MEADE V. DENNISTONE: THE NAACP'S TEST CASE TO ". . . SUE JIM CROW OUT OF MARYLAND WITH THE FOURTEENTH AMENDMENT"*

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INTRODUCTION

In 1936, Edmond D. Meade,[1] the young African-American pastor at Israel Baptist Church, contracted to buy the house at 2227 Barclay Street in Baltimore, Maryland.[2] Estelle Dennistone and other neighbors objected to the arrival of a "colored family" in the midst of their almost exclusively white block.[3] Suit was filed on their behalf by lawyer William L. Marbury, Jr., in an effort to restrain Meade and his family from occupying the premises.[4]

The row house at 2227 Barclay Street had been a rental property in 1927 when the landlord had executed and duly recorded a covenant promising that the house would not "at any time [be] occupied or used by any . . . negroes . . . ."[5] But in 1935 after the house had fallen vacant and had lapsed into terrible condition, the current owners sold it to Frank Berman, who later contracted to sell it to Meade

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* Juanita Jackson Mitchell in an oral interview in 1991, attributed this quotation to Charles Houston, the NAACP's special counsel. *See* Bruce A. Thompson, The Civil Rights Vanguard: The NAACP and the Black Community in Baltimore, 1931-1942, at 239 (1996) (unpublished Ph.D. dissertation, University of Maryland) (on file with the University of Maryland College Park McKeldin Library).

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1. The court records in the case erroneously refer to Edmond Meade as "Edward [sic] Meade." Meade v. Dennistone, 173 Md. 295, 296, 196 A. 330, 331 (1938); *see also* Transcript of Record at 1, Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938) (No. 26—Oct. Term 1937) [hereinafter *Meade Transcript*]. Meade's obituary confirms that his first name was correctly spelled "Edmond." *See Rev. Meade Eulogized at Thurs. Services*, BALT. EVE. SUN, Jan. 5, 1985 (on file at Enoch Pratt Free Library, Afro-American Vertical File) [hereinafter *Obituary*].

2. *See E.D. Meade, Was Pastor, Long Official of NAACP*, AFRO-AM. LEDGER (Balt.), Jan. 3, 1995 (on file at Enoch Pratt Free Library, Afro-American Vertical File).

3. *See Meade Transcript*, *supra* note 1, at 5-6 (Statement of the Case) (noting that the house at 2227 Barclay Street had never been occupied by non-Caucasians and that the plaintiffs would suffer loss and injury by such an occupation).

4. *See id.* at 3-6 (Docket Entries and Statement of the Case).

5. *Meade*, 173 Md. at 297, 196 A. at 331 (describing the terms of the covenant).

for $1100.[6] Meade made a $150 down payment and, along with his family, took possession.[7]

The neighbors requested an injunction, and Judge George A. Solter of the Circuit Court of Baltimore City granted it.[8] Meade and his family were perpetually enjoined and restrained from using or occupying 2227 Barclay Street.[9] Likewise Berman was "perpetually enjoined and restrained from procuring, authorizing or permitting . . . any Negro or Negroes or person or persons, either in whole or in part of Negro or African descent" from using or occupying the premises.[10] In 1938, the Court of Appeals of Maryland affirmed Solter's order.[11]

Today *Meade v. Dennistone* remains as an ugly artifact of Baltimore's, Maryland's, and the Nation's heritage of racial discrimination. But it is also part of a larger story. The prologue is the timeless debate concerning how free markets should be. The setting is a great American city in the throes of changes wrought by suburbanization. The plot concerns a racist conspiracy; a subplot involves electoral politics as Republicans and Democrats take turns seeking African-American voters. And the conclusion is a beginning—the beginning of a "civil rights movement" whereby The National Association for the Advancement of Colored People (NAACP) undertakes to exorcize racial discrimination from American law.

Part I of this Article starts with the fundamental legal proposition that property should be freely transferable from one person to another. A legal strategy to restrain the freedom of alienation had to be found before "exclusive" communities could be created. Part II traces the evolution of residential racial segregation in Baltimore from *de jure* to *de facto*. After public segregation ordinances were struck down as unconstitutional, a new strategy emerged that relied on the enforcement of private covenants. Part III discusses *Meade v. Dennistone*, wherein, despite the best efforts of the NAACP, the Court of Appeals of Maryland legitimized residential racial restrictions. Part IV traces the aftermath of the *Meade* decision, and the afterlife of the advocates who argued it, during the emergence of the Civil Rights Movement.

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6. *Id.* at 298, 196 A. at 331. The $1100 sales price is taken from the contract of sale but it is misleading. *See Meade Transcript, supra* note 1, at 10. Consistent with a distinctive practice common in Baltimore, the sale was "on leasehold," subject to annual ground rent of $65. If the ground rent is capitalized at the customary 6%, its value is $1084 and the sales price is equivalent to $2184 in freehold.

7. *Meade*, 173 Md. at 298, 196 A. at 331.

8. *Meade Transcript, supra* note 1, at 22-23 (Decree) (granting the injunction).

9. *Id.* at 22 (Decree).

10. *Id.* at 23 (Decree).

11. *Meade*, 173 Md. at 309, 196 A. at 336.

And Part V chronicles the overruling of *Meade* as the United States Supreme Court found a new willingness to attack racial discriminations both public and private. The essay then concludes with a rumination on how changing precedents, customs, and politics led to the final judicial rejection of the "separate but equal" treatment of the races.

I. FREEDOM OF ALIENATION

The right of transfer or "alienation" from one person to another is the first principle of the property law system. This prerogative allows the market to function efficiently by assuring that resources can be sold for top dollar to the highest bidder.[12] Alienability also promotes individual autonomy by allowing the owners to freely rearrange property rights so as to optimize their use and enjoyment.[13]

On the other hand, when property rights have been alienated and divided among many owners, unsolvable conflicts may arise as to how the resource will be utilized.[14] Division of ownership once accomplished may interfere with the best use, and thereby depress the market value.[15] Moreover, restraints on alienation may deny some access to the market on the basis of race, class, or other socially unacceptable reasons.

Hence freedom of alienation promotes the free market in resources and individual autonomy, but the results of alienation may depress property values and deny individuals equality. Such is the "alienation dilemma."[16] And since time immemorial, it has fallen upon the Anglo-American courts to determine when it is in the public interest to promote alienability and when it is in the public interest to prevent it.

Efforts by medieval dynasts to make their estates inalienable resulted in "[o]ne of the great and continuing conflicts in the development of English property law."[17] Feudal lands served as the wellspring of power, status, and wealth.[18] The great barons sought to aggrandize their families by entailing their lands and passing their wealth intact

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12. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 54 (5th ed. 2002) (noting that transferability of property ensures that property moves from low value to high value uses).

13. JOSEPH W. SINGER, INTRODUCTION TO PROPERTY 11 (2001).

14. *Id.*

15. *See id.* (noting that restrictions on alienation may prevent the sale of property as its value rises).

16. *Id.* Singer refers to problems such as these as the "alienation dilemmas."

17. DUKEMINIER & KRIER, *supra* note 12, at 215-16 (summarizing the development of the fee tail).

18. *Id.* at 216.

from the current generation to eldest male heir of the next.[19] The King resisted this entailment of property (and the resulting concentration of wealth) as a threat to his sovereign power and as an evasion of his inheritance taxes.[20] He convinced his courts to "bar the entail" so as to make landed estates more freely transferable and taxable.[21] The land lords responded through Parliament with laws facilitating single-file male descent.[22] And the King's courts answered back by entertaining collusive lawsuits that cut off the rights of issue.[23] Not to be outdone, lawyers for the dynastic gentry devised trust instruments with novel provisos designed to keep the property in the family.[24] So it has gone for the last nine hundred years. Sometimes the courts have accepted restraints on alienation "if . . . reasonable in purpose, effect, and duration," and sometimes the courts have struck down such provisions as "repugnant."[25]

Contractual restraints on use and enjoyment of land can in effect also limit its marketability. Although use and enjoyment constraints are not literally restraints on alienation, they may nonetheless suppress demand and interfere with efficient utilization. The common law's historic compromise was to permit landowners to contractually restrict the use and enjoyment of their entitlements as between themselves, but to sharply curtail the extent to which restrictions could "run with the land" and be binding on successors in title.[26] A basic concern that perpetual restrictions could foreclose efficient land use forever led the courts to this result.

In 1583, in the fabled *Spencer's Case*,[27] the judges ruled that the burden of a covenant would only be binding on successors when it

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19. *See id.* (noting that the male heirs were viewed as the head of a family that extended through various generations and property owners sought to ensure that future owners would not be able to cut off their issue).

20. *Id.* at 216-17.

21. *Id.* at 217.

22. *Id.* at 216 (noting that Parliament established fee tail which allowed a property owner to ensure that property descended to his lineal descendants until all of his descendants were dead).

23. *Id.* at 217 (noting that a fee tail tenant in possession could "bar the entail" by obtaining a court decree that granted him a fee simple, which would cut off the rights of his issue and eliminate any reversion or remainder).

24. *Id.* at 217 n.18 (noting that landowners created a "strict settlement" that allowed inalienability to continue based on the fact that only a tenant in possession could disentail).

25. *See id.* at 227, 228.

26. *See* DUKEMINIER & KRIER, *supra* note 12, at 859-60 (noting that at common law, promises were not enforceable against persons who were not a party to the original transaction unless there was privity of estate).

