acts of* 1798, *ch.* 105. 1807, *ch.* 153. 1812, *ch.* 159. 1816, *ch.* 78. *Wellington, et al vs. Petitioners,* 16 *Pick,* 96. *Dillingham, et al vs. Snow,* 5 *Mass.* 554. *Angel and Ames,* 514. *Hall vs. Marston,* 17 *Mass.* 575. *Chapman vs. Williams,* 7 *Harr. and J.* 157. Upon the forms of the prayers. *Graham and Parran vs. Harris, Parran & Co.* 5 *G. and J.* 493.

NELSON and R. JOHNSON, for the appellees, contended:

1. That the act of 1812, ch. 159, incorporating the Regents of the University of Maryland, cannot be regarded as a contract, the corporation thereby created, being a public corporation. *Mumma vs. the Potomac Co.* 8 *Peters,* 281.

2. That the act of 1825, ch. 148, is not repugnant to the constitution of Maryland or of the United States. *McCulloh vs. the State of Maryland,* 4 *Wheat.* 424, 428, 429. *Mumma vs. Potomac Co.* 8 *Pet.* 281. *Wellington, et al vs. Petitioners,* 16 *Pick,* 98. 1 *Kidd,* 67, 68. *The King vs. Larwood,* 1 *Lord Ray.* 29, 32. *Allen vs. McKeen,* 1 *Sum.* 303. *Rex vs. Hughes,* 5 *B. and Cres.* 886.

3. That assuming said law to be

unconstitutional, still the plaintiffs below were not entitled to recover in this suit, because of the acts of said Regent subsequent to the passage of said law. *Kent Com.* 308, 309. *The King vs. John Pasmore,* 3 *Term,* 199. *The King vs. Morris,* 4 *East,* 17. *The King vs. Morris and Stewart,* 3 *East,* 213. *The King vs. Miller,* 6 *T. R.* 279. *Smith vs. Smith,* 3 *Des.* 557, 576, 577, 578, 580. *King vs. Hughes,* 12 *Serg. and Low,* 399. 14 *Law Lib.* 133, 135. *Bank U. S. vs. Dandridge,* 12 *Wheat.* 70. *Union Bank vs. Ridgely,* 1 *H. and G.* 426. *The Canal Bridge vs. Gordon,* 1 *Pick,* 297. *Canal Co. vs. Rail Road Co.* 4 *G. and J.* 106, 107, 150, 151. *The King vs. Sir G. Chetwynd,* 14 *Serg. and Low,* 111. *The King vs. Wardroper,* 4 *Burr.* 2024. *Hampshire Co. vs. Franklin Co.* 16 *Mass.* 86 . *Riddle vs. Proprietors of Locks,* 7 *Mass.* 184. *Canal Bridge vs. Gordon,* 1 *Pick,* 297, 304, 308. *Wellington, et al vs. Petitioners,* 16 *Pick,* 97.

4. That there is no evidence in the record to show any assumpsit by the defendant to the plaintiffs, and that they therefore were not entitled to recover in this suit. *White vs. Bartlett,* 23 *Serg. and Low.* 312. *Nickolson vs. Knowles,* 5 *Mad.* 47. *Blackburn vs. Scholes,* 2 *Camp.* 344. *Dixon vs. Hammond,* 2 *Barn. and Ald.* 310. *Roberts vs. Ogilby,* 9 *Price,* 269. *Gasling vs. Birnie,* 7 *Bing.* 339. *Travis vs. Claiborne,* 5 *Munf.* 435.

*13 5. That the testimony proposed to be given in the trial below by Doctors Hall and McDowell, was properly rejected by the court.

6. Upon the questions of form and practice. *Agnew vs. the Bank of Gettysburg,* 2 *H. and G.* 478, 493. *Graham and Parran vs. Harris, et al,* 5 *G. and J.* 490. *Bosley vs. Chesapeake Ins. Co.* 3 *G. and J.* 450, 462. *Cole vs. Hebb,* 7 *G. and J.* 20, 26. *Duvall vs. Farmers Bank of Md. ib.* 60. *Davis vs. Leab,* 2 *G. and J.* 302. *Newson, adm. vs. Douglass,* 7 *Harr. and J.* 452. *Hicks vs. Hicks and Norris,* 5 *G. and J.* 82. *McCreary vs. McCreary, ib.* 152. *Maryland Ins. Co. vs. Bathurst,* 224. *McElderry, et al vs. Flannigan,* 1 *H. and G.* 308.

7. That if the act of 1824, ch. 148, is unconstitutional, the act of 1812, ch. 159, is likewise unconstitutional, it being repugnant to the acts of 1798, ch. 205, and 1807, ch. 153.

BUCHANAN, Ch. J. delivered the opinion of the court.

A variety of questions arise in this case, which is one of a grave and delicate character. Important as respects the interests involved, and the results to the community. What may be the effect of the decision of this court (whether beneficial or otherwise) upon the usefulness and future operations of the University, we do not know, nor is it our business to inquire; looking only, and with a single eye, as it is our duty to do, to the questions alone submitted to us, and seeking to decide them, according to the principles of law governing such questions, whatever the consequences may be. Grave and delicate, as it draws in question the validity of an act of the legislature of the state, we are not insensible to the caution with which such questions should always be approached, nor the deliberation with which they should be examined; accompanied by a becoming deference to the legislature, and its high and important functions, and a just regard to the duties and character of the judicial office.

It has been said, that a legislative act should not be pronounced unconstitutional or invalid, in a doubtful case: nor should it, where the doubt is *bona fide,* and well founded, and not the result of a disinclination to deny the authority of the legislature, which all must feel, but none should yield to in violation of a solemn duty. But where a judge is satisfied upon full consideration, that an act of the legislature is contrary to the constitution of the United States, the supreme law which he is bound to obey, and which must prevail over any act that comes in conflict, and cannot stand with it, or is for any other reason invalid, he has no choice; and all that is left him, is honestly and fearlessly to do his duty;--from the faithful discharge of which, however unpleasant the task, no upright judge can shrink if he would. On the other hand, a judge should not suffer himself to be betrayed to pronounce an act unconstitutional or invalid on insufficient grounds, by a morbid apprehension that a contrary decision might be ascribed to the want of a just and proper sense of judicial duty. Thus impressed, we

proceed to the examination of this case--and the first question presented by the record, and which meets us at the threshold, arises on the first bill of exceptions, upon an objection by the counsel of the appellants to the admissibility in evidence of the act of the legislature of this state, passed at the December session, 1825, ch. 190, (which was offered in evidence on the part of the defendant, and admitted by the court below) on the alleged grounds of its being contrary to the constitution of the United States, and to the Bill of Rights and constitution of this state, and is also raised on the first prayer in the fourth exception. The consideration of which, involves other questions upon which the validity of that act depends.

*14 By the act of 1798, ch. 105, a number of persons were incorporated under the name and title of "The Medical and Chirurgical Faculty of the State of Maryland," with authority to elect twelve persons to be styled "The Medical Board of Examiners for the State of Maryland," whose duty it is declared to be, to grant licenses to gentlemen qualified to practise medicine and surgery, upon the payment to the treasurer of the faculty by each person so obtaining a certificate or license, of a sum not exceeding ten dollars, to be fixed on or ascertained by the faculty. And the sixth section subjects persons who shall practise in either of those branches, and receive payment for his services, without having first obtained such license, to a penalty of fifty dollars for each offence, to be recovered in the county court where he may reside, by bill of presentment and indictment, one-half for the use of the faculty, and the other for that of the informer.

The second section of the act of 1807, ch. 53, provides for the establishment in the city or precincts of Baltimore, of a college for the promotion of medical knowledge, by the name of "The College of Medicine of Maryland," to be founded and maintained forever. And the third section declares, that the members of the board of medical examiners for this state, for the time being, together with the president and professors of the college of medicine, shall be one community, corporation, and body politic, by the name of "The Regents of the College of Medicine of Maryland." Thus constituting those two separate and distinct bodies, as might well be done, one corporation; and making them the regents or governors of "The College of Medicine of Maryland," for the management and conduct of which they were thus incorporated.

The fourth section gives to the regents the power to acquire, dispose of, and employ real and personal estate for the purposes of the college.

The ninth section authorizes and empowers the regents from time to time to constitute and appoint (without restriction as to number) professors of the different branches of medicine, to be "severally styled professors of such branch as they shall be nominated and appointed for, according to each particular nomination and appointment," and also to appoint lecturers in like manner. "The professors and lecturers so constituted and appointed from time to time," to be known and distinguished by the name of "The Medical Faculty of the College of Medicine of Maryland."

The twelfth section authorizes the granting diplomas, and admitting students of the college and others, to the office and profession of surgeon, and to the degrees of bachelor and doctor of medicine.

The sixteenth section appoints six persons by name to be professors, until further arrangements made by the regents of the college.

The eighteenth section constitutes "The Medical and Chirurgical Faculty of the State of Maryland," the patrons and visitors of the college; and other sections give to the regents the power to appoint a president, to have and to use one common seal, and one privy sale, and the capacity to sue and be sued, &c.

*15 The first section of the act for founding "an University in the city or precincts of Baltimore," passed at the December session, 1812, ch. 159, provides that the college for the

promotion of medical knowledge, by the name of "The College of Medicine of Maryland," be and the same is hereby authorized to constitute, appoint and annex to itself, the three other colleges or faculties, viz: The faculty of Divinity, the faculty of Law, and the faculty of the Arts and Sciences, and declares "that the four faculties or colleges thus united, shall be and they are hereby constituted an university, by the name and under the title of The University of Maryland."

By the third section it is enacted, "that the members of the said four faculties, with the Provost of the said University and their successors, shall be and are hereby declared to be one corporation and body politic, to have continuance forever, by the name and style of "The Regents of the University of Maryland," with capacity to acquire, enjoy and dispose of real and personal estate for the purposes and interests of the University.

The seventh section gives authority to the regents to appoint a Provost of the University.

The eighth section provides that "each faculty shall possess the power of appointing its own professors and lecturers."

The tenth section provides "that the professors now appointed and authorized in the College of Medicine of Maryland and their successors, shall constitute the faculty of physic; that the professor of theology, together with six ordained ministers of any religious society or denomination and their successors, shall form and constitute the faculty of divinity; that the professor of law, together with six qualified members of the bar, and their successors, shall form and constitute the faculty of law; and that the professors of the arts and sciences, together with three of the principals of any three academies or colleges of this state, and their successors, shall form and constitute the faculty of the arts and sciences.

By the ninth section each faculty is authorized to exercise such powers as shall be "delegated" to it by the Regents of the University, for the instruction, discipline, and government of the institution, and of all students, officers, and servants, belonging to it--and the eleventh section provides that the regents shall meet at least once a year, in stated meetings, to be appointed by their own ordinances, "in order to examine into all matters touching the discipline of the institution, and the good and wholesome execution of their laws," with authority when assembled, "to make their own rules of proceeding, and to make fundamental regulations for the government and discipline of the University," and declares that at all such meetings "a majority of the whole number of regents shall be a quorum to do any business, except to vacate the seat of the provost of said University, or of the professors or lecturers; for which purpose the *consent* of three-fourths of the whole number of the regents shall be necessary, and then only on a formal impeachment," with other sections (as in the act of 1807, ch. 53, for founding a Medical College in the city or precincts of Baltimore) giving to the Regents the capacity to sue and be sued; the authority to make and use one common and public, and one privy seal, and to grant diplomas, and certificates of admission to the office and profession of surgeon, and to the degrees of bachelor and doctor of physic, &c. And the last section professes to repeal so much of the act of 1807, ch. 53, for founding a Medical College in the city or precincts of Baltimore, "as is inconsistent with, repugnant to, or supplied by" this latter act.

*16 It has been asserted in argument, that the corporations created by these three acts are *public* and not *private* corporations; and hinted, rather than seriously insisted upon, that if they are to be considered and treated as *private* corporations, and the acts creating them as grants or contracts within the meaning and grasp of the 10th section of the 1st article of the Constitution of the United States, which declares that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," the act of 1812, chap. 159, violates the provisions of the two preceding acts of incorporation, and is itself unconstitutional and void.

These propositions will be examined.

A corporation may be *private*, and yet the act or charter of incorporation contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state; such as the *Stat.* 14*th*, 15*th Henry the* 8*th, ch.* 5, creating the College of Physicians in London, and imposing a fine on persons practising without license from the college, which was held to be a *private* corporation, *Gilbert's Evid.* 13, and the statute of the same reign, chap. 42, founding The College of Barbers and Surgeons.

The provisions of the act of 1798, ch. 105, making it the duty of the "Board of Medical Examiners" to grant licenses to such as should apply, and who, on examination, should be found qualified to practise physic or surgery, on their paying to the treasurer ten dollars, and imposing a fine of fifty dollars on such as should practise without having first obtained such license, one-half for the use of the faculty and the other for the use of the informer, are supposed to be practically infringed by the act of 1812, ch. 159, founding the University of Maryland; by which authority is given to the Regents to grant diplomas and certificates of admission to the office and profession of surgeon, and to the degrees of bachelor and doctor of physic, &c. Thus virtually, as it is said, removing the necessity for obtaining a license from the board of medical examiners, and in effect invading the rights of the Medical and Chirurgical Faculty, and impairing its interest in the fees for licenses, and the penalty imposed for practising without license from the board of medical examiners. The same may be said of the act of 1807, ch. 53, by which the same authority is given to the Regents of the college of medicine to grant diplomas and certificates of admission to the office and profession of surgeon, and the degrees of bachelor and doctor of physic, that is given by the act of 1812, ch. 159, to the Regents of the University. Of this supposed violation of the rights of the Medical and Chirurgical Faculty, that institution is not here complaining, and to which no exception has ever been taken until now, for the first time, by this defendant, having no connexion with that faculty, and professing to act as an officer or agent of a board claiming to be trustees of the University, to the charter of which, this alleged infraction of the corporate rights of the Medical and Chirurgical Faculty is ascribed.

*17 The charter of the University has no express provision dispensing with the necessity of a license to practise from the board of medical examiners, nor authorizing graduates of that institution to practise without such license.

But admitting that to be the effect of the authority to grant diplomas, and that a student of the University having obtained a diploma, would not be under the necessity to procure any other license, and would be entitled to practise without subjecting himself to the penalty provided by the act of 1798, ch. 105, and therefore would not be likely to incur the unnecessary trouble and cost of procuring any further license; and that such practical result is equivalent to a direct repeal of so much of the act of 1798, ch. 105, as provides for the payment of ten dollars for a license to practise from the board of examiners, and imposes a fine for practising without such license; and admitting also, that if such repeal would be a violation of the vested and chartered rights of the corporation, created by the act of 1798, and therefore void, and the defendant under the pleadings in this cause, has a right to avail himself of that defence, the most that can be said is, that the act of 1812, ch. 159, is unconstitutional and void, so far only as it authorizes the Regents of the University to grant diplomas, &c. and no further.

But are the rights here set up, as belonging to the Medical and Chirurgical Faculty, such inviolable vested rights as are placed beyond the reach of legislative power?

The legislature possesses the power to regulate the internal police of the state; a political power imparted to that department of the government of which it is difficult to say it can entirely disrobe itself. It has among others, the power to pass penal and sanatory

laws, and to revoke them at pleasure, as circumstances and experience may require and teach; and, having regard to the health and lives of the citizens of the state, to adopt from time to time such wholesome regulations as may be deemed best calculated to guard against the evils and mischiefs attendant upon the practice of physic and surgery by ignorant and incompetent persons.

That the legislature might at any time, without the intervention of a corporation, have provided for the organization of a board or boards, for the examination of persons applying for admission to the practise of physic or surgery, and imposed a penalty upon any who should practise without having first obtained a license from such board, and afterwards from time to time have adopted other means more or less efficient, for the promotion of the desired end; or, whether wisely or not, have removed the restriction altogether, is a proposition not to be questioned.

Impressed as it would seem, with the sense of the evil consequences flowing from the pernicious practices of pretenders to the art, the legislature in 1798, as a general police regulation, embodied, as it had a right to do, in the act incorporating the Medical and Chirurgical Faculty, with authority to appoint a board of examiners, not being of themselves a corporation, the provisions for examination and license by the board of examiners, on the payment of ten dollars by the party applying, and the prohibition to practise without such license, under the penalty prescribed.

*18 The object is manifest. It was to encourage and promote the acquisition of knowledge in the profession, and thereby to shield the community from the pernicious effects of the ignorance of unskilful pretenders. And the board of examiners was resorted to as the means of effecting that end, and for that purpose may be considered as the agents or officers of the state.

It is difficult to suppose that the legislature, in adopting that regulation of internal police, intended to part with the whole political power of the state over the subject, and to transfer and repose it entirely in the corporation of the Medical and Chirurgical Faculty. The corporation acquired no vested inviolable right to that political power. The provisions under consideration were introduced, not for the regulation or promotion of private purposes or interests, but for a public purpose, the attainment alone of a public end--the prevention of mischief by the ignorant and unskilful, by the punishment of those who should be found offending against the law.

The examining and granting of licenses by the board of examiners to applicants proved to be qualified to practise, was not a franchise nor property, but in terms a duty imposed, and the allowance to the faculty of the fees for licenses, and a portion of the penalty imposed for practising without license, was merely an incident of a public regulation.

To say that the act of 1812 is unconstitutional, because, by construction, a diploma granted to a graduate of the University may entitle him to practise without being subject to a fine for not having first obtained a license from the board of examiners, would be to deny to the legislature the power to pass any law rendering a license by the board of examiners unnecessary, however expedient the further exercise of that political power may be, which we are not prepared to do.

It has been said too, that the 10th section of the act of 1812 is at war with and violates the 8th section of the act of 1798, but that will be seen, on a slight examination, to be an entire mistake. The 8th section of the act of 1798 provides that every person who shall be elected a member of the medical faculty, shall pay a sum not exceeding ten dollars, power being before given to the Medical and Chirurgical Faculty to elect other members by the "medical faculty" there spoken of, is clearly intended the "Medical and Chirurgical Faculty" created by that act. There was no other medical faculty then in being, and none other could have been meant.

The act of 1807, ch. 53, provides for a faculty consisting of professors and lecturers, to be called the Medical Faculty of the College of Medicine; a separate and distinct institution from the Medical and Chirurgical Faculty. The act of 1812, ch. 159, authorizes the college of medicine, to constitute and annex to itself three other faculties; and declares that the four faculties united, that is, the three to be created and the medical faculty (then existing) of that college, shall be a University. And the tenth section directing how the four faculties of the University shall be constituted, provides that the professors now appointed and authorized in the college of medicine, shall constitute the faculty of physic; not the members of the Medical and Chirurgical Faculty, for there were no professors in that institution; and by the "faculty of physic," evidently meaning the medical faculty, one of the four faculties constituting the University; and not the ""Medical and Chirurgical Faculty," to which it has no relation, and does not, in any manner whatsoever, interfere with the mode of appointing its members.

*19 Again, it is suggested that the act of 1812, in some of its provisions, virtually repeals parts of the constitution of the College of Medicine of Maryland, and professes by the last section, to repeal all such parts of the act of 1807, as are inconsistent with or repugnant to the latter act, and is therefore void; assuming the corporation of the Regents of the College of Medicine of Maryland, created by the act of 1807, to be a private corporation.

And whether the corporation of the Regents of the College of Medicine is a distinct and independent corporation, separately existing as such in its original character, for the promotion of medical knowledge alone, or has been enlarged and expanded to the higher degree and rank of an University by the act of 1812, is the question that will be next examined.

By the act of 1807 it was provided, that there should be a college for the promotion of medical knowledge, by the name of "The College of Medicine of Maryland," established in the city or precincts of Baltimore, to be founded and maintained forever, with a president and professors, and a faculty consisting of professors and lecturers, to be known by the name of "The Medical Faculty of the College of Medicine of Maryland," to be appointed from time to time by the regents; and for the management or government of the institution, the president and professors, together with "the members of the Board of Medical Examiners," were incorporated by the name of "The Regents of the College of Medicine of Maryland."

Afterwards, the college being organized, the legislature by the act of 1812, ch. 159, on the petition of the president and professors of the College of Medicine of Maryland, as such, authorized "the college for the promotion of medical knowledge, by the name of the College of Medicine of Maryland," to constitute, appoint and annex to itself "three other colleges or faculties," ""The Faculty of Divinity," "The Faculty of Law," and the Faculty of the Arts and Sciences; constituting the four faculties when thus united, an University by the name of "The University of Maryland," empowering the Regents of the University to appoint a provost, and declaring the members of the four *faculties* together with the provost, to be one corporation and body politic, by the name of "The Regents of the University of Maryland," omitting throughout """The Board of Medical Examiners."

It is sufficient to say of a corporation aggregate, of which various definitions are to be found in the books, some fanciful and metaphysical, that it is an artificial intellectual being, the mere creature of the law, composed generally of natural persons in their natural capacity; but may also be composed of persons in their political capacity of members of other corporations, as in the case of *Christ's Hospital of Bridewell*, chartered by Edward the Sixth, of which the mayor, citizens, and commonalty of London, are made the governors, and incorporated by the name of the governors, &c. of the hospital of Edward the sixth of England, of Christ Bridewell--so in the cases of the Universities of Oxford and Cambridge, of which the many colleges (distinct and separate corporations) within

those Universities, form component parts of those larger corporations. And the individuals, or any of them who, in their natural capacity compose one corporation, may in the same capacity, compose another distinct and separate corporation; as the president and directors of one bank, or any number of them, may be the president and directors of another bank, or the incorporated managers of any other institution. These undeniable propositions kept in view, will assist in the examination of the question under consideration.

*20 The president and professors of the college or faculty for the promotion of medical knowledge, called The College of Medicine of Maryland, constitute that college or faculty; and the Regents of the College of Medicine, differently constituted, are made the governors and managers of the institution. The act of 1812 authorizes, not the Regents, but the College for the promotion of medical knowledge, consisting of the president and professors, to constitute, appoint and annex to itself, the three other colleges or faculties; thus by the use of the words other colleges or faculties, treating and considering the college as itself a faculty, composed of natural persons, having the capacity to act, and through whose agency alone, as natural persons, it could constitute and appoint the other colleges or faculties. If it had been the intention to give the authority to the corporation as such, it would have been given to "The Regents of the College of Medicine," and not to the college or faculty; which, with their assent could as well have been done. But no such assent appears, and the fact, that in the petition of the president and professors of the college upon which the act of 1812 was passed, they ask that "they and others and their successors may be incorporated as Regents of an University, to be called the University of Maryland," shows that the legislature acting upon that petition, meant by the college for the promotion of medical knowledge, by the name of the College of Medicine of Maryland, the faculty or the president and professors constituting the faculty, as distinguished from the corporation of Regents.

The corporation of the Regents of the college, independent of the constitution of the United States, or the Bill of Rights and constitution of this state, is not destroyed, or merged in the corporation of the Regents of the University; which was originally to be composed of the provost, with the members of the four faculties, omitting the members of the board of examiners, (a component part of the Regents of the college) neither of them being of itself a corporation. That is, the members of the faculty (then existing) of the college, and of the three other faculties to be created; with power given to each, to appoint its own professors and lecturers. The corporation of "The Regents of the College of Medicine," and the corporation of "The Regents of the University," are presented by the acts of 1807 and 1812, as two ideal artificial beings, existing only in contemplation of law, both composed of natural persons and acting through and by the natural agents or persons composing them, respectively. And the professors of the college of medicine originally made members of the corporation of "The Regents of the University," in their natural capacity, and not in a political capacity of members of another corporation; but not therefore ceasing to be members of the corporation of the regents of the college, which is not more incompatible with the separate corporate existence of the two institutions, than if they had been made the president and directors of an incorporated bank, or been incorporated alone, or with others, as the governors or managers of any other institution, nor more than the individuals composing any corporation, and at the same time becoming members of another corporation, would be, with the continued existence of both corporations. The corporations of London, and of Christ's Hospital of Bridewell, are separately existing corporations, although the mayor, citizens, and commonalty of London, are incorporated by the name of the governors, &c. of the hospital, &c. of Christ Bridewell, so the many colleges within the Universities of Oxford and Cambridge, are separate and distinct corporations from each other, and from the larger corporations of those respective institutions.

***21** On the 6th of January, 1813, the faculty of physic of the college of medicine of Maryland, appointed and annexed to itself the three other faculties of divinity, law, and the arts and sciences, in pursuance of the act of 1812, and on the 22d of April, 1813, at a meeting of the Regents of ""The University of Maryland," a provost and secretary were elected.

Although on the original organization of the University, the professors at that time *appointed and authorized in the college of medicine*, constituted the faculty of physic of the University under the 10th section of the act of 1812; yet it did not follow that they were always to compose that faculty. On the contrary, the words of that section, *the professors now appointed and authorized*, &c. would seem to imply that they might not, but that as the vacancies occurring from time to time should be filled up, it might become constituted in whole or in part of other persons, there being no restriction in the selection to the professors of the college, and very properly. For if it were otherwise, the faculty itself might become extinct by the dissolution or forfeiture of the corporation of the college.

Besides, if the professors of the college of medicine and their successors, were necessarily at all times to compose the faculty of physic in the University, as the Regents of the college have alone the power to appoint their own professors, the faculty might thus become constituted of incompetent persons, by the injudicious appointment of professors by the Regents of the college, (should that at any time happen) to the great prejudice of the character and usefulness of the University, without the means of guarding against such a result.

The college of medicine then, and the University, exist in contemplation of law, as distinct and independent corporations, in possession of all the rights and franchises conferred upon them by the acts of their incorporation, each having the power to keep and use a public and privy seal; to sue and be sued; to acquire and dispose of property, real and personal; to pass by-laws; to grant diplomas; and to perpetuate itself.

And there being nothing in the act of 1807 inconsistent with or repugnant to the act of 1812, the last section of the act of 1812 is wholly inoperative, without reference to the question whether the corporation created by the act of 1807 is a private corporation or not; nor could proceedings in nature of a *quo warranto* be sustained against the Regents of the University, acting under the authority of the act of 1812, for usurpation of corporate franchises, in violation of the rights and franchises of the Regents of the college of medicine. The enjoyment and exercise by each, of all the rights and privileges granted them respectively, being entirely compatible, and the powers and authority of one not inconsistent with or opposed to the powers and authority of the other. The legislature having the same undoubted right to establish as many independent colleges and universities in *Baltimore* (not impairing the rights of others) as may be deemed expedient and proper, that it has to incorporate an additional number of banks.

***22** The next subject of inquiry is, whether the corporation of "The Regents of the University" is a public or a private corporation; if at this day, that can be considered an open question.

A public corporation, is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, &c.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by the government for general purposes of charity.

The corporation of the University has none of the characteristics of a public corporation. It is not a municipal corporation. It was not created

for political purposes, and is invested with no political powers. It is not an instrument of the government created for its own uses, nor are its members officers of the government, or subject to its control in the due management of its affairs, and none of its property or funds belong to the government. The state was not the *founder,* in the sense of that term as applied to corporations. It was the creator only, by means of the act of incorporation, and may be called the *incipient,* not the *perficient* founder. It gave to it in its creation the capacity to acquire and to hold property, but made to it no donation; and whatever property the corporation has, is its own, to be managed and disposed of by the Regents for the uses of the institution, in such manner as they may judge most promotive of its interests, and not for the uses of the government, nor in the exercise of any political powers, but as the trustees merely for the University. It is said there have been subsequent endowments by the state. If it be so, that cannot affect the character of this corporation. If eleemosynary and private at first, no subsequent endowment of it by the state, could change its character, and make it public. But it nowhere appears that any such endowments have been made. Several acts of assembly were passed, authorizing money to be raised by lottery for the use of the University; and by the act of 1821, ch. 88, certificates of five per cent. stock of the state were authorized to be issued by the treasurer, to the amount of $30,000, to be appropriated to the payment of the debts of the institution; the medical professors of the University being required to enter into bond for the annual payment of interest on that sum; which can scarcely be called endowments. The authority to raise money by lottery certainly was not; it was a mere privilege granted, which cost the state nothing; and the appropriation of the $30,000 to the liquidation of the debts of the institution, on the payment of interest by the professors of one of its faculties, assumes more properly the shape and character of a loan to a private corporation for its own private purposes, than of an endowment or appropriation of money for the uses or political purposes of the government.