27. 77 Eng. Rep. 72 (1583).

touched and concerned the land, and then only when there had been a landlord–tenant relationship between the original parties when the contract was entered into.[28] Absent such a tenurial relationship (cryptically referred to as "privity of estate"), neighbors who reciprocally agreed to covenants and conditions could not bind their successors in title.[29] Developers who sold lots outright were precluded from imposing uniform restrictions that would be enforceable against the original promissor's heirs, successors, and assigns.[30]

At mid-nineteenth century, the English courts found themselves still actively reconsidering the appropriate balance between promotion of the marketability (by guaranteeing alienability) and the promotion of autonomy (by allowing contractual restraints on the use and enjoyment).[31] The English Lord Chancellor shifted the balance in 1848 in the landmark case of *Tulk v. Moxhay*.[32] Therein a purchaser of land had covenanted on behalf of himself and his successors in title to keep Leicester Square open as a private garden for the enjoyment of surrounding householders.[33] When a subsequent purchaser who had acquired Leicester Square with knowledge of the covenant undertook to commercially develop it, the Equity Court granted an injunction.[34] In equity the covenants could run with the land.[35] The public policy in favor of free alienation of land yielded to the equitable principle that in fairness and justice a purchaser with notice ought to be subject to a solemn contract of which he was aware.

II. RACIAL RESIDENTIAL SEGREGATION

A. Suburbanization

When *Tulk v. Moxhay* was decided, English and American cities were in the throes of change. Suburbs had bordered London since

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28. *Id.* at 75.

29. *See* DUKEMINIER & KRIER, *supra* note 12, at 860 (noting that English courts found that privity of estate was only satisfied by a landlord-tenant relationship).

30. *See generally id.* (noting that in England the burden of a covenant will not run between landowners at law).

31. *See id.* at 864, 867 (noting that although English courts had previously refused to hold that negative servitudes could run against successive owners, the English courts in 1848 responded to market demands and provided that negative covenants could run against subsequent owners in equity in certain circumstances).

32. 41 Eng. Rep. 1143 (1848).

33. *Id.* at 1143.

34. *Id.* at 1144-45.

35. *Id.* at 1144.

the 1700s,[36] and by the mid-nineteenth century they could be found on the edge of a number of Anglo-American cities.[37] Urban historians simply explain them as a result of unprecedented urban growth.[38] The pre-modern cities were unable to contain the explosive population expansion.[39] A field of forces pushed and pulled the burgeoning middle class out of the old urban centers and onto the outskirts. Repulsion to slums, contagious disease, and factory smoke, combined with prejudice against those of a different race, religion, or lower class, and an attraction to living near to co-religionists and people of an equal or higher caste, and the dream of a pastoral family life combined to make "suburbia . . . the residence of choice for the Anglo-American middle class."[40]

American suburban development followed the street car lines.[41] Speculators platted land bordering the ever-lengthening electric street railway system into building lots and constructed row houses that they then offered for sale.[42] The low-cost transit coupled with the efficiencies of constructing block rows (shared walls, common utility lines, and mass construction) brought houses within the means of mechanics, artisans, and other skilled workers, as well as the middle class.[43]

The Baltimore house at 2227 Barclay Street serves as an exemplar. In Baltimore, the preferred location for suburban development was to the north beyond the town's North Avenue boundary. Access to the northwest was obstructed by the Jones Falls stream valley, but the northeast corridor was unobstructed and prime—ripe for develop-

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36. ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA 25-26 (1987) (noting that in the mid-eighteenth century, the merchant elite of London began to move to agricultural settlements outside London).

37. *Id.* at 106 (stating that in the 1850s and 1860s the middle class in the United States began to move to suburbs).

38. *Id.* at 19 (describing the development of the modern suburb in London).

39. *Id.* at 19-20.

40. *Id.* at xi.

41. *Id.* at 136 (noting that development in the suburbs followed the rail system); *see also* SAM BASS WARNER, JR., STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870-1900, at 2-3 (2d ed. 1978) (explaining that the expanding settlements in Boston were made possible by the railway transportation system).

42. FISHMAN, *supra* note 36, at 136 (stating that in the second half of the nineteenth century, developers grasped the potential of streetcar lines for suburbanization); MARY ELLEN HAYWARD & CHARLES BELFOURE, THE BALTIMORE ROW HOUSE 127 (1999) (noting that Edward J. Gallagher, a developer of rowhouses in Baltimore, would not build in an area if it was not served by a streetcar line).

43. HAYWARD & BELFOURE, *supra* note 42, at 85, 105-06.

ment.[44] A horse-drawn street railroad had run along York Road since the 1860s,[45] and by 1892 a speculative builder had constructed eleven houses in a block row along the east side of the 2200 hundred block of Barclay Street (just one block from the York Road line).[46] The builder offered No. 2227 Barclay Street for sale on leasehold subject to a $65 annual ground rent.[47] The lower down payment associated with the ground rent system of finance (peculiar to Baltimore) tended to make the houses more affordable.[48]

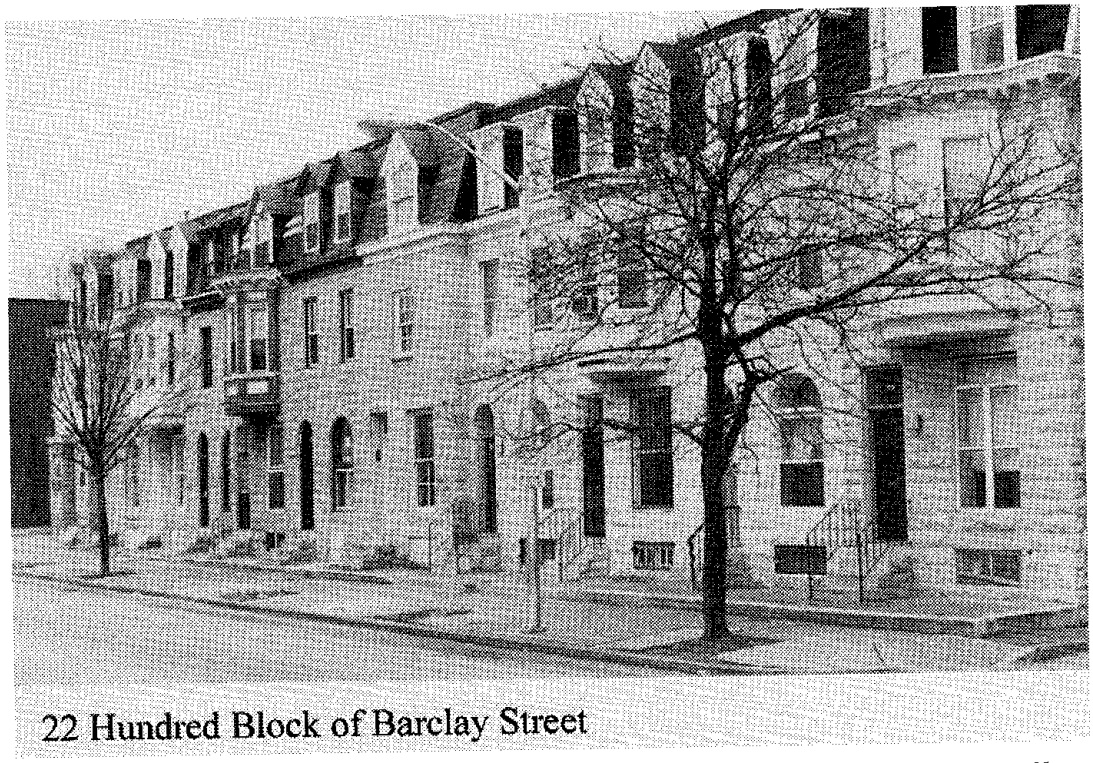

Illustration 1. 2200 Block of Barclay Street. [From Mary Ellen Hayward & Charles Belfoure, The Baltimore Rowhouse (1999). Used by permission.]

Although the newcomers to the 2200 block of Barclay Street found refuge from the smoke, squalor, disease, and filth of the old city, the developer offered no assurance that these conditions might

44. JAQUES KELLY, FROM PEABODY HEIGHTS TO CHARLES VILLAGE: THE HISTORIC DEVELOPMENT OF A BALTIMORE COMMUNITY 5 (1976).

45. *Street Car System and Rapid Transit, in* 1 BALTIMORE: ITS HISTORY AND ITS PEOPLE 547 (Clayton Colman Hall ed., 1912).

46. HAYWARD & BELFOURE, *supra* note 42, at fig. 73.

47. *See supra* note 6 (discussing the concept of ground rent).