***23** If it is a public corporation, and its members the officers or agents of the government, and the debts contracted in the due course of that agency, they were debts of the state, contracted by its own officers, which the state was bound to discharge, instead of lending money for that purpose, and taking security from the members of one of the faculties for payment of the interest, which will hardly be contended; and certainly the legislature acted upon no such principle.

But it has been urged in argument at the bar, that whenever the *end* is public, the franchise granted to effect that *end* is also public. That here, the *end* was the preservation of life and health, which depend upon the skill of those who minister to the sick, &c. A public *end,* in which the whole public have an interest, and therefore that this corporation is public.

The same might be said with equal propriety of the college of Physicians, and the college of Barbers and Surgeons, in London; where the preservation of life and health was as much the *end* as here; yet it has never been doubted, that they are private eleemosynary corporations. The act incorporating the college of Physicians was, as this, passed on the petition of certain individuals, and the preamble of the act incorporating the college of Barbers and Surgeons, as of this, recites the benefits and advantages accruing to the public from the establishment of such institutions; and each of those statutes imposes a penalty for practising without license, which would seem to give to the corporation more of a public character than this, which has no such provision.

It is not enough to say, that the public has an interest in the skill and learning of physicians and surgeons. The public has a deep interest in the dissemination of learning and useful knowledge; and so it has in the beneficial results to the community of insurance, canal, rail road, and turnpike companies, &c. The uses or objects may, in a certain sense, be called public; but the corporations as distinguished from the uses or objects, are private.

The objects for which almost, if not all corporations are created, are such as the government deems it expedient to promote, upon the supposition that they will be beneficial to the public, and these expected benefits constitute the chief, and usually the only consideration of the grants.

The distinction is between the franchise granted, and the expected beneficial results to the community, from the possession and exercise of the franchise, upon the performance of the implied condition of the grant to exert the rights acquired, in a manner suited to the promotion of the objects proposed. The institution, the bank, canal, rail road, college, &c. from the nature of its particular object, and the interest the public has in that object may, and commonly does acquire, in a popular sense, the character of a public institution; but the corporation, the artificial being composed of natural persons for the management of the affairs of the institution, in contemplation of law is private; as much so as the individuals composing it were, before the act of incorporation imparted to them an artificial existence, with power to take and hold property in that particular form, and for particular purposes, which is all the act of incorporation does, and that only because the particular objects can best be effected in that particular form. But not therefore making the artificial being or corporation an instrument, nor the persons composing it members of the civil government of the country.

***24** Suppose an association of private individuals had contributed funds in real or personal property, for the establishment and conduct of this very University, (which, in legal understanding, would be a private charity,) and had appointed professors, and constituted them governors and managers of the institution, and of the appropriated funds; the objects being the same as now, the promotion of religion, and the dissemination of scientific, literary, and medical knowledge, and the interests of the public in those objects the same; could the governors so appointed be considered public officers, or members of the civil government? and if not, why should the artificial being created by law, and composed of the same persons for the same purposes, thereby become a part of the civil government, and a public corporation? A private charity cannot, by a mere act of incorporation, be made a public one. In the language of Lord Hardwicke, "the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be." 2 *Atk. Rep.* 88, and that is the settled law upon the subject.

Again, "a charity may be public, though administered by a private corporation; and to hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions from the time of *Lord Coke.* 2 *Kent's Com.* 273.

Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. That is of the essence of a public corporation. But it has no such right in relation to eleemosynary corporations, or the management of their affairs. That belongs to the visiters alone, under the visitatorial power incident to such corporations. *Angell and Ames on Corp.* 410. 2 *Kyd. on Corp.* 174. 2 *Kent's Com.* 299, 300. *Philips vs. Bury,* 1 *L. Raymond in* 2 *Term Rep.* 346, *&c. &c.* And where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character. 4 *Wheat. Rep.* 675. *Story J. Phillips vs. Bury,* 1 *L. Ray. in* 2 *Term R.* 346. *Ang. and Ames,* 412. 2 *Kent's Com.* 301.

The Regents of this University are made the visiters by the terms of the act of 1812, the 11th section of which authorizes them to "vacate the seat of the provost or any of the professors," and requires them to meet in annual and other stated meetings, "in order to examine into all matters touching the discipline of the institution, and the good and wholesome execution of their laws." And all the authorities agree that colleges and academies established for the promotion of

learning and piety, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c. considered and treated as private eleemosynary corporations.

***25** It is the acknowledged law in England, received and acted upon in the courts of this country, and asserted by the elementary writers. *Phillips vs. Bury,* 1 *L. Ray.* 5, *and* 2 *Term Rep.* 346. *Lord Hale's opinion confirmed by the House of Lords, Dartmouth College vs. Woodward,* 4 *Wheat.* 518. *Allen vs. McKeen,* 1 *Sumner R.* 276. *Society, &c. vs. New Haven,* 8 *Wheat. Rep.* 464, *&c.* 1 *Kyd. on Corp.* 25. *Angell and Ames on Corp.* 2 *Kent's Com. title Corporations.* This then is a private eleemosynary corporation, differing from a college only in degree.

The extent of the property or funds it may have acquired by donation or otherwise is not material; the capacity expressly given to acquire and hold property in perpetuity, for the uses and purposes of its institution, is the same thing, so far as concerns its character as a corporation, as the actual acquisition of it would be. It appears from the statement of the evidence, that it has been endowed to a small amount by private donations, and no donations that it can derive from the bounty of the state would change its character, and convert it into a public corporation.

That a charter or act of incorporation, when accepted, is a contract, is a proposition too self-evident and universally assented to, to be drawn in question, or to require the aid of argument or authority to support it. There is no *dictum* opposed to it to be found in the books; and it would be strange if there was, assuming (what is no where denied, and cannot be,) that the government can compel none to become an incorporated body without their consent; and that acceptance of an act or charter of incorporation, is necessary to the creation of a corporate body. The grant being of the powers and franchises conferred, and the stipulation on the part of the government, that they shall be held and enjoyed on the implied condition, that they are to be exercised in the promotion of the objects of the charter; and the acceptance being an implied undertaking on the part of the grantees, that they will, in consideration of the charter and the franchises granted, perform the condition; which, as it cannot be forced upon them against their will, is necessarily a subject of contract, requiring the concurring assent of the parties respectively concerned, and ripens into a contract for the fulfilment of the terms of the charter, when that concurrence is manifested by acceptance. In the *King vs. Pasmore,* 3 *Term R.* 97, *Buller, J.* said, "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place."

The act of 1812, then, incorporating the Regents of the University of Maryland, being by acceptance a contract between the state and the corporation, the organization and continuing existence of which have been recognized by various subsequent acts of the legislature, is it a contract protected by that clause of the Constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts?" This question would seem to have been fully settled by the decisions in the cases already cited, of *Dartmouth College vs. Woodward, Allen vs. McKeen, and the Society, &c. vs. New Haven.* The contract on the part of the state is, that the Regents shall have the capacity and right to acquire and hold real and personal property in perpetuity in their corporate character, to sue and be sued, a power essential to the protection and enjoyment of the property they may acquire; to pass ordinances and make fundamental regulations for the discipline and government of the University; as governors and visiters to examine into all matters touching the discipline of the institution and the due execution of their laws, and to amove the provost or any of the professors on impeachment.

***26** It cannot be denied, that the franchises

granted by the act of incorporation are vested rights, and can they be taken from the Regents by any act of the legislature without impairing the obligation of the contract, that they shall be possessed and enjoyed by them and their successors in their corporate character? It is very clear they cannot, and that no act of the legislature of the state can effect that object without the assent of the corporation, if the prohibitory clause of the tenth section of the first article of the Constitution of the United States is applicable to such a contract as this; and no reason is perceived why it should not be held to apply as well to such contract as to any others, considering and treating this as a private corporation. Neither the character or nature of the contracts intended to be protected, nor of the contracting parties is defined. The generality of the prohibition "no law impairing the obligation of contracts," without any description of contract or parties, or any words of restriction, would seem sufficiently to show the intention of an equally general and unrestricted application, and embraces in its letter such contracts as this. It is not meant to be denied that there may be contracts not within the spirit of, and therefore not embraced by this prohibitory clause. But this being a contract clearly within the words of the prohibition, it is for those who would exclude it from the operation and protection of the constitution, to show that a strict adherence to the letter would be so inconsistent with, or repugnant to the spirit of that instrument, as to authorize the making it an exception.

There is no known rule of construction that would justify or permit an exclusion from the operation of the constitution of any contract plainly comprehended by its words, in the absence of any thing to show that it is not within its spirit. What is there to be found in the constitution distinguishing contracts of this description from any other contracts, or tending in the slightest degree to show that they were not intended to be protected? There is nothing in their character to invite such a distinction, but much to invoke the aid of the framers of the constitution; and surely they are quite as worthy of protection as thousands of other contracts, confessedly shielded by the same provision of the constitution.

It has been suggested, that no consideration passed for this grant to give it the binding force of a contract, and that merely voluntary contracts are not within the prohibitory clause of the constitution. It is true, that the constitution did not mean, nor does it profess to create any new obligations, or to impart efficacy to contracts void in themselves. But it did intend to preserve the obligatory force of valid contracts; and the principle advanced is not applicable to this case, which does not rest in a mere voluntary engagement to grant, but was an actual grant, in consideration of the benefits expressed in the preamble to be derived to the community, of corporate franchises, which are incorporeal hereditaments, considered in law as property, and properly the subjects of grant, involving a contract that the state should not resume, and that the Regents should hold and enjoy the grant, and all the rights derived under it; and it will scarcely be said, that such a consideration, the dissemination of learning and useful knowledge, in which the country has so deep an interest, is not a sufficient consideration, and that the payment of a pecuniary consideration is necessary to the validity of a grant by the state. Would it, or could it be said, that a voluntary donation from the state, by a grant of land to this institution, authorized to receive such donation, would be void, and that the land so given could be taken away again by the state at pleasure, and given to another. If not, neither can the franchises, the incorporeal hereditaments conferred by this act of incorporation, be taken away.

*27 The principle is the same, equally applicable to both, and one is just as irrevocable and inviolable, as the other,--property, though of different descriptions, being the subject of each--among the rights granted, is that of acquiring and holding property in perpetuity; and the state is pledged not only to the corporation, but to all donors to the institution on the faith of this contract; and to revoke it, would be to violate the plighted faith of the state, that it shall

remain inviolate. If the state has a right to revoke at will, this grant, it has the same right in relation to rail road, canal, and other corporations, which will not be pretended.

This brief view of the character and legal effect of the act incorporating the Regents of the University, results in the opinion, that it is a contract protected by the Constitution of the United States, the obligation of which cannot be impaired by any act of the legislature of the state, without the assent of the corporation; and leads to the conclusion, consequent upon that opinion, that the act of 1825, ch. 190, is repugnant to that instrument, and therefore void. It recognizes the organization and existence at that time of the corporation created by that act, and states in the preamble, that the good government and discipline of the University require important alterations in the act of incorporation. It professes to discontinue and abolish the board of Regents, and the members of its several faculties, declaring that the faculties shall consist of professors alone; to appoint a number of persons by name, to be known by "the corporate title of trustees of the University" of Maryland; to invest them with all the powers and privileges before belonging to the corporation of the Regents, with power to elect a vice-president, and to appoint and dismiss the provost, professors, and lecturers, at pleasure; to establish new professorships, and to abolish old ones; and to make by-laws for the regulation and discipline of the institution; declares that the governor of the state for the time being, shall be ex-officio president of the board of trustees; that all the pecuniary concerns of the University shall be under the control and direction of the trustees, who shall have power to appoint a treasurer, and direct and control all expenditures of money; that all money thereafter raised or appropriated for the benefit of the University, shall be paid to the trustees, or to an officer appointed by them to receive it; that all the rights of property then possessed by the Regents, shall vest in the trustees; that vacancies occurring in the board of trustees shall be filled up by the executive of the state, and that, that act should go into effect and operation on the first day of June, 1826,--and it professes to repeal all such parts of the act creating the corporation of the Regents of the University, as are inconsistent therewith. If it is possible to pass an act impairing the obligation of a contract, this is that act, if the act creating the corporation of the Regents of the University is, in legal understanding, a contract. It attempts to do more than impair the obligation of the contract. Except for the protecting shield held over it by the Constitution of the United States, it would have the effect to annul it altogether, if there be not some inherent principle in the government of the state to forbid it. It not only aims to strip the existing corporation of the Regents of all the privileges and powers conferred upon it by the act of its creation, but to destroy the old corporation, and to create a new one in its place; and to give to the corporation of its own creation, all the same powers and privileges, with additional and important powers--such as the election of a vice-president, the appointment and dismission of professors, lecturers, &c. at pleasure, and the establishment of new professorships, and the abolition of old ones; to cause all money raised or appropriated for the benefit of the University to be paid to the corporation of "the trustees," and to vest in that corporation all the rights of property belonging to the corporation of the Regents; thus not only to deprive the Regents of the capacity to acquire and hold property in perpetuity in their corporate character, but to take from them the property they have already acquired and give it to the corporation of trustees, and to connect that corporation with the political power of the state, by declaring that the governor for the time being shall, ex-officio, be the president of the board of trustees, and that the executive of the state shall fill up all vacancies occurring in the board of trustees.

*28 "It is a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts." 2 *Black. Com.* 37. And by the act of 1812 it is expressly stipulated by the state, that this franchise, the corporation of the Regents of the University, shall continue for ever. And yet

the act of 1825 professes, in words, to abolish the board (or corporation) of Regents, and declares that the several faculties shall thereafter consist of the professors alone. It then proceeds to appoint and incorporate a number of other persons by name, to be known and distinguished by the corporate title of "the Trustees of the University of Maryland," and as if that was not enough, concludes with a repealing clause of every part of the act of 1812 inconsistent with its provisions; that is, to suffer so much of the act of 1812 as declares that there shall be an University established to remain in force, but to annul entirely the existing corporation, and to create another, constituted of different persons, to possess and exercise all the franchises (and more) granted to, and the property actually acquired by the former; keeping in mind, that in one case the corporate body, the artificial being composed of natural persons, the Regents, is the corporation attempted to be destroyed; and that in the other, the corporate body, the artificial being composed of other natural persons, the Trustees, is the corporation attempted to be created and substituted in its place, and not the University.

But the objection to the validity of the act of 1825, does not rest alone for support upon the construction of the Constitution of the United States. Independent of that instrument, and of any express restriction in the constitution of the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, (in this country at least) the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power.

The legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property; they are alike beyond the reach of legislative power here, and the high prerogative power of the crown of England, which may create, but cannot at pleasure dissolve a corporation, or without its consent alter or amend its charter.

The parliament of England has been said to be omnipotent. But restrained by public opinion, it has not undertaken to dissolve any corporation since the instances of the suppression of the Order of Templars in the time of Edward the Second, and of the religious houses in the reign of Henry the Eighth, and that power may be considered at this time as resting mainly in theory.

*29 When in 1783, a bill was introduced for the purpose of remodelling the charter of the East India Company, it was successfully opposed by Mr. Pitt and Lord Thurlow, as subversive of the law and constitution of the country; and in the strong language of Lord Thurlow, "an atrocious violation of private property, which cut every Englishman to the bone." And it might be said, that the possession and exercise of such a power by the legislature of this state, would cut every free citizen of Maryland to the bone; not that a corporation is clothed with any peculiar sanctity, or that its property and rights are to be deemed more sacred and inviolable than the property and rights of any private individual. But, because the property and franchises of a corporation *are private property,* regarded as such by the law, and under the safeguard of the same principle, that protects and preserves from legislative violation the property and rights of individuals in their natural character. The law knows no distinction; if one can be invaded, so can the other. Vested, corporate, and individual rights, resting for protection on the same principle, the power to violate the former would necessarily involve the power to prostrate the latter; which would be at war with the purposes for which the social compact was entered into; and the nature and ends of *legislative* power, would furnish no limit to the exercise of it, as it was intended they should do.

To say that the legislature possesses the power to pass capriciously or at pleasure a

valid act, taking from one his property and giving it to another, would be in this age, and in this state, a startling proposition, to which the assent of none could be yielded; and yet there is nothing to forbid it, if it is once conceded that they have the power to dissolve one corporation, and take from it its franchises and property, without its consent, and transfer them to another.

But the bill of rights, which together with the form of government composes the constitution of this state, is not silent upon the subject. The sixth article declares, "that the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other."

The legislature, executive, and judiciary, are all creatures of the constitution, each confined in its action to the circumscribed sphere assigned it, and cannot rightfully exercise any power which is repugnant to that instrument, or not within their respective sphere of action.

The province of the legislative department of the government is to make laws, confining itself within the limits prescribed by the constitution. It cannot usurp the powers confided to either of the other departments, without violating the declaration in the bill of rights, that they shall be forever separate and distinct from each other, which would be a subversion of the principles that lie at the foundation of the government. For if the legislature could, without control, exercise judicial as well as legislative powers, the tenure of every thing dear and valuable to the citizen, would be, the unrestricted will of that body; to guard against which, the provision was introduced for a division of the powers of the government.

*30 It is not to be presumed that the legislature can ever have a wish, or would intentionally abuse or exceed its just powers. But it may (as it sometimes has done) incautiously and unadvisedly step beyond the strict limits of its authority; and it is the province and duty of a court, when called on judicially to decide upon the validity of the act, to pronounce it void, if satisfied that it is not warranted by the constitution; that being the paramount law to which all acts of the legislature not authorized by it, must yield.

This power and duty of the judicial department were asserted by the late general court in *Whittington vs. Polk,* 1 *Har. and John.* 236, and have been since by this court, in several cases, among which are *Crane vs. Meginnis,* 1 *Gill and Johns.* 463, in which an act of assembly passed in 1823 divorcing *C. Meginnis* and *Mary* his wife, and directing *C. Meginnis* to pay annually thereafter three hundred dollars to a trustee who is named, for the use of *Mary Meginnis,* was adjudged to be unconstitutional and void, so far as it directed the annual payment by *C. Meginnis* of three hundred dollars to a trustee for the use of *Mary,* on the ground that it was an exercise by the legislature of judicial power. The provision for the payment of the annuity being considered as a legislative decree of alimony, which is recoverable in this state only on proceedings in chancery. And in *Berret vs. Oliver, 7 Gill and Johns.* 191, an act of the legislature declaring certain deeds and decrees to be void, and divesting certain persons named of real and personal property held under them, and vesting it in *W. E. Berret,* was pronounced to be a violation of the provision in the bill of rights, "that the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other," and of the constitution of the United States, that "no state shall pass any law impairing the obligation of contracts," and utterly null and void.

The act of 1825 is obnoxious to the same objection. It professes to discontinue and abolish the corporation of the Regents of the University; to appoint a board of trustees composed of different persons, under the corporate name of the Trustees of the University of Maryland, "and to transfer to the new corporation thus attempted to be created, all the franchises and property of the corporation intended to be abolished; which, if effectual, would amount to a legislative ouster; a legislative judgment of dissolution; an exercise of judicial power not warranted by the constitution. A sentence of ouster or of

dissolution, being strictly a judicial act, for some imputed delinquency ascertained on proceedings at law instituted for that purpose, which, though assuming the garb of a law, the legislature not being invested with a judicial power, is not competent to pass without the consent of the corporation.

The division of the powers of the government proclaimed by the sixth article of the bill of rights, and the twenty-first article of the same instrument, declaring, "that no free man ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land," were intended as restraints upon the legislative power, by means of the courts of justice in which the laws were to be administered, and where all would be entitled to be heard, and have an opportunity afforded them of asserting and defending their rights against any attempted invasion. By "the law of the land" is meant, by the due course and process of the law. *Co. Ins.* in the commentary upon the same words in *Magna Charta.* The general law, prescribed and existing as a rule of civil conduct, relating to the community in general, judicially to be administered by courts of justice. An act which only affects and exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, "is rather a sentence than a law." 1 *Blac. Com.* 44. A sentence that condemns without a hearing, and the very passing of which implies the absence of any general law or rule of civil conduct, by which the same purpose could be judicially affected in a court of law.

*31 If the transferring one person's property to another, by a special and particular act of the legislature, is a depriving him of his property, by or according to the law of the land, then any legislative judgment or decree, in any possible form, would be according to the law of the land, although there existed at the time no law of the land upon the subject, and that too by a tribunal possessing no judicial power, and to which all such power is denied by the constitution. Such a construction would tend to the union of all the powers of the government in the legislature, and to impart the attribute of omnipotency to that department, contrary to the genius and spirit of all our institutions; and the office of courts would be not to declare the law or to administer the justice of the country, but to execute legislative judgments and decrees, not authorized by the constitution. The act of 1825, therefore, though bearing the form of a law, being in effect a legislative judgment of dissolution of the corporation of the Regents of the University, is, in this view of the subject, unconstitutional and void.

It is not intended by these remarks, to call in question the various general laws for quieting possessions, &c. which the legislature has been in the habit of passing, both before and since the adoption of the present constitution of this state, nor to impeach the decisions upon these laws, which have been considered as resting upon different principles; though it may be that the legislature has sometimes been unadvisedly drawn into the passing of such a law, to effect a particular purpose, not known to and concealed from that body at the time; which, if any such case exists, points to the necessity for great caution in the passing of such a law, and furnishes an additional reason for objection to the exercise by the legislature of judicial power.

In *Norris vs. The Abingdon Academy, 7 Gill and Johns.* 7, an act of the legislature vesting the government of the academy in a new board of trustees, was decided by this court to be a violation of the rights of the old corporation, forbidden by the Constitution of the United States, and therefore void. The decision of that case was founded upon the prohibitory clause alone of the Constitution of the United States, which applies equally and with the same force to this, if there be nothing in the facts and circumstances of the case to exempt it from the operation of that instrument.

But it has been strongly urged, that if the act of 1825 was not passed with the previous consent of the corporation of the Regents, there was enough to authorize the inference

by the jury of a subsequent assent and acceptance. It is perfectly clear that there was no previous consent, nor any evidence whatsoever offered, tending in any manner to prove such consent. On the contrary, the only evidence relating to that point, was that produced on the part of the plaintiff, with nothing offered on the part of the defendant to rebut it, or in any way to weaken its force. *First,* the report of a joint committee of the two houses upon which the act was passed. In that report it is stated by the committee, to be their opinion, that the charter of the Regents "is radically defective, and requires fundamental alterations," that the difficulty of getting a quorum of the Regents to meet, and the want of time prevented them from ascertaining the opinion or wishes of the Regents as a body, with respect to alterations of the charter, "that there is nothing in the nature of the act of incorporation which deprives the general assembly of the constitutional power of making the change proposed by them, without the formal assent of the persons incorporated, and that assent is only necessary when a charter of incorporation is in the nature of a contract, as a bank charter, for instance, where a bonus has been stipulated in favour of the state, and where a consideration which would give binding force to a contract, has been paid." That report was adopted, and the changes proposed by the committee, embodied in the act founded upon it. The proceedings then of the legislature, manifestly show that no previous consent had been given; but on the contrary, that the committee charged with that subject, had been unable to ascertain the opinion or wishes of the Regents as a body in relation to an alteration of the charter, and that the legislature had been drawn into an error, and passed the act under the impression made by the ill-founded suggestion of the committee, that in the absence of a pecuniary consideration being paid for it, the charter had not the binding force of a contract, and therefore, that the consent of the corporation was unnecessary. And *secondly,* that on the 17th of March, 1826, soon after the act was passed, (which was on the 6th of March, 1826, at the December session, 1825,) at a regular corporate meeting of the board of Regents, a resolution was adopted with but one dissenting vote, that a committee of five, who were appointed for that purpose, should take the opinion of counsel upon the constitutionality of the act, with another resolution unanimously adopted, directing the committee, if the opinion so obtained should be that it was unconstitutional, to prepare an address to the governor of the state, and to the trustees appointed for the government of the University, informing them of such opinion, and requesting them to defer acting until the act that had been passed, could be re-considered by the legislature, and in the event of the trustees determining to proceed, to adopt such legal measures as might be deemed necessary to resist the operation of the act. And that the committee having obtained from counsel an opinion that the act was unconstitutional, on the 22d May, 1826, and before the corporation of trustees went into operation, addressed a letter to the governor, and to each of the trustees, advising them of the opinion, and requesting them to suspend measures for carrying the act into operation until an application could be made to the legislature at their next meeting for a repeal of it; informing them, that they were prepared on the part of the Regents to make such arrangements with them as would produce the speediest judicial decision of the question, if they should deem it inexpedient to accede to the proposed delay, and requesting a reply to that communication, which does not appear to have been made. So that, there was not only no evidence whatsoever, of a previous corporate assent to the act of 1825, but an unequivocal subsequent dissent, expressed by solemn corporate acts before it was carried into operation, or the arrival of the time, (the 1st of June, 1826,) when by its own provisions it was to take effect. Which subsequent dissent, and proceedings of the corporation of Regents, independent of the report of the committee of the legislature, precludes the idea of any previous assent, and leaves no ground for presumption or inference of a subsequent assent prior to the 1st of June, 1826, when the trustees, in defiance of the corporation of Regents, and in disregard of its dissent, thus solemnly expressed and formally communicated, organized themselves as a corporation, under the supposed authority of

the act of 1825. Still it has been contended, that the conduct and course of the corporation of Regents, after the organization of the corporation of trustees, were such, as to afford evidence proper and sufficient to be left to the jury, from which to infer the assent from that time, of the former, to the act for the incorporation of the latter, and its acceptance of that act.

***32** It may well be questioned, whether, and indeed it is difficult to perceive how, an unconstitutional act of the legislature, can be made constitutional and valid, by a subsequent acquiescence in it. The whole community "have an interest in preserving the constitutional limitations upon the exercise of legislative power." How can the subsequent approval of, or assent to it, give to the legislature a power, which it did not possess at the time it was passed: and if it cannot, how can it give effect to the act itself, which was passed without authority? But be that as it may, and to proceed: An act of incorporation may be offered for acceptance, and when accepted by those to whom it is offered, it becomes a contract. If the act of 1825 had been made to take effect when, or if assented to by the corporation of the Regents, it would until that assent was given, have been in *fieri;* and when given, a law, if accepted by the trustees; and that would not have been unconstitutional. Parties to a contract have a right to rescind it, and as between the state and the corporation of the Regents, such a provision would have amounted to an offer on the part of the state to rescind the contract of the act of 1812, and if assented to by the corporation, would have been an abrogation of it. But no such offer was made. The act of 1825 was a peremptory and unconditional dissolution of the corporation of the Regents; made by its terms, to take effect with or without its consent, and manifestly passed under the impression, that no consent was necessary.

It is not intended by what has been said, to deny that an act for altering a charter, to the passing of which, previous assent has not been given, can be constitutional, unless it contains an express offer for acceptance, or is made by its terms to depend upon a subsequent assent. The passing of it with nothing more, amounts to an offer only for acceptance; and if afterwards accepted, either expressly or by acting under it, it then receives life, and becomes an operative law--as in the cases of the various acts altering or amending existing bank and other charters.