48. For a history and description of the ground rent system see HAYWARD & BELFOURE, *supra* note 42, at 12-14; *see also* Garrett Power, *Entail in Two Cities: A Comparative Study of Long Term Leases in Birmingham, England and Baltimore, Maryland 1700-1900*, 9 J. ARCHITECTURE & PLAN. RES. 315, 315-24 (1992).

not some day move to the suburbs. Just six blocks to the northwest of Barclay Street, a large-scale subdivider had grander plans. The Peabody Heights Company offered for sale "the most desirable lands for the erection of FIRST CLASS RESIDENCES within the suburbs of Baltimore."[49] It looked to make its lands more attractive than those offered by its competitors by imposing perpetual restrictions requiring that all dwellings be "first class" and that slaughter houses, livery stables, manufactories, and saloons would be prohibited.[50] The Company looked to *Tulk v. Moxhay* as the legal precedent that would allow these covenants to run with the land and provide long-term guarantees of the community's "first class" character.[51]

Promoters had formed the Peabody Heights Company in 1870 and then acquired fifty acres of land bordered by 27th Street to the south, 31st Street to the north, Maryland Avenue to the west, and Guilford Avenue to the east, and bisected by St. Paul Street.[52] For a decade the Jones Falls lay between the tract and the downtown, but by the mid-1880s a slow paced horse-drawn streetcar line had bridged the stream valley and their parcel seemed ripe for development.[53]

The Company targeted the city's middle-class elite as its clientele.[54] The restrictive covenants mandated that the twenty-odd blocks be subdivided into building lots in a conventional gridiron plan of rectangular lots, twenty-five feet wide, and suitable for stately town house development.[55] Construction would be set back twenty feet from the street and ornamented with shrubbery and flowers.[56] The Company retained a right of design approval over the houses that were to be built in the classic urban row house style with three stories, brownstone or glazed-brick facades, marble trim, large rooms, high ceilings, oak doors, mahogany paneling, and brass fittings.[57]

Even after the St. Paul line was converted to a more rapid cable car system in the 1890s, Peabody Heights lay largely vacant and unim-

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49. KELLY, *supra* note 44, at 3.

50. *Id.* at 3, 6.

51. *See* Newbold v. Peabody Heights Co. of Baltimore, 70 Md. 493, 498, 17 A. 372 (1889) (Peabody Heights Co. argued, based on *Tulk*, that once restrictions are established they remain enforceable with subsequent owners).

52. KELLY, *supra* note 44, at 3, 6.

53. *Id.* at 5-6, 8.

54. *See id.* at 3-6 (discussing the Company's advertising of the neighborhood's proximity to estates of the city's elite, and the Company's awareness of the trend among middle-class citizens to move out to the suburbs).

55. *Id.* at 6.

56. *Id.*

57. *Id.* at 1, 6, 11.

proved.[58] The Company seems to have misunderstood the taste of its intended clients. When relocating beyond the city limits, the captains of industry, merchant chiefs, and top professionals generally preferred picturesque villas on curving roads in park like settings, and Baltimore's more modest middle-class home buyers could not afford the wide lots and stately town houses mandated by the Peabody Heights covenants.[59] In the early 1890s, the Company's board of directors dubbed its earlier demands "absolute folly" and conjectured that "but for these apparently harmless restrictions [the building lots] would have been sold years ago."[60]

When the Company went to court in an effort to get rid of the dysfunctional restrictions, it found itself the captive of their alienation. Following the precedent of *Tulk v. Moxhay*, the Court of Appeals of Maryland ruled that the covenants and conditions had been validly created, and that they reciprocally benefited and burdened all lot owners and their successors in title who were on notice of them.[61] Because a number of lots had been sold, and some re-sold, the covenants could only be modified with the unanimous consent of all of the present owners.[62] It was not until 1896 that a developer obtained the consent of all interested parties and began construction of Peabody Heights houses on a more modest scale.[63]

Two miles further to the northwest, another land speculation firm, the Roland Park Company, had conceived an even grander strategy for marketing building lots to the city's middle-class elite.[64] Designation of its subdivision as a "park" suggested an aristocratic estate, and the restrictive covenants held the promise of an "exclusive" district of picturesque cottages and garden villas.[65]

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58. *Id.* at 9-10.

59. *See* KELLY, *supra* note 44, at 6 (describing how the Peabody Heights Co. used restrictions to ensure that the neighborhood would have stately mansions); *see also* HAYWARD & BELFOURE, *supra* note 42, at 132 (asserting that some of the city's most expensive rowhouses were in Peabody Heights).

60. *See* KELLY, *supra* note 44, at 10.

61. Newbold v. Peabody Heights Co. of Baltimore, 70 Md. 493, 501-03, 17 A. 372, 374-75 (1889).

62. *Id.* at 502-03, 17 A. at 374.

63. KELLY, *supra* note 44, at 10-11.

64. *See* HAYWARD & BELFOURE, *supra* note 42, at 134-36 (describing the Roland Park Company's various development projects).

65. *See* Wilbur Harvey Hunter, *Baltimore Architecture in History*, *in* A GUIDE TO BALTIMORE ARCHITECTURE 24-28 (John Dorsey & James D. Dilts eds., 1997) (describing how Bouton used restrictive covenants to create an exclusive neighborhood).

B. Racial Exclusion

By 1892, the Roland Park Company had acquired 550 acres of restricted land intended for building lots.[66] General manager, Edward H. Bouton, sought to determine exactly what type of restrictions would make his building lots most attractive to first-class buyers.[67] The deed covenants would certainly be "[c]arefully devised protective restrictions safeguard[ing] owners from encroachment of business, and from other uses of property detrimental to the values and general good of the residential section."[68] But what other restriction might make the building lots more desirable? Perhaps in this era of heightened racial tension, a prohibition against Negro newcomers might appeal to well-heeled whites.

The real prospect of African Americans buying building lots in Roland Park was remote. Baltimore's 1890 population was roughly 435,000,[69] and the black population was approximately 54,000, not all of whom were homeowners.[70] These bourgeois black families lived clustered in the northwest section of downtown along upper Druid Hill Avenue, just within the city's North Avenue boundary and adjacent to Mt. Royal (the old line white society district).[71] But fear of "a Negro invasion" was one reason why the white middle-class elite were moving to the suburbs.[72] Perhaps the promise that blacks would be forever excluded would have a special market appeal.

In 1893, Bouton inquired of the Company's lawyers, Schmucker & Whitelock, as to the legality of a provision prohibiting Negroes from ownership or occupation.[73] The lawyers responded:

> *Schmucker & Whitelock*
> *Attorneys and Counselors at Law*
> *10 E. Lexington Street*

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66. HAYWARD & BELFOURE, *supra* note 42, at 134.

67. *Id.*

68. NATIONAL ASSOCIATION OF BUILDERS' EXCHANGES OF THE UNITED STATES OF AMERICA, BALTIMORE OF TODAY 96 (1916) (souvenir of the Fifth Annual Convention of the National Association of Builders' Exchanges of the United States of America).

69. *The Political and Human Geography of Baltimore City: An Overview 1729-1992*, MARYLAND STATE ARCHIVES: DOCUMENTS FOR THE CLASSROOM (Maryland State Archives, Annapolis, MD) Dec. 20, 1991, at 1.

70. HAYWARD & BELFOURE, *supra* note 42, at 125.

71. Cynthia Neverdon-Morton, *Housing Patterns in Baltimore City, 1885-1953*, *in* 16 THE MARYLAND HISTORIAN 25, 25-26 (1985).

72. HAYWARD & BELFOURE, *supra* note 42, at 154.

73. Letter from law firm of Schmucker & Whitelock, to Edward H. Bouton, Gen. Mgr., Roland Park Co. (Oct. 5, 1892) (on file with Cornell University Libraries, Department of Manuscripts and University Archives, Roland Park Co. Papers, #2828, Box 2-5) (stating that Mr. Bouton asked Schmucker & Whitelock for an opinion).

October 5, 1893

Edward H. Bouton Esq.,
Gen. Mangr. Roland Park Co.,
Baltimore, Maryland.

Dear Sir,
You have asked our opinion as to whether or not your Company can legally insert a provision in deeds to purchasers of its lots of land at Roland Park, that the title thereto shall at no time be conveyed to negroes or persons of African descent, or be used or occupied by such persons.
We have deferred writing you upon this subject until we could give to it the time and consideration demanded alike by its novelty and its importance to your Company.
Such a provision would not, in our opinion, be the mere imposition of an easement, charge or restriction in the manner of the use of the land to be sold by your Company, which would be valid against parties purchasing the land with notice thereof, as already determined by our Court of Appeals. (Newbold vs. Peabody Heights Co. 70 Md. 493; Halle vs. Newbold 69 Md. 265). It would rather be a condition of partial inalienability annexed by the vendor of land in fee-simple to prevent the transfer thereof to a class of persons because deemed objectionable.
General restraints on the alienation of fee-simple property are void, but it has been said by various writers that a grantee of such land might be restrained from assigning it to a particular person or class. The decisions of leading courts upon this subject are not uniform. We are, however, of opinion that the weight of authority clearly sustains the conclusion that even a restriction as to the persons or classes of persons to whom the estate may be aliened is invalid.
This seems, moreover, to be the view of the Maryland Court of Appeals, who in the recent case of Stansbury vs. Hubner (73 Md. 228) in which we ourselves represented the appellee, quoted with approval the proposition of Chancellor Kent, that conditions in conveyances will not be sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee, or by devise, that the purchaser or devisee should not alien, is unlawful and void.
The difficulty of maintaining such a restriction would be greatly enhanced by the fact that the class intended to be excluded from interest in the land is not a limited number of persons, but a whole race of people, who are in Maryland numbered by thousands.
This embarrassment would also be further increased by the fact that the race intended to be excluded is the African or colored race, who as Justice Strong of the United States Supreme Court in the case of

Strauser vs. West Virginia, 100 U.S. 103, says, were designed to be assured by the Fourteenth Amendment to the Federal Constitution the enjoyment of all the civil rights that are enjoyed b[y] [sic] white persons. While it is true that individual invasion of individual rights is not the subject-matter of the Amendment (Civil Rights Cases, 109 U.S. 3) the significance of this constitutional provision is too great to be overlooked in this connection.