And here it is proper to remark, that the question of acceptance does not, and cannot arise in this case. The act of 1825 did not propose merely to alter or amend the existing charter of the Regents, or to give them another; but to give a new charter to the trustees named. There was nothing therefore for the Regents to accept, or to reject. They could neither reject or accept that which was not offered to them, but attempted to be given to others. The trustees alone had the privilege to reject or accept the act of incorporation that was offered to them--and the Regents were put without the pale of the consideration of the legislature. The question then, is not whether the corporation of Regents accepted the act of 1825, but whether there was any evidence of its having assented to it, after the organization of the corporation of trustees.

***33** It appears that after the trustees had organized as a corporation, all the members of the faculty of physic, and members of each of the other faculties, were appointed, and accepted situations under them as professors; and that, from that time the corporation of the Regents ceased to exert its corporate functions, until the month of September, 1837, and this is considered as evidence to prove the assent of that corporation to the act of 1825.

It is admitted that the acceptance of an act of incorporation by the persons to whom it is offered, or the assent of an existing corporation to an act for an alteration of its charter, may be inferred from facts demonstrative of such acceptance or assent, without the production of a written instrument or vote of acceptance or assent on the books of the corporation; such as in the first case, the fact of actual organization, which furnishes the presumption of previous acceptance, or may be considered, as of itself

an act of acceptance, and in the latter, acts and transactions by the corporation or its authorized officers, in pursuance of the proposed alterations of the existing charter, showing the assent of the corporation to such alterations. But the acts, from which the assent of an existing corporation to an alteration of its charter, may and can alone be inferred, must be corporate acts, acts of the corporation, or acts of its authorized officers or agents. It is a vital principle of a corporate body "that the members are to do no act which may destroy its existence, or injure its privileges." 3 *Desaus.* 574. 2 *Binn. R.* 441. "Particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation." 1 *Black. Com.* 575. *Angell and Ames on Corp.* 107. And "since individual members of a corporation cannot, unless authorized, bind the body by express promises, neither can any corporate engagements be implied from their unsanctioned conduct or declarations, as corporations can be bound only by joint and corporate acts, so it is only from such acts, done either by the corporation as a body, or by its authorized agents, that any implication can be made binding it in law." *Ib.* 130. *Proprietors of the Canal and Bridge Co. vs. Gordon,* 1 *Pick. R.* 297.

If no corporate engagement can be implied from the unauthorized conduct or declaration of individual members, if no implication can be made from them, binding in law upon the corporation, in relation to ordinary transactions, on what principle, can any inference be drawn from them, going to the very existence of the corporation? In this case, the members of the different faculties who accepted situations under the corporation of the trustees, were not in doing so, acting as the authorized agents of the corporation of Regents, nor for any thing that appears, under the sanction of any corporate act of assent to the act of 1825, but in disregard of solemn and express corporate acts of dissent, and protestation against the carrying that act into operation by the trustees--and the law does not permit any inference of assent to that act, by the corporation of Regents, to be drawn from such doings--and more particularly, in the face of its clearly expressed dissent. The most that can be said of it is, that the individual members who accepted places under the trustees, wanted situations which they were afraid of losing, and acted alone under that impulse. Then, what act, corporate or otherwise, was done by the corporation of Regents, showing or implying, or legally tending to show its assent to the act for incorporating the trustees, and for its own dissolution? It was in full existence and operation when it was passed, as the record shows. It protested against it after it was passed, and requested the trustees not to carry it into execution. That was no act of assent. A number of its members took situations and acted under the trustees, which it could not prevent; that was no assent by the corporation, but by doing so, and withholding themselves from the discharge of their duties as members of the corporation of Regents, though they did not therefore cease to be members, they caused that corporation as a result of the act of 1825, to cease from that time to perform its functions until September, 1837, when the members who had taken situations under the trustees, resigned them, and returned to their duty. During that time it was passive and did nothing, yielding only (as the members who accepted places under the trustees had done) to necessity, and doing no act, from which its assent could be implied, and in the absence of any written instrument or vote of assent, some other act of the corporate body, or of its authorized agent affording the presumption of its assent, should have been produced; and the more particularly, as it is an act not beneficial to the corporation, but one that aims directly at its dissolution, and the presumption in the absence of any express corporate act to the contrary, would rather be against the assent; seeing, that the last corporate act it did, was a vote of express dissent. It was unwilling submission only to legislative power and influence, and not an adoption of its act.

***34** In *Allen vs. McKeen,* 1 *Sumner,* 276, where a corporation passed a resolution that they acquiesced in an act of the legislature, it was decided not to be an adoption of it, but expressive of mere submission to the

legislative will; and that if it could be construed into an approval, it could not give effect to an unconstitutional act. Suppose none of the members of either of the faculties of the corporation of Regents had taken office under the trustees, and they had appointed others and gone into operation; and that the corporation of Regents had by no act assented to the act of 1825, but have become wholly inactive, and performed none of their corporate functions; such non-user, if it would have been deemed sufficient cause of forfeiture, on proceedings at law instituted for that purpose, would have been no evidence of assent to the act; but neglect of duty, or a violation of the implied condition of its contract, for which it would have deserved to be dissolved. But the act of 1825 could not have taken the place of judicial proceedings to work a dissolution, and thereby become valid and effectual. Neither non-user nor mis- user of corporate franchises, has ever been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared. And how in principle, does this case differ from that which has been put, supposing for a moment, that the conduct of the corporation of Regents was such as to have furnished sufficient cause of dissolution upon judicial proceedings? But here it is proposed to give effect to an act of assembly, which was passed before any cause of dissolution existed; on the ground that assent by the corporation to that act, arising from a supposed subsequent cause of forfeiture might be presumed; which cannot be against the express dissent of the corporation by a formal vote. An inference of assent by a corporation to an act of assembly, after it has passed, can no more be drawn from a subsequent non-user or mis-user of its franchises, than an inference of consent to its being passed, can be drawn from a previous non-user or mis-user, which is no where pretended; otherwise, there would be no necessity for a judicial ascertainment and declaration of forfeiture, before a new charter can be granted. Nor can effect be given to this act of assembly by considering the non-user by the corporation of Regents, as equivalent to a surrender of its franchises. That can only be done by deed to the state. 1 *Salk. Rep.* 191. *Angell and Ames on Corp.* 507. 2 *Kent's Com.* 311, *et al.* And a court is not warranted to presume a surrender of the corporate rights and a dissolution of the corporation, from a mere intentional abandonment of the franchises, unless there be something in the act of incorporation to justify it; as in the case of some of the incorporated companies in New York, under which, for the sake of the remedy and in favour of creditors, the courts of that state have acted upon such presumption. *Slee vs. Bloom,* 19 *Johns. Rep.* 456. *Briggs vs. Penniman,* 8 *Cowen,* 387. But those cases go no further, and recognize the general rule. And if an actual abandonment of the corporate franchises will not warrant the presumption of a virtual surrender of the corporate rights, and a dissolution of the corporation, how can the assent of a corporate body, to an act dissolving the corporation, be inferred or presumed from a mere non-user of the franchises produced by that very act? and that too, in the face of a corporate act of express dissent, remaining unrescinded on the books of the corporation. In no view, therefore, is it believed, that effect can be given to the act of 1825; and whatever may be the condition of the corporation of the Regents, the trustees have no authority, as governors of the University, under that act.

***35** But it has been again further contended, that the faculty of physic of the University, became dissolved or extinct on the acceptance by the professors of professorships under the trustees, which it is supposed amounted to resignations of their situations as members of the corporation of the Regents; and that by the loss of that integral part the corporation became dissolved, and incompetent to institute or sustain this suit.

The same argument would perhaps equally apply to some of the other faculties; and if either of the faculties was thereby lost, and not restored at the time of bringing the suit, the objection would be fatal to a recovery, whether the corporation was dissolved or only suspended (perhaps more properly the latter) considered as a corporation of integral parts, and not existing as a corporation *de facto.* But their accepting situations under the trustees, did not, in law, amount to resignations of their professorships in the corporation of the

Regents. "An office in a corporation may be resigned in two ways: by an express agreement between the officer and the corporation, or by such an agreement implied, from his being elected to another office incompatible with it." And "to complete a resignation, it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant." *Willcock on Municipal Corporations,* 14 *Law Lib.* 132, 133, 238, 240. *Angell and Ames on Corp.* 254, 255. It is incidental to the right to appoint. *Ib.*

By an election to "another incompatible office," is meant another office in the same corporation, as is shown by the several examples put in the same books. Here the several members of the corporation of Regents, who accepted offices under the trustees, were not elected to other offices in the corporation of Regents, but to offices in another corporation; and there is no evidence of any acceptance of their resignations by the corporation of the Regents, by any entries in their books, or the elections of other persons to fill their places treating them as vacant, or in any other manner; nor is there any evidence of their having offered to resign. If individual members of a corporation could resign their situations at pleasure, without the consent of the corporation, it would be in the power of any definite integral part of a corporation composed of integral parts, having the right to fill up vacancies in their own bodies, at any time to dissolve the corporation against its will, and even of a mere majority of any such integral part; and thus a corporation so constituted, would be always at the mercy of a minority of its members; and hence the propriety of, and necessity for the rule, that there can be no resignation by a member without the acceptance of it by the corporation; the appointments given by the trustees to members of the corporation of Regents, did not make them the less, members of that corporation. "Where a new charter which is void, assumes to incorporate a place where there is an existing corporation, and includes the members of the ancient corporation together with new men, if a sufficient number of the ancient corporators, professing to act under the new charter, without any of the new men joining, make a by-law, which they are capable of making under the ancient constitution, their act is referred to their genuine authority, and not to the new charter, and the by-law will be good." *Willcock on Municipal Corporations,* 14 *Law Lib.* 57, 103. 1 *Salk. Rep.* 191. Which shows that the taking a situation under a void charter or act of incorporation, is not a resignation of a situation in another existing corporation, and has not that effect, which is just this case. The acceptance of situations under the trustees, might have furnished ground to the corporation of Regents for removing them, if the power to do so had remained; but that would have been to work a dissolution or suspension of the corporation, if the faculties alone are empowered to fill up the vacancies in their own bodies as has been supposed.

*36 And thus the corporation of Regents was constrained by the act of 1825, and the trustees acting under it to that very inactivity, which is now charged upon it as a fault or as evidence of its assent to that act. Besides, the nineteenth section of the act of 1812, provides, that the charter shall not be avoided or forfeited by any thing done or transacted by the corporation, contrary to the tenor of that act, through oversight, misapprehension, or mistake, either by any court of law, or by the general assembly. The spirit of which solicitude to preserve the corporation, would seem to be, that it should be equally protected against any omission arising from the same cause. And if the corporation could, through oversight or misapprehension, do no corporate act to avoid or forfeit the charter, how could the mistaken course of the individual members of an integral part work that mischief? Or could it have been intended that it should be in their power to dissolve the corporation? Their acceptance, however, of places under the trustees not amounting to resignations of their situations in the corporation of Regents, and not having the effect to dissolve or suspend the corporation; if there remained to each faculty when they returned to their duty, which was before the bringing of the suit, of those who were

members when the trustees took upon themselves the government of the University, a majority of the number of which each should properly be composed, whether residing in Baltimore or not, there was no objection to the competency of the corporation to institute the action. What number did in fact remain does not distinctly appear from the record. But the plaintiff having proved the fact of incorporation, the burden of showing a dissolution of the corporation rested upon the defendant.

These remarks have been made upon the hypothesis, that the corporation is composed of distinct, definite, integral parts. But is that so? The faculties of theology and law, are definite classes, consisting of seven members each. But the faculties of physic and of the arts and sciences, are indefinite parts,--clearly the faculty of the arts and sciences.

In relation to that faculty, the language of the tenth section of the act is, that "the professors of the arts and sciences, (in the plural,) and three others, shall form and constitute the faculty of the arts and sciences." Now, "the professors" may be two, or any larger indefinite number. They cannot, however, be fewer than two, and as there must be three more, that faculty when full, would consist of five at least, of which, three is a majority,--the number that is at least necessary to preserve the faculty. With respect to the faculty of physic, the language used is "that the professors now appointed and authorized in the College of Medicine of Maryland, shall constitute the faculty of physic," without specifying any particular number. But they who were at that time, professors in the College of Medicine, were merely designated as the persons, who should in the first instance compose that faculty, to the exclusion of the president and lecturers. That body, as originally formed, consisted of six members, appointed in the law itself, for the purpose of organizing and carrying the corporation into operation. But the Regents of that institution were authorized, from time to time, to appoint professors of the different branches of medicine, without limitation as to number; and seeing how many branches there are, it would seem, that the policy of that act was intended to be adopted; leaving the faculty to be composed thereafter, of as many members as from time to time should be thought proper and advisable, according to the condition of the institution; as it was left to the Regents of the College of Medicine, to appoint as many professors, as from time to time might be thought necessary and proper; and seeing too, that seven is designated as the definite number of members, to compose each of the two faculties of divinity and law. But not so with respect to the faculties of the arts and sciences, and of physic, which might require a larger number; which circumstance would seem further to indicate, that the two faculties of physic and of the arts and sciences, were not intended to be definite classes. Nor is it clear that it is strictly a corporation of integral parts. "The members of the four faculties," in the language of the act, being as a whole, the persons incorporated, and by the eleventh section a majority of the whole number of Regents being declared to be a quorum competent to make fundamental regulations for the government and discipline of the University, and to do other corporate business, although every member of any one faculty, and a large portion of another, should be absent from such meeting; whereas, ordinarily, the attendance of a majority of the members of each class, when the corporation is composed of definite integral parts, is necessary to constitute a corporate meeting or assembly. But when this suit was brought, there was in fact a sufficient number of members in each faculty, and whether regularly appointed or not, was not a matter to be inquired of at the trial. No advantage can be taken of any non-user or mis-user on the part of a corporation, by any defendant in any collateral action.