The Supreme Court has declared the amendment to mean that all persons shall be equally entitled to pursue their happiness and acquire and enjoy property. (Barbier's case, 113 U.S. 27) and Congress in a law sustained by that Court, (Ex parte Virginia 100 U.S. 313) has enacted that in every State all citizens shall have the same right as is enjoyed by the white citizens thereof, to inherit and purchase real estate (Rev. Stat. U.S. Sec. 1978).

We are, therefore, of the opinion that the proposed provision in deeds to be made by your Company would be illegal.

Yours respectfully,

/s/ Schmucker & Whitelock[74]

Thus, the Company's lawyer opined that although private racial restrictions were not unconstitutional under the United States Supreme Court's narrow interpretation of the Fourteenth Amendment to the United States Constitution, the racial restrictions would constitute an unreasonable restraint on alienation and were therefore void.[75] And in response Bouton dutifully included no racial covenant in the Roland Park Company's first deeds.[76]

C. Disenfranchisement

Following the Civil War, American constitutional law underwent a profound change. The Thirteenth Amendment to the U.S. Constitution abolished the institution of Negro slavery.[77] African Americans were persons, not property. The Fifteenth Amendment prohibited denial of the right to vote "on account of race, color, or previous condition of servitude."[78] And the Fourteenth Amendment ordered that "all persons" (African Americans included) be guaranteed "equal protection of the laws."[79]

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74. *Id.*

75. *Id.*

76. *See* Hunter, *supra* note 65, at 26 (enumerating the restrictions designed by Bouton for Roland Park deeds, which did not include race restrictions).

77. U.S. CONST. amend. XIII, § 1.

78. U.S. CONST. amend. XV, § 1.

79. U.S. CONST. amend. XIV, § 1.

Although the Fourteenth Amendment mandated a new public policy, a question lingered as to its meaning. Did it forbid all racial discrimination or only discrimination by public authority? In 1883, the U.S. Supreme Court answered that the Fourteenth Amendment only applied to public actions.[80] Government discrimination was curtailed, but not private discrimination.[81] Meanwhile in Maryland and elsewhere there were renewed and revitalized efforts to disenfranchise and segregate the Negro population.

Immediately after the Civil War, racism was not so virulent as it was to become later. Racial prejudice abounded but after the initial unease at seeing Negroes become the citizens and voters, Maryland's dominant Democratic Party ignored them.[82] Negroes freely participated in the electoral process and they voted Republican, but it did not much matter to the Democrats.[83] Between 1870 and 1895 the Democratic Party won virtually all city-wide and state-wide offices.[84]

The ruling Democratic coalition consisted of Southern sympathizing patricians, nouveau riche businessmen, immigrant workers, fledgling labor groups, and farmers.[85] The Republican Party, which consisted of Union loyalists, Old Wealth, western Marylanders, and the newly enfranchised African Americans,[86] could claim only about forty percent of the electorate.[87]

By the 1890s, the Democratic Party had fallen into disarray. Aristocrats had left out of distaste for city boss Isaac Freeman Rasin and his machine's election violence and abuse.[88] Businessmen felt that the Party was too solicitous of labor and farmers, who in turn blamed the leadership for an economic downturn.[89] Only in Baltimore City was one faction still loyal. Boss Rasin kept the immigrant newcomers in line with small favors and petty patronage.[90]

At the 1895 election, the Republican Party took control of the state house and General Assembly from the Democrats and, in Balti-

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80. The Civil Rights Cases, 109 U.S. 3, 24-25 (1883).

81. *Id.* at 11.

82. JAMES B. CROOKS, POLITICS & PROGRESS: THE RISE OF URBAN PROGRESSIVISM IN BALTIMORE 1895-1911, at 8.

83. *Id.*

84. *Id.* at 9-11.

85. *Id.*

86. *Id.*

87. *Id.* at 45.

88. *Id.*

89. *Id.* at 44-45.

90. *See id.* at 43 (stating that a portion of lower-class voters remained loyal to Rasin, probably as a result of being under his control).

more City, a Republican mayor was elected.[91] Democrats looked for ways to recapture their dominance. Although the Humpty-Dumpty Democratic coalition could not be put back together again, simple arithmetic suggested an alternative solution. The Democratic leadership undertook to disenfranchise the state's approximately 60,000 adult male Negroes of voting age.[92] Rather than rebuilding the Party, the Democrats would make its comeback by disqualifying African Americans from voting Republican.[93]

A strategy had been developed elsewhere that might deny Black suffrage without running afoul of the Fifteenth Amendment. The State of Mississippi had invented constitutional techniques for denying the black vote through the use of literacy tests.[94] The Democratic leadership looked to lawyer John Prentiss Poe to adapt this strategy for use in Maryland.[95]

In 1899, Poe was serving as president of the Maryland Bar Association.[96] A lifelong Democrat, he had served as dean of the University of Maryland School of Law since 1869.[97] He was a lawyer's lawyer with the respect of his peers and with expert technical skills.[98] If anyone could amend the organic law of Maryland to disenfranchise Negroes without violating the Fifteenth Amendment it was John Prentiss Poe.

Poe drafted an amendment to the Maryland Constitution designed to deny Negro suffrage.[99] He proposed language containing a "grandfather's clause" and a "reasonable explanation" provision.[100] The "grandfather's clause" automatically gave the vote to the lineal male descendants of anyone eligible to vote on January 1, 1869.[101] This provision practically assured the right to vote to all white males (other than newly arrived immigrants).[102] An alternative way of getting the right to vote was to pass a test by giving the voting registrar a

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91. *Id.* at 40.

92. *Id.* at 56.

93. *Id.* at 56-58.

94. *See* MARGARET LAW CALLCOTT, THE NEGRO IN MARYLAND POLITICS 1870-1912, at 115 (1969) (noting Southern states, including Mississippi, that had already adopted constitutional amendments for the purpose of disenfranchisement).

95. CROOKS, *supra* note 82, at 58.

96. *See* Maryland State Archives, *at* http://www.mdarchives.state.md.us.

97. *See id.*

98. CROOKS, *supra* note 82, at 58.

99. CALLCOTT, *supra* note 94, at 115.

100. *Id.*

101. *Id.* at 115-16.

102. *Id.*

"reasonable explanation" of a provision of the Maryland Constitution.[103]

From the Democratic leadership's point of view the advantage of this amendment was its flexibility. The registrar's discretionary power to determine what constituted a "reasonable explanation" might be used in a racially discriminatory manner so as to disenfranchise literate black Republicans and to enfranchise illiterate immigrant Democrats.[104]

The Democratic campaign in support of the disenfranchisement of Negro voters appealed to both reformer and party regulars. Lawyer and reformer, William L. Marbury Sr., a descendant of plantation aristocracy, supported disenfranchisement because of his belief that blacks were genetically incapable of assuming the responsibility of citizens.[105] Less genteel Party regulars called the Negro vote "a perpetual menace to the prosperity and peace of Maryland."[106] And the notion of a "Negro menace" so captured the white man's fancy that a number of other racial segregation laws were passed by the General Assembly.[107] Public schools and prisons had always been segregated, but new segregation laws extended this policy to railroads and steam ships and other public accommodations. When a law requiring colored passengers to occupy separate railroad coaches was challenged as a denial of the "equal protection," the Court of Appeals of Maryland upheld it under the authority of the United States Supreme Court's recent 1896 decision in *Plessy v. Ferguson*[108] that "separate but equal" treatment satisfied the requirement of the Fourteenth Amendment.[109]

Efforts by the Democratic Party to amend the Maryland Constitution to deny suffrage to African Americans proved less successful. On three occasions (1904, 1908, and 1910), the Maryland General Assembly approved disenfranchisement amendments by the requisite three-fifth majority, but in each instance they subsequently were rejected by the voters in the required statewide referenda.[110] The rejection of these amendments by the voters, however, should not be seen as a plebiscite in favor of equal rights and racial justice.[111] Republicans

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103. *Id.* at 115.
104. *Id.*
105. WILLIAM L. MARBURY, THE CATBIRD SEAT 321 (1988).
106. CROOKS, *supra* note 82, at 56.
107. *Id.* at 56, 59.
108. 163 U.S. 537 (1896).
109. Hart v. Maryland, 100 Md. 595, 614-15, 60 A. 457, 463 (1905).
110. CALLCOTT, *supra* note 94, at 118-32.
111. *See id.* at 119 (asserting that opposition to the amendments was not due to actual disagreement about disfranchisement of blacks).

and some reform Democrats joined blacks in opposing the amendments out of concern that Negro disenfranchisement would entrench the Democratic Machine.[112] And while Democratic city boss Isaac Freeman Rasin ostensibly supported the amendments, it appears that his machine, heavily dependent on the vote of first generation Americans, took election days off.[113] It seemed too risky to make the right of immigrants to vote Democratic dependent on the whim and caprice of a registrar.[114]

D. Segregation Ordinances

There was in Baltimore City, however, growing support for a particular form of racial segregation. In 1911, Baltimore's black population numbered approximately 85,000, roughly 36,000 of whom lived in the so-called Negro district that extended a quarter of a mile from east to west and a mile from north to south on the northwest side of town.[115] Houses in the downtown reaches of the district were overcrowded, poorly ventilated, and lacked water and sewers.[116] These tuberculosis ridden "lung blocks" were said to be Baltimore's worst slum.[117] The uptown portion of the district was home to the 1000 families of the town's black bourgeois elite.[118] Their substantial three-story town houses were intermixed with those of some white residents.[119]

Between 1903 and 1910, Baltimore's black population had grown by approximately 600 families per year and the Negro District had expanded.[120] White residents had resisted with terror tactics, but to no avail as African-American families overflowed six or seven blocks to the west.[121] But the eastern boundary remained inviolate. Houses to

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112. *See* CROOKS, *supra* note 82, at 60-61.