***37** There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter. The one is by *scire facias,* which is the proper process when there is a *legally* existing body capable of acting, but who have abused their power. The other by information in nature of a *quo warranto;* which properly applies, where there is a corporate body, *de facto* only, but who take upon

themselves to act, though from some defect in their constitution or organization, they cannot legally exercise their powers. But are entitled to be heard in either case, before they are condemned on proceedings instituted for that purpose, which must be at the instance of the government, and in no other way. For, besides the right of the corporation to a full hearing and judicial judgment of ferfeiture, before it can be stripped of its franchises and property, or be considered as dissolved, the government, with which the contract is made, may not wish to enforce a forfeiture, and may if it chooses to do so, waive the breach of any condition of the contract arising out of the charter.

This principle runs through all the books, and has been judicially enforced in a case in the Supreme Court of *New York,* strictly analogous to this. *The Trustees of Vernon Society vs. Hills,* 6 *Cowen,* 23--where it was determined, that though the trustees were at the time of bringing the suit a corporation *de facto only,* not having been appointed in the manner directed by the charter, it could not be taken advantage of by the defendant without showing that proceedings had been instituted by the government, and carried on to a judgment of ouster. Upon the whole, there is nothing to sustain the objection, that the plaintiffs were not competent to sue at the time of bringing the action, on the ground that the corporation was dissolved by the loss of an integral part.

It may not be amiss here to observe, that whatever may have been the understanding, it is by no means clear, that the power to fill up vacancies in the different faculties by the appointment of new members of faculty, does not as a necessary incident, belong to the Regents in their corporate character, and not to the faculties. The power given to the faculties by the eighth section, being to appoint respectively their own "professors and lecturers," who may or may not be selected from their own bodies. And when taken from among themselves, clothed in the two-fold character of members of the faculty so selecting them, and also of professors and lecturers. May not a faculty consisting of a definite number, be full, and yet have professors and lecturers appointed by itself, not belonging to it as members of the faculty, but rather as officers or agents? and if so, may not the power "to appoint its own professors and lecturers," look alone to the appointment of persons in that character only, and not as members of the faculty, leaving the power to fill up vacancies in the respective faculties to the corporation of Regents, by the appointment of new members?

*38 The second and third exceptions, and the second and third prayers, in the fourth exception, being abandoned, it is unnecessary to examine them.

And the only remaining question is, whether this suit can be sustained against the defendant for money received by him as the treasurer of the trustees; which arises on the first prayer in the fourth exception. And the opinion of this court is, that the plaintiffs are entitled to recover from the defendant any money amounting to a sum within the jurisdiction of the court below, remaining in his hands at the time the suit was brought; and which was received by him as the treasurer of the persons claiming under the act of 1825, to be the trustees of the University of Maryland, at any time within three years before the suit was instituted, to which they can show themselves entitled as the Regents of the University, or which properly belongs to that institution.--But no sum not received within that time, the act of limitations being pleaded and relied upon by the defendant.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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Westlaw.

God's Angry Man

Bill Hart was a one-man NAACP more than 50 years ago

He walked all the way from Alabama to Howard U. in Washington in the 1870's and when he got there he was barefooted and ragged.

Panty-Waist

Bill Hart secured funds from Congress for Howard's first law school building and $10,000 a year to run it.

After 30 years of teaching there he resigned from the faculty over a minor matter of which there are three versions.

One—Enemies said he was an athiest.

Two—He was supposed to have referred to Dean Richards as a panty-waist, and the trustees as "not worth a confidential."

Three—He is said to have remarked that a celebrated New York murder of two persons was justified under the law.

Bill Hart was usually right. It was his audacity and plain speech which made enemies.

His favorite quotation from Shakespeare was:

"Oh cursed spite
That I was sent
To make things right."

By John Jasper

FIFTY-ONE years ago W. H. H. Hart, a Howard University law professor, bought a railroad ticket for passage between New York and Washington.

At the Maryland line, the little professor was red to move from the mixed coach in which he riding to a jim crow car.

Just the year before, 1904, the Maryland legisla had passed a law requiring railroads to furnish rate cars for white and colored passengers. Conors were to be fined for refusing to enforce the lation.

Bill Hart wouldn't move, so he was put off the train at Elkton, arrested, and fined $5.

• • •

NOW he was angry. He demurred to the indictment, filed a plea of abatement and a motion to arrest judgment. All were overruled.

He appealed the five dollar fine to the Maryland Court of Appeals. It wasn't the 5 dollars. It was the principle and the humiliation of jim crow.

Mr. Justice Boyd delivered the opinion of the court which consisted of Chief Justice McSherry and Associate Justices Briscoe, Page, Schmucker and Jones.

He ruled the Maryland jim crow law was invalid because it interfered with inter-state commerce.

The power to regulate commerce between the states resides in Congress alone. Justice Boyd said, and state legislatures have no such authority.

• • •

ON A TRIP from Winchester, Va., to Harrisburg, Pa., the court said a passenger would be required to ride jim crow 6 or 8 miles. Then in West Virginia he could move to a mixed coach.

At the Maryland line he could be required to move to a jim crow car and at the Pennsylvania line go back to the mixed coach.

Three changes required in a short distance placed an undue burden on the passenger and the railroad and could not be tolerated.

The Supreme Court in Plessy vs. Ferguson, 1896, ruled jim crow cars legal in Lousiana, Judge Boyd admitted, but he added that the question of interstate travel was not raised in that case. Bill Hart was awarded 1 cent damages.

• • •

FROM THAT DATE ON, railroad passengers from the north travelled through Maryland in mixed coaches.

The jim crow line began at Virginia, not in Maryland.

Why?

Because there was no Bill Hart in Virginia, in the Carolinas or any of the other Southern states, who was angry or resourceful enough to challenge the unlawful statutes of their areas.

Bill Hart is one of Maryland's forgotten Civil Rights heroes.

Older lawyers in the nation's capital remember him well. He neither drank nor smoked.

Kelly Miller said Hart had the most brilliant mind of any graduate of Howard.

Editorial On Hart's Death

Afro-American
January 20, 1934

What a contrast to the chiselers, the compromisers, the trimmers, who are so busy conciliating and reconciling the dominant race that they surrender everything except the shirts on their backs..."

Hart's Howard in 1900

In addition to instructing 77 students in torts, crimes, misdemeanor and corporations in Howard Law School, Professor Hart taught 7 students in the college agriculture department the nature of soil, crop rotation and use of manures.

The law school had a faculty of 8. Tuition was free, matriculation fee $10, books cost $30 a year and classes began at 6:15 p.m. each week day.

President of Howard was Rev. Jeremiah Rankin, writer of the hymn "God Be With You 'Til We Meet Again."

General O. O. Howard, university founder, was on the board of trustees.

• • •

HOWARD HAD an enrollment of 810 students, 193 of medicine, 36 in college, 130 in pedagogy (teachers college), 56 in theology, 32 in nursing, 77 in law, 145 in a 4-year preparatory department, and 141 in an English Department (grammar school grades).

Professor Hart's students included James A. Cobb of D.C., Isaac H. Nutter of Princess Anne, Md., William H. Crawford of New York, Ira T. Bryant of Nashville, and James H. Rapier (Congressman) of Alabama.

His faculty associates included Kelly Miller, George Cook, L. B. Moore, who had the only doctor's degree in philosophy on the whole faculty.

Medical students included Thomas S. Hawkins, Baltimore; Robert G. Chissell, Petersburg, Va.; Charles H. Crawford, Harrisburg, Pa.; James C. Carper, Hampton, Va.; E. Mayfield Boyle, Baltimore.

Students in college included J. H. Bluford, Capahosic, Va.; Thomas W. Turner, Charlotte Hall, Md.; Florence Dungee, Baltimore; Neval Thomas, Springfield, Ohio.

Prep school students included John W. Cromwell, Jr. and Harold Norwood of D.C.

Sued For 22 Million

The District of Columbia signed a contract with Professor Hart to house 200 wayward children on his Potomac River farm.

He sent them a bill for $148,000. The case dragged for 23 years and Professor Hart built up a claim and sued the government for 22 million dollars.

Uncle Sam offered to compromise for $48,000. The professor haughtily rejected it.

After all, right was right.

The claim was never paid.

For myself, I need no photograph. I can see him in my mind as clearly as I saw him in the flesh 40 years ago.

Short, stocky, pleasant faced, brown, baggy pants, loose coat, flapping in the wind although his pockets seemed full of papers.

Always he seemed in a hurry. He was both mother and father to two small children. A divorce left him with them when Bill Hart Jr. was two years old.

He carried the kids with him frequently and they had to run to keep up with him.

In his fight with the State's Attorney of Cecil County and Attorney General William S. Bryan of Maryland, he was represented by Henry M. McCullough, but Bill Hart in fact was his own lawyer. The briefs and arguments were his work.

Bill was a one-man NAACP in the days when Thurgood Marshall was still with the angels in heaven.

Except for the fact that Maryland had an excellent Court of Appeals, Bill would have taken his case clear to the Supreme Court—and probably have won it too.

• • •

A PHOTOGRAPH of Professor Bill Hart deserves a place of honor in Howard Law School's library and in Maryland's Hall of Heroes.

He was a God's angry man.

None of us should forget him.

The Hart Family

Bill Hart, Jr., a mail carrier, lives with his wife and two children at 4014 Illinois Ave., N.W. His route includes the AFRO's Washington office.

Clementine Hart, his sister, now Mrs. Clementine Simkins, is a New York school teacher.

Their mother, a handsome woman, died in 1934. Professor Hart at 77 the same year.

His grave is in Harmony Cemetery.

Anything Left On The Street

A client of Professor Hart's was charged with larceny of a car in the early days of the automobile.

The professor argued that under the common law, anything left on the streets was abandoned.

The court dismissed the case provided the youth would enlist in the army.

The District of Columbia immediately revoked the old law and passed a new one covering unauthorized use of autos.

FINALE.

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THEY WERE NOT WANTED.

Two Colored Students at the Maryland Law School Complain of Race Prejudice, But the Faculty Say Otherwise.

W. Ashbie Hawkins and J. L. Dozier, two colored students at the Law School of the University of Maryland, have been informed that their presence in the law class is no longer desired. This, they say, is the outcome of a protest signed by all the students in the medical, law and dental departments and sent to the faculty against their retention.

Dozier graduated at Lincoln University and Hawkins at Morgan College. The latter recently edited a race paper at Cambridge, Md.

Each student has spent one year at the Law School. They claim that their ostracism now is the outcome of race prejudice. On the other hand, the faculty of the school say that neither student possesses the qualifications of a lawyer, and that they would reflect neither mental nor moral credit on the school.

Last night a prominent jurist, who is an officer of the school, said: "The young men have been asked to withdraw. Their examination showed that they were not intellectually qualified to pursue the study of law and receive diplomas as graduates in law, and they have been told that they were simply wasting time and money in attending our lectures. This is our view of the situation aside from the race question. In 1889 we graduated two colored men, Cummings and Johnson, both of whom are now practicing in the city. They were able students and passed good examinations. We treat a colored student as we do a white one, and if he has no aptitude for the law we simply tell him we cannot take his money, as he will receive, of course, no equivalent for it."

Dozier states that he will enter the law school in Howard University which is entirely devoted to colored students. This university has also a theological and a medical course.

Hawkins and Dozier were the only two colored students in the university.

AT THE CAPITOL.

Eulogies of Senator Beck and Representative Randall.

WASHINGTON, Sept. 13.—The approval of

INNOCENCE PROVED AT LA

Convicts Who Are to be Released Long Years of Imprisonment f Crimes They Did Not Commit.

ATLANTA, GA., Sept. 13.—Seven year a young man named Roby, who lived i per county, was arrested on the char arson.

It was alleged that he had wilfully s to his uncle's house in the night. The was burned to the ground and the in narrowly escaped with their lives. protested his innocence and, being of a l respected family, every effort was ma save him from the penitentiary. He ha some disagreement with his uncle, and with other circumstantial evidence, m seemingly strong case against him.

He was tried and convicted and sent to 15 years in the penitentiary. From to last he stoutly denied that he was g but without a murmur bade farewell t world and took up his life within penite walls.

All these years he has patiently toil chains, always protesting that he v wronged man and waiting for that j which has come at last.

This afternoon a gentleman from J county called on Governor Gordon and the story of Roby's conviction and showed indisputable proofs that the pri was innocent, and that a negro comm the crime. The governor will pardon at once.

JAMES GRAY'S ROMANCE.

ST. LOUIS, MO., Sept. 13.—There is doubt that James Gray, a life convict i penitentiary at Chester, Ill., is serving ence for a murder committed by some else. His case furnishes a strange ron of crime. Gray is not his real name, b will furnish no other to the public. well educated and has been four years a l keeper in the institution. He was conv on his own voluntary confession made b the trial, though in court he stoutly d the crime.

One morning in October, 1883, a man found murdered in a box-car at Centrali He was a tramp and was never ident There was no clue, but on the third after the murder a young man entered

COLORED LAW STUDENTS.

What Young W. Ashbie Hawkins Has to Say—His Statement As to His Standing.

W. Ashbie Hawkins, one of the two young colored men who were asked to retire from the Maryland University Law School, has something to say in reply to the interview published in THE SUNDAY HERALD, in which a "prominent jurist," who is an officer of the institution, is quoted as saying:

"The young men have been asked to withdraw. Their examinations showed that they were not intellectually qualified to pursue the study of law and receive diplomas as graduates in law, and they have been told that they were simply wasting time and money in attending our lectures. We treat a colored student as we do a white one, and if he has no aptitude for the law we simply tell him we cannot take his money, as he will receive no equivalent for it."

Mr. Hawkins, commenting upon the foregoing statement, said to a reporter yesterday:

"It is bad enough to have the University of Maryland take our money, start us on our course, and then suddenly stop us for no other reason than that the white students do not desire to mingle with us, but to have one of the officers misrepresent us in this way is provoking in the extreme. As to Mr. Dozier I have nothing to say; he is fully capable of taking care of himself. For my part I know that what this 'prominent jurist' says is all moonshine. I maintained the university's required standing in every subject but one, and in that I failed by a slight margin. This is no more than some of the best students in the school do. All the university requires is that you make an average of 75 under each professor before it will graduate you. If you do not reach the average the first year, you have the second and third years in which you may do it.