113. *See* CALLCOTT, *supra* note 94, at 125 (noting while Rasin denied foregoing support for the Poe amendment, Senator Gorman, a proponent of the amendment, was certain that Rasin betrayed the cause).

114. CROOKS, *supra* note 82, at 61 (stating that opponents of the amendment called it "clearly undemocratic" to allow unqualified election officials such power in applying the "understanding" clause).

115. William George Paul, The Shadow of Equality: The Negro in Baltimore 1864-1911, at 390-91 (1972) (Ph.D. dissertation, University of Wisconsin) (on file with the University of Wisconsin).

116. Paul, *supra* note 115, at 392-93.

117. JANET KEMP, HOUSING CONDITIONS IN BALTIMORE 16-19, 38 (1907); Paul, *supra* note 115, at 394, 396; Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 295-96 (1983).

118. Paul, *supra* note 115, at 391.

119. *Id.*

120. *Id.* at 389-90.

121. SHERRY OLSON, BALTIMORE: THE BUILDING OF AN AMERICAN CITY 279 (1980).

the east of Druid Hill Avenue were in the exclusively white Mt. Royal district, one of the most fashionable residential sections of Baltimore.[122] No Negro residences had crossed the "color line."

In 1910, George W.F. McMechen purchased a house at 1834 McCulloh Street.[123] McMechen was a Yale law graduate and practicing attorney.[124] He and his family would have been welcomed newcomers except for the fact that they were black and they had crossed the color line into the Mt. Royal society district.[125]

The response was immediate. While the proletariat of west of the Negro District in Baltimore had attempted to hold back the expanding "black sea" with thrown stones and smeared tar, the plutocrats to the east in Mt. Royal answered with public meetings, petitions, and legislation.[126] Lawyer Milton Dashiell, a concerned resident, drafted a segregation ordinance.[127]

The segregation ordinance divided all of Baltimore into white blocks and black blocks—no Negro could move into a block in which more than half the residents were white; no white person could move into a block in which more than half of the residents were Negroes.[128] The ordinance was crafted to satisfy the constitutional requirements of the Equal Protection Clause of the Fourteenth Amendment.[129] The "separate but equal" treatment of white residents and Negro residents was designed to satisfy the test of *Plessy v. Ferguson*.[130]

The Baltimore City Council passed the segregation ordinance, but when it proved to be politically, legally, and technically flawed,[131] its proponents sought a more skillful lawyer to do the re-draft. The task fell to William L. Marbury, Sr., a resident of the Mt. Royal neighborhood, whose credentials as a segregationist were well established by his active role in the Disenfranchisement Movement, and whose annual income of $40,000 made him one of the most successful law-

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122. Power, *supra* note 117, at 298.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 298-300.

127. *Id.* at 299.

128. *Id.* at 299-300.

129. *Id.* at 300. Edgar Allan Poe, the City Solicitor, issued an opinion stating that the ordinance was constitutional because it used the state's police power to separate whites and blacks while keeping them equal. *Id.*

130. 163 U.S. 537 (1896).

131. Power, *supra* note 117, at 301-03.

yers in town.[132] Marbury redrafted the ordinance which after several setbacks was upheld by the Court of Appeals of Maryland.[133]

E. The NAACP

The segregation ordinance served its immediate purpose of protecting the Mt. Royal district from a "Negro invasion."[134] And this "Baltimore idea" for promoting residential segregation proved so attractive that it was copied in a score of other southern and border cities, Winston-Salem and Asheville, North Carolina; Richmond, Roanoke, and Norfolk, Virginia; Atlanta, Georgia; Birmingham, Alabama; St. Louis, Missouri; and Louisville, Kentucky among them.[135]

Indeed the success of residential segregation ordinances was the catalyst for the emergence of the National Association for the Advancement of Colored People in 1909 as a nationwide counter-force to segregation.[136]

> [I]ts membership and political power grew as it established local branches to press court challenges to the segregation ordinances. The success of these challenges varied: The North Carolina Supreme Court had struck down an ordinance as a violation of property rights; Georgia's Supreme Court vacillated, first rejecting, then approving, different versions of Atlanta's ordinance; and the Virginia Court of Appeals sustained its ordinances with some qualifications.[137]

It was from Louisville that the case testing the constitutionality of segregation ordinances came to the U.S. Supreme Court in 1916.[138] The ordinance in question was a close copy of the ordinance that Milton Dashiell had originally drafted for Baltimore in 1910. After hearing and rehearing the Court made fast work of it. In 1917, in the unanimous decision of *Buchanan v. Warley*,[139] the Court held that while the ordinance under the precedent of *Plessy v. Ferguson* might be said to afford "separate but equal" treatment to Negroes and whites, it nonetheless violated the Fourteenth Amendment because:

> *The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of*

132. *Id.* at 304-06; MARBURY, *supra* note 105, at 36-37.
133. State v. Gurry, 121 Md. 534, 88 A. 546 (1913).
134. Power, *supra* note 117, at 306.
135. *Id.* at 310.
136. *Id.*
137. *Id.* at 310-11 (citations omitted).
138. *Id.* at 311-12.
139. Buchanan v. Warley, 245 U.S. 60 (1917).

> *color and of a colored person to make such disposition to a white person. . . . We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand.*[140]

The Court found that the ordinance was in violation, not of the Fourteenth Amendment's "equal protection" clause, but of its "due process" clause instead—the seller was deprived of the property right to alienate his property.

Baltimore City Solicitor S.S. Field lamented the "modern tendency to look upon property rights as more sacred than personal rights,"[141] (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). But the Court of Appeals of Maryland dutifully found the Baltimore ordinance "essentially alike in theory and purpose" to the Louisville ordinance and therefore unconstitutional.[142]

F. De facto *Segregation*

Baltimore's Mayor, James H. Preston, was undaunted.[143] He borrowed from Chicago a plan to keep Negroes in their place. The Chicago plan was designed to assure *de facto* segregation.[144] City building inspectors and health department officials would cite for code violations those renting or selling to blacks in white neighborhoods.[145] Real estate boards would sanction as unethical those members who violated the "color line."[146] White property owners associations would encourage their members to enter into reciprocal covenants precluding sale or rental to Negroes.[147] In essence *de jure* segregation was to be replaced with a public-private conspiracy in restraint of sale or rental to Negroes.

When Mayor Howard Jackson took office in 1923, he institutionalized the city's segregation efforts with a committee. As his represen-

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140. *Id.* at 81-82.
141. S.S. Field, *The Constitutionality of Segregation Ordinances,* 5 VA. L. REV. 81, 81-84 (1917).
142. Jackson v. State, 132 Md. 311, 312, 130 A. 910 (1918).
143. Power, *supra* note 117, at 314.
144. *Id.* at 314-15.
145. *Id.* at 315.
146. *Id.*
147. *Id.*

tative, he appointed his City Solicitor and good friend, Philip B. Perlman.[148] Although only thirty-five years of age, Perlman already had a substantial career of public service behind him. A member of the Bar since 1911, he had been serving as Governor Albert C. Ritchie's Secretary of State when he resigned to accept his post with Jackson.[149] While new to the game, Perlman could draw upon the experience of long-time segregationist William L. Marbury, Sr., who also was a member.[150] The Committee on Segregation undertook to encourage neighbors, government officials, and real estate agents to use restrictive covenants, peer pressure, harassment, and suasion to promote *de facto* segregation.[151]

The Committee for Segregation went to work at a tumultuous time. Following World War I, Baltimore was undergoing dramatic growth.[152] In 1918, the city annexed territory tripling its area.[153] Between 1920 and 1930, housing construction peaked at 6000 per year, most of them in the new annex.[154]

During the 1920s, Negroes poured into Baltimore from the countryside and the black population increased by fifteen percent.[155] Between 1920 and 1930, the city's overall population rose from approximately 730,000 to approximately 805,000, while the non-white population increased from approximately 108,000 to approximately 143,000.[156]

The white middle-class led the exodus to the suburbs, leaving the old city to the white native-born working class, first generation European immigrants, and the growing Negro population.[157] Black housing was limited in supply because of the *de facto* segregation.[158] The

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148. Committee on Segregation, *in* Howard Jackson Files, Baltimore City Archives (1924).

149. Garrett Power, *Public Service and Private Interests: A Chronicle of the Professional Life of Philip B. Perlman*, 4 J.S. LEGAL HIST. 61, 62 (1995-1996).

150. Committee on Segregation, *in* Howard Jackson Files, Baltimore City Archives (1924).

151. Power, *supra* note 117, at 318.

152. OLSON, *supra* note 121, at 302.

153. *Id.*

154. *Id.* at 303.

155. Power, *supra* note 117, at 316.

156. *The Political and Human Geography of Baltimore City: An Overview, 1729-1992*, MARYLAND STATE ARCHIVES, DOCUMENTS FOR THE CLASSROOM (Maryland State Archives, Annapolis, MD) Dec. 20, 1991, at 1; IRA DE A. REID, THE NEGRO COMMUNITY OF BALTIMORE 9 (1935).

157. OLSON, *supra* note 121, at 325.

158. *Id.* at 326.

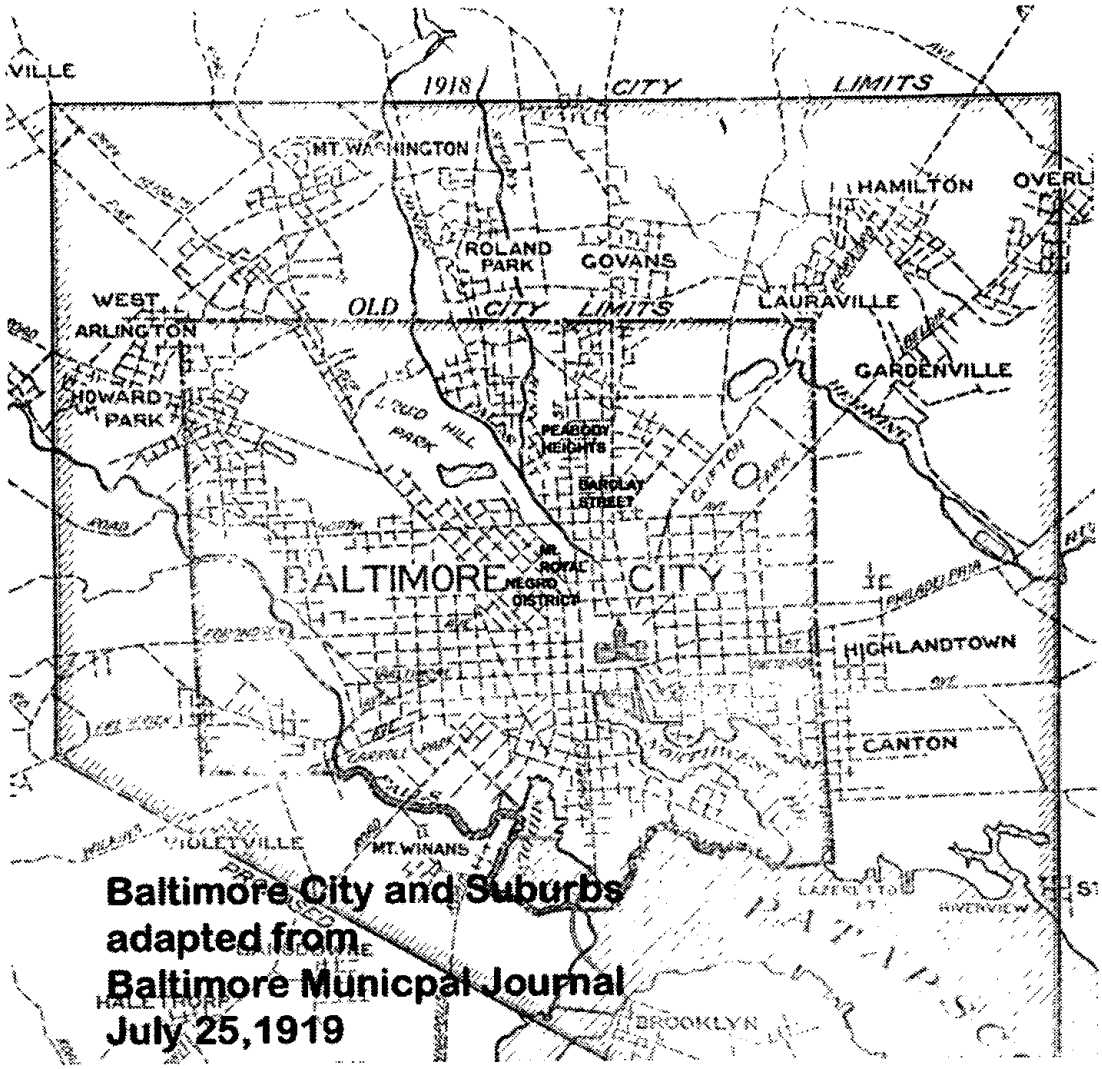

Illustration 2. Baltimore City and Suburbs adopted from Baltimore Municipal Journal, July 15, 1919.

100,000 African Americans who lacked decent housing forced entry into white neighborhoods.[159]

White city-dwellers resisted the "black invasion" district by district, neighborhood by neighborhood, block by block, and house by house. News accounts from the 1920s are filled with stories of angry confrontations, broken windows and the other terror tactics employed by the besieged white homeowners.[160] But over the long term, a voluntary multi-party conspiracy in restraint of sale of homes to blacks in white neighborhoods was doomed to failure.

159. Neverdon-Morton, *supra* note 71, at 31.

160. Power, *supra* note 117, at 297.

The economics are simple: "The temptation of members to cheat is strong . . . because the returns from cheating are substantial . . . ."[161] White sellers willing to violate unwritten rules of segregation could sell a house at a premium to black buyers.[162] Speculators could multiply this premium by "busting" a block at a time.[163]

If a plan for *de facto* segregation was to have any long term success it needed to be backed by the force of law. While the U.S. Supreme Court had ruled in *Buchanan v. Warley* that residential racial segregation could not be imposed by public law, it had not foreclosed the legal enforcement of private covenants requiring residential segregation.[164] Racially restrictive covenants seemed to be the answer. It was easy enough for suburban developers of new subdivisions to prospectively impose restrictive covenants on the building lots they were creating. Ever since the decision in *Tulk v. Moxhay* in 1848, there had been good precedent for the imposition of permanent restrictions on the use of land.[165] Subdividers had long used such deed restrictive covenants as a marketing device to guarantee lot purchasers a first-class neighborhood. For example, the Roland Park Company touted a "thousand acres of restricted land" where "[c]arefully designed protective covenants safeguard owners from encroachment of business, and from other uses of property detrimental to the value and general good of a residential section."[166]

We have seen that years before, in 1893, the Roland Park Company had requested advice of counsel as to whether it could legally insert a provision prohibiting ownership, use or occupancy by "persons of African descent."[167] When their lawyer opined that such provisions would be illegal because they constituted an unreasonable restraint on the free alienation of land, the Company backed off and

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161. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 115 (1972).

162. Power, *supra* note 117, at 321.

163. *Id.*

164. *See supra* note 139 and accompanying text (quoting the holding in *Buchanan v. Warley* and its application to the Baltimore ordinance).

165. 41 Eng. Rep. 1143 (1843) (holding that when a subsequent purchaser acquires property with knowledge of a restrictive covenant, the purchaser is bound by the covenant).

166. NATIONAL ASSOCIATION OF BUILDERS' EXCHANGES OF THE UNITED STATES OF AMERICA, BALTIMORE OF TODAY 96 (Baltimore, Md. 1916) (souvenir of the Fifth Annual Convention of the National Association of Builders' Exchanges of the United States of America).

167. Letter from law firm of Schmucker & Whitelock, to Edward H. Bouton, Gen. Mgr., Roland Park Co. (Oct. 5, 1892) (on file with Cornell University Libraries, Department and Manuseries and University Archives, Roland Park Co. Papers, #2828, Box 205).

concentrated on restricting the physical development of the lots instead.[168]

By 1910, however, Roland Park found itself in earnest competition with copycat Forest Park for recognition as Baltimore's premiere suburb. Forest Park had copied the Roland Park covenants, but "improved" upon them by adding a prohibition against Negro occupancy. Roland Park met the competition head-on by adding its own racially restrictive covenants. For example, the covenant for its Guilford plat read as follows:

> At no time shall the land included in said tract or any part thereof or any building erected thereon be occupied by any negro or person of negro extraction. This prohibition, however, is not intended to include the occupancy by a negro domestic servant . . . .[169]

Presumably, these covenants focused only on Negro "occupancy" and not Negro "ownership" to protect them from legal challenge as unreasonable restraints on alienation. Besides, white communities were distressed by invasion of Negro residents not absentee Negro owners.

During this era, other Baltimore suburban development companies were imposing similar racial restrictions.[170] And one developer went a step further. George Morris, who was a member of Mayor Jackson's Committee on Segregation when he created Ashburton in 1920, undertook to make it the most "exclusive" subdivision in town with the following restriction:

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168. *See supra* notes 74-76 and supporting text (noting that the Roland Park Co. did not use racial covenants as a result of the opinion letter). The Roland Park Company subdivided its land over the years in a series of separate plats. Typically a master set of restrictions was prepared for each plat and uniformly imposed on all of the lots therein. Judge Frank detailed these procedures in *Wehr v. Roland Park*, Cir. Ct. No. 2 Baltimore City, filed September 8, 1922, 4 Baltimore City Reports 158 (1922) as follows:

> The Roland Park Company of Baltimore City, was incorporated in 1891 and acquired the property which it thereon proceeded to develop. In 1892, Plat No. 1, involving 116 acres of land, was recorded, and the land was laid out in 427 lots. In 1901, Plat No. 2, affecting about 52 acres, was recorded, the land being divided into 85 lots. In 1903, Plat No. 3, comprising 120 acres and subdivided into 192 lots, was recorded. . . . Plat No. 6, comprising 52 acres and subdivided into 132 lots, was filed in 1909; Plat No. 5, containing 67 acres, laid out in 201 lots was recorded in 1911; Plat No. 4a, containing 11 acres and 32 lots was filed in 1915, and the Plat of Guilford, containing 335 acres and 761 lots was filed in 1913.

Id.

169. Land Records of Baltimore City, Liber S.C.L. 4220, folio 321 (1924).

170. Homeland, Land Records of Baltimore City, Liber S.C.L. 4330, folio 435 (1924); Forest Park, Land Records of Baltimore County, Liber W.P.C. 347, folio 31 (1909); Mt. Washington, Land Records of Baltimore County, Liber W.P.C. 371, folio 472 (1911); Ashburton, Land Records of Baltimore City, Liber S.C.L. 4778, folio 460 (1927); West Forest Park, Land Records of Baltimore City, Liber W.P.C. 4763, folio 209 (1927).