"One of the white students in my class last year failed in everything; he is going back to the university and in due time will graduate. Nothing is said of his inability to learn the law. One of the most brilliant men in the class of '90 failed the year before in several studies. Now, I failed in but one, and that one a subject which is considered by many the most difficult and technical in the law—real property—yet this 'prominent jurist' does not hesitate to show his lack of that element which every jurist should possess—a sense of justice.

"He says further 'they have been told that they were simply wasting time and money in attending our lectures.' This that jurist must know is not true, for we have been told no such thing. Last February after our first examination would have been the proper time, if any, to tell us this, but we were not told so, and the secretary did not hesitate to accept the second instalment of our tuition.

"In conversation with the Hon. John P. Poe he did me the honor to say that my record is a fair one. I have engaged in teaching in this State and Virginia for eight years, and from all my examiners I have received commendation for my ability as an instructor, and, in Baltimore county, where I am now engaged, I am among the few teachers who hold first-grade certificates. It seems that if I were so poor off intellectually some of these examiners would find it out.

"The real and the only question underlying this difficulty is my race and not my intellectual fitness for the study of the law. If it were not for my color there would be no trouble. I shall have nothing to say about the jurist's statement that 'we treat a colored student as we do a white one.' The mere statement itself is enough to provoke an incredulous smile on the face of every man in Baltimore. I do not care for my exclusion from the university. I can find some other place to pursue my studies, but the faculty does me an injustice and shows the weakness of its own cause when it charges that my exclusion is for any other cause than my color."

Baltimore Morning Herald 9/15/1890

Boaz, the owner of the [illegible], understands that it is Ruth accosts her with a blessing: "A full reward be given thee of the Lord God of Israel, under whose wings thou art come to trust." Christ compares Himself to a hen gathering the chickens under her wings. In Deuteronomy God is represented as an eagle stirring up her nest. In a great many places in the Psalms David makes ornithological allusions, while my text mentions the wings of God, under which a poor, weary soul had come to trust.

I ask your attention, therefore, while, taking the suggestion of my text, I speak to you in all simplicity and love of the wings of the Almighty.

First: I remark that they were swift wings under which Ruth had come to trust. There is nothing in all the handiwork of God more curious than

A BIRD'S WING.

You have been surprised, sometimes, to see how far it could fly with one stroke of the wing; and, when it has food in prospect, or when it is affrighted, the pulsations of the bird's wing are unimaginable for velocity. The English lords used to pride themselves on the speed of their falcons. These birds, when tamed, had in them the dart of lightning. How swift were the car-carrier-pigeons in the time of Anthony and at the siege of Jerusalem! Wonderful speed. A carrier-pigeon was thrown up at Rouen and came down at Ghent, 90 miles off, in one hour. The carrier-pigeons were the telegraphs of the olden time. Swallows have been shot in our latitude having the undigested rice of Georgia swamps in their crops, showing that they had come 400 miles in six hours. It has been estimated that in the 10 years of a swallow's life it flies far enough to have gone around the world 89 times, so great is its velocity. And so the

WINGS OF THE ALMIGHTY,

spoken of in the text, are swift wings. They are swift when they drop upon a foe and swift when they come to help God's friends. If a father and his son be walking by the way and the child goes too near a precipice how long does it take for the father to deliver the child from danger? Longer than it takes God to swoop for the rescue of His children. The fact is that you cannot get away from the care of God. If you take the steamship or the swift rail-train He is all the time along with you. "Whither shall I go from Thy spirit, and whither shall I flee from Thy presence? If I ascend up into Heaven Thou art there. If I make my bed in hell behold! Thou art there. If I take the wings of the morning and dwell in the uttermost parts of the sea even there Thy hand shall hold me."

THE ARABIAN GAZELLE

is swift as the wind. If it gets but one glimpse of the hunter, it puts many crags between. Solomon, four or five times, compares Christ to an Arabian gazelle (calling it by another name) when he says: "My beloved is like a roe." The difference is that that roe speeds the other way; Jesus speeds this. Who but Christ could have been quick enough to have helped Peter when the water-pavement broke? Who but Christ could have been quick enough to help the Duke of Argyle, when, in his dying moment, he cried: "Good cheer! I could die like a Roman, but I mean to die like a Christian. Come away, gentlemen. He who goes first goes cleanest?" I had a friend who stood by the rail-track at Carlisle, Pa., when the ammunition had given out at Antietam; and he saw the train from Harrisburg,

FREIGHTED WITH SHOT AND SHELL,

as it went thundering down toward the battlefield. He said that it stopped not for any crossing. They put down the brakes for no grade. They held up for no peril. The wheels were on fire with the speed as they dashed past. If the train did not come in time with the ammunition it might as well not come at all. So, my friends, there are times in our lives when we must have help immediately or perish. The grace that comes too late is no grace at all. [illegible] I want is a God—now. Oh! is it

A Year of Segregation in Baltimore

By W. ASHBIE HAWKINS

For many years the great majority of the Negroes of Baltimore had their homes, their churches and what business places they possessed in the central, southern and eastern sections of the city. Here and there in other sections—the western, northern and northwestern—there were a few colored residents, of course, but their homes, with few exceptions, were on the narrow alleys or streets.

W. ASHBIE HAWKINS
Who conducted the first law case

Beginning in the early eighties a quiet movement to the more favored sections of the city, notably the northwestern, was begun and has continued until the present. It was greatly accelerated about 1898, when Sharp Street Memorial Methodist Episcopal Church, one of the oldest, if not the oldest, and most prominent of our city churches, began the erection at Dolphin and Etting Streets of its handsome house of worship; and a few years later when the colored high school was removed from the business section of the city to Dolphin Street and Pennsylvania Avenue, and when Union Baptist Church, one of the strongest religious forces in the community, dedicated its new home on Druid Hill Avenue, but a short distance from the other institutions just mentioned.

Condemnation of large blocks of property in South Baltimore for the use of the Baltimore & Ohio Railroad Company compelled a great number of our people to seek homes elsewhere, and the most natural course was to follow this migration to the northwest. The "invasion" of Russians and other foreigners in East Baltimore in like manner forced many of our people there to seek other quarters, and to the northwest they went also. Persons coming to the city in search of business, educational or professional opportunities naturally sought the section occupied by the prosperous, and where the best houses were to be obtained. In East Baltimore, or Old Town, as it is popularly known, and the other older parts of the city the houses for the most part which were open to rent or purchase by our people were not always modern in their construction and appointment, and so when the great northwest with its splendid houses on wide streets, amid sanitary surroundings, were opened for rent and purchase the opportunity was eagerly grasped.

Another cause for which the black man is in no way responsible lies in the opening and development of large suburban tracts for residential purposes by the middle class of whites. Their migration to the suburbs threw great blocks of handsome houses on the market, and they had to be disposed of to anybody, and often on any terms. Baltimore was for years without any great suburbs, but with the coming and development of her cable and electric cars reaching out in every direction, these have grown with great rapidity and often at the expense of city market values.

Druid Hill Avenue on the east, Dolphin Street on the south, Gilmore Street on the west and North Avenue on the north, a territory covering approximately ten blocks square and comprising some of the city's chief residential streets, is the section mostly affected by this Negro "invasion." More or less friction had been caused whenever a block was invaded—in several instances harsh measures were taken, such as breaking the window lights, putting tar on the white marble steps, and in other ways mutilating the property. In one or two cases the families moving in were frightened away, but the great majority stuck, and after a short time the excitement wore off, the whites either moving themselves or resigning gracefully to their fate.

Mitchell House

THE CRISIS

A RECORD OF THE DARKER RACES

Volume 3 - 4

November 1911 - October 1912

AUTHORIZED REPRINT EDITION

ARNO PRESS

A Publishing and Library Service of The New York Times

NEW YORK • 1969

M Howell House

The black lawyers of Baltimore pictured here had gathered at the home of the Reverend Harvey Johnson (1923 Druid Hill Avenue), circa 1910. Johnson had been instrumental in securing the admission of the Maryland bar's first black lawyer. In the doorway (*center*): Rev. Harvey Johnson. *From left to right*, top row: U. Grant Tyler (Howard University, 1894) and C. C. Fitzgerald (Howard University, 1892); second row: John L. Dozier (Howard University, 1891), Hugh M. Burkett (Howard University, 1898), Warner T. McGwinn (Yale University, 1887), and H. R. White (layman); third row: George L. Pendleton (Howard University, 1896) and William Chester McCard (Wisconsin and Northwestern universities, 1896); fourth row: W. Ashbie Hawkins (Howard University, 1892); bottom row: William H. Daniels, Harry S. Cummings (University of Maryland, 1889), and J. W. Parker. (Courtesy of Ollie May Cooper and Mr. and Mrs. Paul F. Cooper.)

THE DAILY RECORD

Published Daily Except Sunday By THE DAILY RECORD COMPANY
Daily Record Bldg., 11-15 E. Saratoga St.
Baltimore, Md.
Telephone Plaza 2848.

EDWIN WARFIELD, JR., President.
FRANK T. WALLACE, Editor and General Manager.

Member of
ASSOCIATED COURT AND COMMERCIAL NEWSPAPERS, INC.
UNITED PRESS ASSOCIATION.
NATIONAL EDITORIAL ASSOCIATION.

GEORGE T. HOPEWELL CO.
National Advertising Representative
Suite 1832—101 Park Avenue
New York, N. Y.

Subscription Price $10 Per Year; $1 Per Month; 5 Cents Per Copy.

Entered as second-class matter at the Postoffice at Baltimore, under the Act of March 3, 1879.

Under no circumstances will any judgment, decree or other matter of record be withheld from publication in this paper.

The Daily Record does not assume responsibility for or adopt the views expressed in published correspondence or contributed notes or articles unless expressly so stated.

THE DAILY RECORD *is on sale at the following places:*

News Stand in the Equitable Building.
Sherman's News Agency, Calvert & Fayette Streets.
News Stand in the American Building.
News Stand at St. Paul & Lexington Sts.
News Stand at 722 East Baltimore St.
News Stand at Howard & Fayette Sts.
News Stand at Baltimore & Eutaw Sts.
News Stand at Eutaw & Fayette Sts.

Vol. 106. Saturday, April 5, 1941. No. 82.

Old Age Assistance

In an Eastern State a committee of the Legislature recently held a hearing on several bills that were designed to increase the benefits under the old-age assistance law. The hearing brought out a large group of aged and aging citizens to register as proponents of the measures. The "human appeal" of these aged folk tugged at the heart-strings, and the job of sorting sentiment from realism was a tough assignment for the Legislative Committee. Undoubtedly these aged folk are entitled to the friendly consideration of the Legislature, but the Legislature also has the job of giving full and careful consideration to the economics of the matter. The system of old age assistance must neither fail of giving true assistance nor fail of its own weight because of unsound and uneconomic generosity. There is a happy medium. It must be found.

Relax!

We'll freely admit that these are trying times, and that there is such a plentiful supply of problems that the ordinary business executive could put in a twenty-four-hour stretch every day worrying about them. This of course would leave him no time at all for recreation, ordinary social contacts or amusements. Frankly, in our opinion the only ones who would benefit by such a program would be the under-

Mental Examination Given Before Arraignment Held Improper

Denver, April 4 (CCNS)—Sanity observations made by psychiatrists before arraignment of a defendant cannot be entered as evidence in his trial, District Judge Samuel W. Johnson ruled in the trial of Jack Carleton, charged with murder.

The ruling was made in connection with testimony by Dr. Charles A. Rymer, assistant director of Colorado Psychopathic Hospital.

Dr. Rymer testified his observations of Carleton showed the latter was sane at the time of the fatal shooting of Undersheriff C. B. Fugate of Jefferson County in Carleton's tavern.

Defense Attorneys Don B. Bowman and Fred Pferdesteller objected on grounds these observations were made before Carleton entered a plea of not guilty by reason of insanity, and Judge Johnson sustained their objection and ruled out the testimony.

Funeral Services For Late W. Ashbie Hawkins Will Be Held Today

Funeral services for W. Ashbie Hawkins, prominent colored member of the Bar, will be held at 2 o'clock this afternoon at his residence, 929 Arlington avenue, Govans.

Mr. Hawkins, who died at the Provident Hospital on Thursday following a long illness, was born in Lynchburg, Va., 78 years ago. He was graduated from Morgan College and received his law degree at the law school of Howard University, in Washington, D. C., being admitted to practice on May 29th, 1893. He served as a delegate to the General Conference of the Methodist Episcopal Church on two occasions and at one time was Supreme Chancellor of the Knights of Pythias of the Eastern and Western Hemispheres. He is survived by his wife and a daughter.

Monumental City Bar Assn. To Hold Stated Meeting This Evening

A regular stated meeting of the Monumental City Bar Association will be held at 9:30 o'clock this evening at the Fowler Dining Rooms, Druid Hill avenue and Dolphin street.

Reports of the various committees of the organization will be submitted for the consideration of the members and such other business as may be properly presented will be transacted at the session.

Dallas F. Nicholas, president of the Association, will preside.

Bank Clearings Again Reach Seven-Billion-Dollar Mark

New York, April 4—Continuing well above the level of recent years, the volume of bank clearings in the latest week was only slightly below the peak total recorded two weeks ago and exceeded the $7,000,000,000-mark for the third time this year.

Total clearings for the twenty-three cities included in the Dun & Bradstreet, Inc., compilation during the week ended Wednesday, April 2, amounted to $7,082,798,000, a rise of 12.2 per cent. above the $6,313,879,000 recorded in the

Supreme Bench Announces Decisions In Motions For New Trials

The new trial motions of May Brown and Gertrude R. Jordan, convicted of operating a disorderly house, and of Stanley Lubinski, convicted on two charges of robbery with a deadly weapon were overruled by the Supreme Bench of Baltimore yesterday.