> [F]or the purpose of maintaining the property and the surrounding property as a desirable high class residential section . . . no owner of the land hereby conveyed shall have the right to sell or rent the same without the written consent of the grantor herein which have the right to pass upon the *character desirability and other qualifications* of the proposed purchaser or occupant of the property. . . .[171]

Morris had retained the power unto himself to select the class, race, religion, and ethnic background of Ashburton's residents.

Morris had gone a step too far. When his covenant was challenged in 1929, the Court of Appeals of Maryland struck it down because "[t]he existence of such discretionary control would be plainly incompatible with the freedom of alienation . . . ."[172] Perhaps the lawyer for the Roland Park Company had been correct in his 1893 opinion that racial restrictions would likewise be void, but from a marketing standpoint the suburban development companies had little to lose. Because a covenant excluding Negroes appealed to their intended white purchasers, they might as well include it, valid or void.

In preexisting neighborhoods, those undertaking to put in place restrictive covenants barring Negroes faced what the economist has called high transaction costs. Even where the bugbear of "Negro invasion" had created a consensus in favor of the desirability of reciprocal racially restrictive covenants, some property holders in the community could take strategic advantage of the situation and refuse to sign on. Holdouts would have both the advantage of the racial restrictions binding their neighbors' houses while retaining the option of selling out to African-American families at a premium, if and when the proffered price was high enough. And during the negotiation stage, some supporters of the covenants might be reluctant to sign because of a concern that some of their neighbors might hold out.

Those seeking to impose uniform racial restriction in their old Baltimore row house communities tried to overcome these obstacles with community organization, peer pressure, and persuasion.[173] By May of 1925, eighteen neighborhood associations had formed the Allied Civic and Protective Association of Baltimore with the intent of working together to urge "property owners to sign agreements not to

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171. Northwest Real Estate Co. v. Serio, 156 Md. 229, 231, 144 A. 245 (1929) (emphasis added).

172. *Id.* at 235, 144 A. at 247.

173. Power, *supra* note 117, at 315.

dispose of their property to Negro purchasers."[174] Participants agreed that:

> *all possible publicity be given to anyone who sells a house in a white neighborhood to a negro buyer in order to make a large profit or who evicts white tenant in order to let his house to a number of negro families at a greater rental.*[175]

When one attendee urged that violators of the "color line" be tarred and feathered, others agreed.[176]

The Allied Civic and Protective Association had some success in "retrofitting" restrictive covenants on Baltimore's preexisting downtown neighborhoods. The proponents claimed that racial covenants were preventing the expansion of the black districts in both west and east Baltimore.[177] In the white society district, for example, the head of the Mt. Royal Association asserted that of the three thousand properties in the area, twenty-eight hundred had been restricted.[178]

III. *MEADE V. DENNISTONE*

The Home Protective Association was one of the community's "improvement and protective associations" that fell under the aegis of the Allied Civic and Protective Association.[179] Its boundaries encompassed a twenty-four square block neighborhood, "bounded on the north and south by Twenty-fifth Streets and North Avenue and on the east and west by Barclay Streets and Charles Streets."[180]

When the houses in this area were first built in the 1890s, the main streets, Charles, St. Paul, Calvert, Guilford, and Barclay, were occupied exclusively by white residents.[181] By the end of the first World War (1917), several side streets and alleys, 22½, and 23rd Streets, had come to have a significant Negro population.[182] By 1927 or 1928, the 2300 block of Guilford had become "practically all colored."[183]

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174. BALT. SUN, May 14, 1925, in "Baltimore-Zoning" Vertical File, Maryland Department, Enoch Pratt Free Library, Baltimore MD.

175. *Id.*

176. *Id.*

177. Neverdon-Morton, *supra* note 71, at 33.

178. *Id.*

179. Stenographic Transcript, at 27-28, Dennistone v. Berman, Circuit Court of Baltimore City (Docket No. A 865-1936 (1937)) [hereinafter Stenographic Transcript].

180. Meade v. Dennistone, 173 Md. 295, 298, 196 A. 330, 331 (1938).

181. Stenographic Transcript, *supra* note 179, at 4-6.

182. *Id.* at 25-26.

183. *Id.* at 19-20.

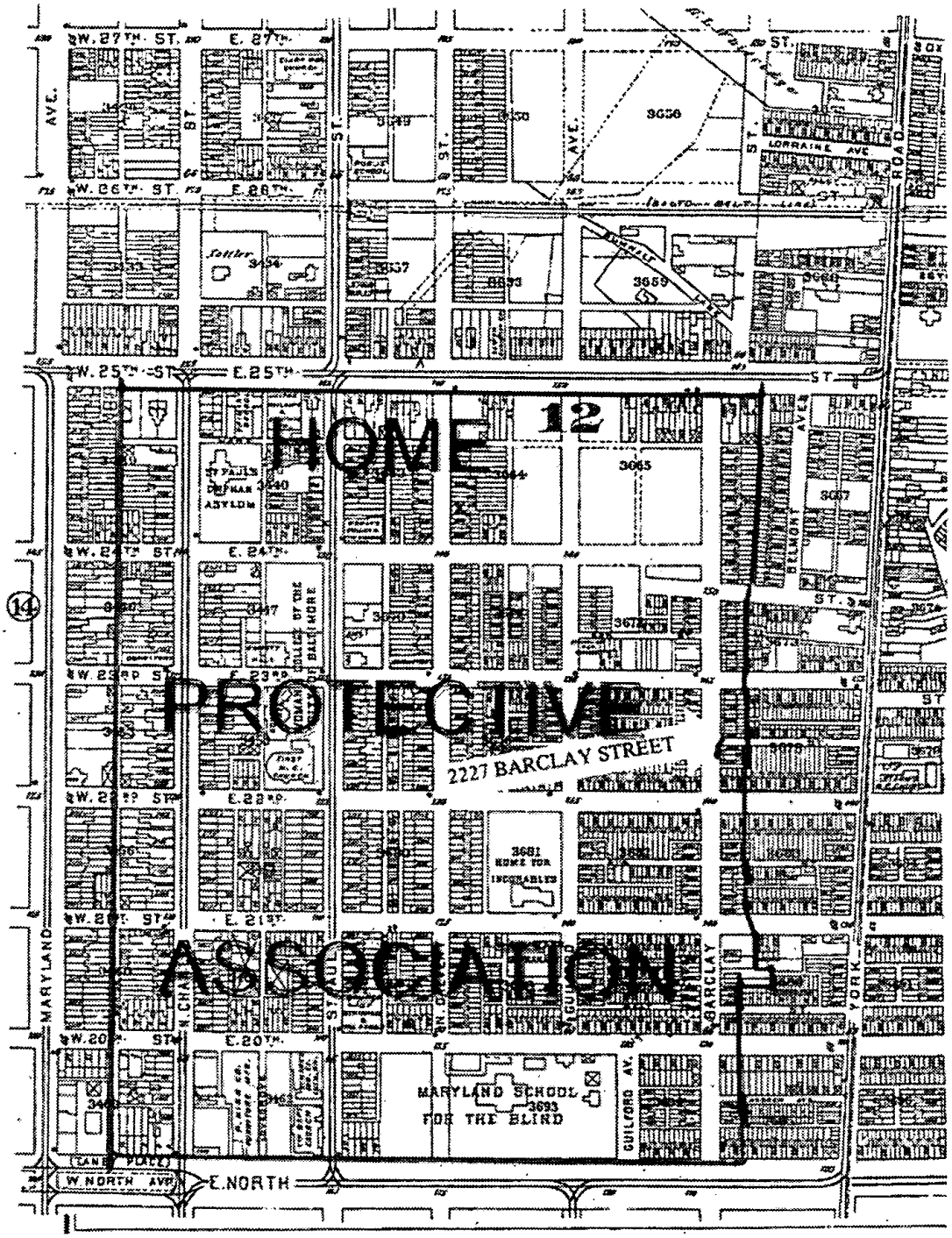

Illustration 3. Home Protection Association. Adapted from: G.W. BROMLEY & CO., ATLAS OF THE CITY OF BALTIMORE 15 (1906).

Beginning in 1927 or 1928, Association members circulated an agreement, and many owners of property mutually agreed that their houses should not "at any time [be] occupied or used by any negroes . . . except . . . that negroes . . . may be employed as servants . . .

and whilst so employed may live on the premises."[184] The promises were said to "run with and bind the land" and were recorded in the Land Records of Baltimore City.[185]

By no means did all of the property owners within the twenty-four block area agree to the racial restrictions. In the 2200 block of Barclay Street, for example, only fifteen of the twenty five properties were restricted.[186] But the owners of No. 2227 Barclay had on November 14, 1927 "duly acknowledged and recorded," to exclude Negroes from ownership or occupancy, and when No. 2227 was subsequently conveyed to Frank Berman who in 1936 contracted to sell the property to Edmond Meade, a Negro, the issue was drawn and the case was presented.[187]

The plaintiff's complaint in the Circuit Court of Baltimore City came as no surprise to the defendant, Edmond Meade. In 1934, the NAACP appointed Charles Houston (the long-time Dean of Howard Law School) as its special counsel and Houston embarked on a national legal strategy to attack racial discrimination with locally generated issues.[188] Baltimore was to serve as a "legal laboratory" in Houston's effort.[189] The NAACP provoked the suit by Dennistone as a test of the constitutionality of racially restrictive covenants.[190]

Baltimore seemed an unlikely focal point for Charles Houston's strategy. Although a Baltimore branch of the NAACP had been founded to fight the city's residential segregation laws in 1912, by the 1930s it was largely inactive, with only 100 members.[191] But Houston had a protégé already in residence. Thurgood Marshall, one of Dean Houston's favorite students at Howard Law School, who graduated in 1933 and returned to his hometown to practice law.[192]

Together Houston and Marshall undertook to constitutionally challenge under the Fourteenth Amendment the pervasive racial segregation laws in Maryland and Baltimore. Although the broad import of the clause guaranteeing all persons "equal protection of the laws"

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184. *Meade*, 173 Md. at 297, 196 A. at 331.