The Bench also overruled the motion for a new trial and the motion for arrest of judgment in the case of Thomas M. Hubin, Edward Leon, Ceval Neal and Francis Schussle, who were convicted of bets on horse races. The new trial motion of Walter Cegelski, who was convicted of lottery, was dismissed.

Assistant State's Attorneys Stewart Lee Smith and Paul C. Wolman represented the State at the hearing.

Birthday Greeting Alleged Cause For Finding Damage Suit

Washington, April 4 (U.P.)—The Postal Telegraph Company today received the following bill from Wally O'Hara for allegedly garbling a birthday greeting he sent to a friend:

Mental anguish, $350; loss of sleep and rest, $300; cost of moving, $75; injury to health, $150; loss of job, $125.

That adds up to $1,000, the most you can sue for in Municipal Court where the case was filed yesterday. The company has 15 days to reply.

O'Hara charged that on July 22, 1930, he sent the following greeting to a friend named Mrs. Micky Mertz:

"Micky, c/o Mrs. C. A. Lubett, Manhasset, N. Y.

"Nothing but the best for the best from the world's worst red-headed Irishman."

But, he charged, this is how the telegraph company sent it:

"Mickey C. Lubett, Manhasset, N. Y.

"Nothing better to wish the world's best lover than lots of luck from the world's worst lover, the head-headed Irishman."

That caused Micky, O'Hara charged, much humiliation and embarrassment among friends and associates who held her up to contempt and ridicule.

Micky is no longer his friend, he said, as a result of which he wants financial compensation for great mental anguish and loss of peace of mind.

Real Estate Notes

The deeds placed on record during the week ending April 4th numbered 672 and the considerations aggregated $229,019.12, compared with 741 and $229,258.25 for last week and with 555 and $130,017.77 for the corresponding week of 1940.

The mortgages numbered 280 and the total amount involved was $1,005,744.28, compared with 288 and $1,053,310.47 for the preceding week and with 248 and $741,772.19 for the like week of last year.

Permits were granted for 234 buildings, of which 217 were for two-story and 17 were for one-story structures, compared with 71 for last week, of which 60 were for two-story and 11 were for one-story buildings, and with 129 for the corresponding week of 1940, which included 4 three-story, 95 two-story and 30 one-story structures.

James W. Miller, broker, reports the sale of the three-story brick business property at 306 North High street to Jacob and Jennie Zetzer. The property was sold subject to a ground rent of

Appointments In Clerks' Offices Approved By Supreme Bench

The appointment of Charles F. J. Carroll as Chief Deputy Clerk of the Baltimore City Court was approved by the Supreme Bench of Baltimore yesterday. Mr. Carroll, who succeeds the late Peter Stevens, has been associated with the office since December, 1915.

The Bench also approved the appointment of Edwin J. Dickerson as a deputy clerk of the City Court office; the selection of Irvin Zelger to serve as general office clerk in the Clerk's office of the Criminal Court to succeed the late Frank P. (Buck) Reynolds, and the appointment of Miss Beverly Eaton as a stenographer in the Criminal Court office in the place of Anthony J. Nolan, who was furloughed to serve in the Army. The resignation of F. M. Bobbitt as a bailiff to the Supreme Bench was also accepted.

LEGAL NOTICES.

First Insertion.

Kendall A. Young, Solicitor,
543 Title Building.
Nathan Posner, Solicitor,
702 Hearst Tower Building.

IN THE CIRCUIT COURT OF BALTIMORE CITY—(B—194—1941).

ORDER OF PUBLICATION.

The object of this suit is to procure a divorce a vinculo matrimonii from the defendant, Olga Sara Willamymie McKellar Cottman.

The bill recites the marriage of the parties on March 16th, 1933, in New York City; that the complaint has been a resident of Baltimore, Maryland, in excess of two years prior to the filing of his bill of complaint; that there are no children as a result of the marriage; that the defendant is a non-resident of the State of Maryland, her last known address being Williamsburg, Virginia; that the defendant abandoned and deserted the complainant during the month of March, 1938; that said abandonment and desertion has continued uninterruptedly for more than three years prior to the filing of the bill of complaint, is deliberate and final and the separation of the parties is beyond any reasonable hope of reconciliation and that the conduct of the complainant has been that of a kind, affectionate and dutiful husband.

It is thereupon, this 4th day of April, 1941, by the Circuit Court of Baltimore City, ordered, that the complainant, by causing a copy of this order to be inserted in some daily newspaper published in the City of Baltimore, State of Maryland, once in each of four (4) consecutive weeks, before the 5th day of May, 1941, giving notice to the said Olga Sara Willamymie McKellar Cottman of the object and substance of this bill, and warning her to be in this Court, in person or by solicitor, on or before the 20th day of May, 1941, to show cause, if any she may have, why a decree ought not to be passed as prayed.

EDWIN T. DICKERSON.

True Copy—Test:
CHAS. R. WHITEFORD, Clerk.

ap5,12,19,26

Robert L. Maines, Solicitor,
628 Baltimore Trust Company.

IN THE CIRCUIT COURT OF BALTIMORE CITY — (B — 194 — 1941) — Minnie Scherr vs. Michael Scherr.

ORDER OF PUBLICATION.

The object of this bill of complaint is to procure a divorce a vinculo matrimonii by the complainant, Minnie Scherr, from the defendant, Michael Scherr.

The bill recites that the complainant is a resident of the City of Baltimore, State of Maryland, and has resided in the State of Maryland for more than two years next preceding the filing of this, her bill of complaint. That the defendant is a non-resident of the State of Maryland and when last heard of was residing in the City of New York, State of New York. That the parties were married in the City of Baltimore, State of Maryland, on the 9th day of January, 1900, by a religious ceremony. That three children were born as the result of said marriage, all of whom are now of legal age and married. That the defendant without any just cause or reason abandoned and deserted the complainant and has declared his intention to live with her no longer; that the said abandonment and desertion has been continuous and uninterrupted for more than three years and is the deliberate and final act of the defendant, and this separation is beyond any reasonable hope or expectation of reconciliation.

It is, therefore, this 4th day of April, 1941, by the Circuit Court of Baltimore City, ordered that the complainant by causing a copy of this order to be inserted in some daily newspaper published in Balti-

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J. Carroll Su
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IN THE CIRCUIT
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Gave H.U. His Life

of Dr. George Emmett
e of Howard Univer-
taken from the An-
kin Memorial Chapel,
y afternoon. Pallbear-
: Dean Charles Wesley,
L. K. Downing, Joseph L. Johnson, William B. West, Dr. Russell A. Dixon, and Registrar F. D. Wilkinson. Interment was at the Columbia Harmony Cemetery, with the Rev. Arthur F. Elmes officiating.

Ashbie Hawkins, Attorney for 50 Years, Dies at 78

BALTIMORE.

William Ashbie Hawkins, 78, who has practiced law here for the past 50 years and was for many years one of the leading lawyers in the State, died early on Thursday morning in Provident Hospital where he had been confined for seven months.

Mr. Hawkins had been suffering from a kidney and heart ailment for the past four years. Funeral services were held on Saturday at 2 p.m., at his home, 929 Arlington Avenue, Govans.

Rev. Mr. Coates Officiates

The Rev. Robert F. Coates, pastor of Sharp Street Memorial Methodist Church of which he was a lifelong member and where he served as trustee for the past 32 years, officiated, assisted by the Rev. C. Y. Trigg, pastor of Metropolitan Methodist Church. Interment followed in Mt. Auburn Cemetery.

Mr. Hawkins was born on August 2, 1862, in Lynchburg, Va., the son of the late Rev. Robert and Mrs. Susan Cobb Hawkins. He came to Baltimore while a young man and studied at Morgan College where he was graduated in 1885. The school con-

W. ASHBIE HAWKINS

...ve Leads 28 ...Rockville

...ILLE, Md. — Marriage
...ere issued to seventeen
...re, last month.
...ts were:
...ARRETT — John R.,
...ington; Marguerite, 21.
...OHNSON — William
...Washington; Jeneve E.,
...ORNE—Ellis J., 22,
..., Md.; Emma L., 16.
...CKETT—Herbert R.

41 Baltimore Deaths in Week; 12 Past 60

of Dr. George Emmett of Howard University taken from the Andrew Memorial Chapel, afternoon. Pallbearers Dean Charles Wesley, L. K. Downing, Joseph L. Johnson, William B. West, Dr. Russell A. Dixon, and Registrar F. D. Wilkinson. Interment was at the Columbia Harmony Cemetery, with the Rev. Arthur F. Elmes officiating.

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ORNE—Ellis J., 22, , Md.; Emma L., 16.

ACKETT—Herbert R., rced, Alexandria, Va.; 22.

ON - CLAGGETT — S., 21, Norbeck, Md.; L., 21, Sandy Spring,

STILL — Aaron, 39, Glen, Md.; Bernice G., sington, Md.

MARTIN—Melvin A., hington; Gladys M., 23.

-HARRIS—Joseph, 36, gton; Pearl H., 31.

DUNLAP—Charles W., Bealesville, Md.; Myrtle Seneca, Md.

DAVIS—Henry C., 25, gton; Elizabeth L., 25.

STANDFIELD— James Baltimore; Edna B., 29.

JOHNSON — Claude Washington; Mary D.,

DUNLAP—Charles W., ower, Washington; Rose

WHEELER — Clyde, 29, r, Washington; Serina,

cCRAY—John W., 21, lle, Md.; Mildred, 18, re, Md.

S-HENDERSON—James Kensington, Md.; Mabel Linden, Md.

-BARNETT—Henry J., ntwood, Md.; Charlotte

41 Baltimore Deaths in Week; 12 Past 60

Two women, 80 and 85, two men, 81 and 84, respectively, five men and three women past 60 were among the forty-one persons whose deaths were reported to the Baltimore City Health Department during the week of March 28 to April 3.

The complete list follows

Viola Barrett, 24, 2119 Howard-st.
Edward Bailey, 39, 1125 N. Carey-st.
Ida E. Reddick, 65, 620 N. Bruce-st.
Edward Williams, 66, 627 N. Paca-st.
Marion Jones, 47, 655 W. Lee-st.
William E. Roberts, 19, 818 N. Spring-st.
James T. Jackson, 71, 536 Laurens-st.
Howard Mason, 67, 728 Pennsylvania-av.
Henry Clark, 38, Hyde, Md.
Angeline Chester, 80, 831 Harlem-av.
Mary Robb, 61, 642 Dover-st.
Taylor Davis, 65, 2005 Brunt-st.
Frank Boose, 84, 1729 Orleans-st.
Mary Simmes, 32, 507 Brune-st.
Cecil J. Daniels, 35, 1110 W. Mulberry
Lizzie Tuckson, 85, 10 N. Bruce-st.
Harry Seymour, 9 mos., 921 N. Vincent
Margaret A. Foster, 51, 924 Pierce-st.
Edward Mills, 46, Princess Anne, Md.
William Porter, 45, 815 W. Ostend-st.
James Walker, 69, 638 W. Mulberry-st.
Eugene Beale, 1, Phoenix, Md.
Jessie Andrews, 65, 1902 E. Madison-st.
Mabel Pulley, 22, 802 Ostend-st.
Edna W. Ferrell, 1, 1918 Madison-av.
Sidney Bowens, 57, 817 S. Hanover-st.
Benjamin King, 81, 817 Hanover-st.
Georgiana Smith, 59, 925 N. Parrish-st.
James T. Corprow, 39, 212 N. Gilmor-st.
Avon Carr, 26, 1343 Stricker-st.
Raymond Evans, 2, 1639 W. Lafayette-av.
Ethel Ross, 33, 610 S. Greene-st.
Harry Matthews, 45, 501 Gold-st.
Lucy Bordley, 52, 1032 Leadenhall-st.
William Jordan, 64, 520 W. Conway-st.
John A. Warren, 46, 216 N. Stricker-st.
Rebecca Rowley, 42, 506 N. Stricker-st.
Howard Nick, 37, 119 Paca-st.
William W. Braxton, 43, 709 Sharp-st.
Margaret R. Griffin, 39, 2655 Boone-st.
Charles Johnson, 63 1435 Webb-st.
Emma Ritchburg, 29, 1610 Madison-st.
William Ennis, 43, 2040 E. Eager-st.

EATHS

MRS. LAURA FEAT

HILL, Md. — Funeral services for Mrs. Laura Feat were held on

GEORGE PARKER

O, N.Y.—Funeral services for arker, 191 Hickory Street,

EDMUND MILLS

MT. VERNON, Md.—Funeral services for Edmund Mills, who died in Mercy Hospital, Baltimore, on March 27, were held recently.

He is survived by his mother; twelve childrens, Misses Tressa Beulah, Nettie, Madeline, Cora, Lola and Harriet and George, Isaac, Edmund and Johnny Mills and Mrs. Annie Mae Wallace and

uated in 1885. The school con-

W. ASHBIE HAWKINS

ferred an honorary M.A. on him in 1918.

He took his law training at the Maryland University which later became the University of Maryland, graduating in 1891; taught in the public schools from 1885 to 1892, and at the same time he was doing further study at Howard University Law School, where he was awarded his bachelor of law in 1892.

Champion of Right

Mr. Hawkins took up his law practice in Baltimore the same year, and during his career was prominent in championing the cause of the colored people of the State.

For a number of years, Mr. Hawkins was counsel to the local branch of the NAACP, and he also served as counsel for the AFRO-AMERICAN Newspapers.

He was married twice, his first wife was the late Mrs. Ada M. McMechen Hawkins, whom he married in 1885. Of this union there were two children, Mrs. Aldina Haynes, who died last year, and Mrs. Roberta M. B. West, who survives.

He was married to his second wife, Mrs. Mary E. Sorrell Hawkins who survives in 1921. There were no children of this union. Besides his wife, and daughter, he is survived by three sisters, Mrs. Susie Blythe of Jersey City, N.J., Mrs. Clara Johnson of Philadelphia, Mrs. Mamie Simms of Chicago and two grandchildren.

4 Couples Wed