185. *Id.*

186. Stenographic Transcript, *supra* note 179, at 14-16.

187. *Meade*, 173 Md. at 297-98, 196 A. at 331.

188. W. Edward Orser, *Neither Separate Nor Equal: Foreshadowing* Brown *in Baltimore County, 1935-1937*, 92 MD. HIST. MAG. 5, 6-7 (1997).

189. Andor D. Skotnes, The Black Freedom Movement and Worker's Movement in Baltimore, 1930-1939, at 389 (1991) (unpublished Ph.D. dissertation, Rutgers University) (on file with Rutgers, The State University of New Jersey, New Brunswick).

190. *Id.* at 396-97.

191. *Id.* at 389 (stating that in the mid-1930s the NAACP only had 100 members).

192. Orser, *supra* note 188, at 9.

worked in their favor, two nineteenth-century precedents of the U.S. Supreme Court crimped the Amendment's meaning. First, *Plessy v. Ferguson* held that segregation, if "separate but equal," was good enough to satisfy the requirements of equal protection,[193] and second, the Civil Rights Cases, which held that the Fourteenth Amendment only forbade public discrimination and not private discrimination.[194]

With the advice and consent of Charles Houston, Thurgood Marshall first took on the inequality of the separate treatment of Negroes in Maryland in the realm of education.[195] Marshall reluctantly accepted racial segregation so long as real equality was afforded in the separate treatment of Negroes and argued cases on that question of fact.[196] He gained African-American Donald Gaines Murray's admission to the University of Maryland School of Law by showing that the state failed to provide Murray with the equal opportunity of an equivalent legal education elsewhere.[197]

Following this spectacular victory young Marshall launched an assault on the inequality of Negro secondary education. In *Williams v. Zimmerman*,[198] he challenged the failure of Baltimore County (a rural subdivision surrounding Baltimore City) to provide any public high schools for black teenagers.

The lawyer opposing Marshall had a familiar name, William L. Marbury, Jr. Young Marbury had graduated from Harvard Law School in 1924 and joined his father's law firm in 1935.[199] The senior Marbury had long established credentials as a segregationist.[200] He played a leading role in efforts to disenfranchise blacks in the first decade of the century; he drafted the ill-fated residential segregation ordinances in the second decade; and he served on Mayor Howard Jackson's Committee on Segregation in the 1920s. Marbury senior died in 1935, but his son carried on the family tradition of advocating racial segregation.[201]

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193. 163 U.S. 538, 550-51 (1896) (holding specifically that a Louisiana statute requiring railways to provide separate but equal railway carriages did not violate the Fourteenth Amendment).

194. 109 U.S. 3, 17 (1883) (holding that the constitution does not protect against wrongful acts by individual unsupported by state laws).

195. Orser, *supra* note 188, at 9.

196. *See id.* (noting that in *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936), Marshall argued that exclusion was the issue, not segregation).

197. Pearson v. Murray, 169 Md. 478, 489, 182 A. 590, 594 (1936).

198. 172 Md. 563, 192 A. 353 (1937).

199. MARBURY, *supra* note 105, at 75, 86.

200. *Id.* at 321.

201. *Id.*; *see supra* notes 132-133, 150 and accompanying text (noting Marbury's activities).

Marshall failed to gain the African-American Margaret Williams entry into a white county high school. The Court of Appeals of Maryland found that Marshall failed to meet the burden of proving that "equality of treatment [was] not obtainable separately."[202]

Marshall and Houston reassessed their options and took no appeal to the U.S. Supreme Court.[203] In 1936, Marshall left Baltimore and joined Houston as an Assistant Special Counsel in the NAACP's national office in New York.[204] The NAACP refrained from bringing any other school equalization case involving primary or secondary education in Maryland or elsewhere for ten years.[205] It was not until 1954 that Marshall would convince the high court that segregated schools were "inherently unequal."[206]

Marshall left behind a revitalized Baltimore Branch of the NAACP, and the groundwork for a challenge to the public-private dichotomy as it limited constitutional protection of civil rights. The decision in the *Civil Rights Cases*, that the Fourteenth Amendment only protected against unconstitutional public actions,[207] was an open invitation to government agencies to achieve racial segregation by promoting racial discrimination from behind the scenes through private actors. Certainly that proved to be the case with respect to residential segregation in Baltimore. When its segregation ordinances (public actions) were held unconstitutional in *State v. Gurry*,[208] the Mayors Preston and Jackson had sponsored an informal plan for segregation in which private racially restrictive covenants were the centerpiece.

W. A. C. Hughes, Jr. was Marshall's successor as counsel of the Baltimore branch of the NAACP.[209] Hughes, who had descended from two historic Maryland African-American families, was a graduate of Boston University School of Law.[210] He had found the perfect test case for challenging restrictive racial covenants when white neighbors sought to enjoin Edmond Meade, an African American, from occupying the house on Barclay Street.[211] Hughes masked the interest of the

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202. *Williams*, 172 Md. at 567, 192 A. at 355.

203. Orser, *supra* note 188, at 22.

204. *Id.* at 21.

205. *Id.* at 22.

206. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

207. 109 U.S. 3, 17 (1893).

208. 121 Md. 534, 88 A. 546 (1913).

209. Obituary of William Alfred Carroll Hughes, Jr., Hughes, William A.C., 1905-1966, *in* Maryland Vertical File, Baltimore Enoch Pratt Free Library.

210. *Id.*

211. Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938).

NAACP by appearing as Meade's private attorney. The opposing counsel representing the neighbors was William L. Marbury, Jr.[212]

Meade's defense presented Hughes with an extremely difficult case. Housing was a most divisive issue; whites had a long tradition of using violence to discourage blacks from moving into their neighborhoods.[213] And a requirement of a "state action" had become firmly ensconced in the Fourteenth Amendment jurisprudence.[214] But there remained the argument that racial restrictions constituted an unreasonable restraint on alienation.[215] Moreover the political landscape was changing. In 1923, Democratic mayor Howard Jackson had created a Committee on Segregation and charged it with the protection of white neighborhoods from Negro invasion. In 1936, during a second tour of duty as a Democratic mayor, Jackson had become a dues-paying member of the Baltimore branch of the NAACP.[216] The Democratic Party was seeking support from African-American voters. Perhaps a Democratic judge would find a way to deny the injunction and to permit Meade to reside at 2227 Barclay Street.

Hughes in Baltimore consulted with Thurgood Marshall at the New York office of the NAACP as to the arguments to present on Meade's behalf before Judge George A. Solter (a member of the Democratic Party) in the Circuit Court of Baltimore City.[217] They mixed together fifteenth-century formalism, Fourteenth Amendment jurisprudence and twentieth century public policy. They contended that the racially restrictive agreements did not apply to Meade because: they did not "run with the land," they were unsupported by "privity of estate," they were repugnant to the grant, they were unreasonable restraints on alienation, they violated the Fourteenth Amendment, and they were contrary to public policy.[218] Judge Solter rejected these defenses out of hand and enjoined Meade and his family from "using or occupying No. 2227 Barclay Street."[219]

Meade's loss in the Circuit Court left the Baltimore branch of the NAACP without funds and in debt to the National NAACP.[220] Only a reluctant financial concession by the national office permitted the

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212. *Id.* at 296, 196 A. at 331.

213. Skotnes, *supra* note 189, at 396-97.

214. *See, e.g.*, Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (stating that the Thirteenth and Fourteenth Amendments do not restrict individual private actions).

215. State v. Gurry, 121 Md. 534, 549-50, 88 A. 546, 549 (1913).

216. Thompson, *supra* note 0, at 227.

217. *Meade Transcript, supra* note 1, at 10.

218. Meade v. Dennistone, 173 Md. 295, 299, 196 A. 330, 332 (1938).

219. *Id.* at 296-97, 196 A. at 331; *Meade Transcript, supra* note 1, at 22 (Decree).

220. Thompson, *supra* note 0, at 259-60.

branch to finance the appeal of Meade's case to the Court of Appeals of Maryland.[221] And the appeal was doomed to failure. Eight of the nine judges on Maryland's highest court rejected Meade's defenses one by one.[222] Meade, as a purchaser with notice of contractual restrictions, was held equitably bound regardless of traditional limitations on running covenants and the antiquated notions of privity and repugnance.[223] The constitutional inhibition in the Equal Protection Clause of the Fourteenth Amendment was considered to be the power of the state and not the right of individuals to contract with respect to their property.[224] The rules against restraints on alienation were only intended to permit free conveyance of land, not to foreclose limitations on use and occupancy.[225] And it was not viewed as within the province of the court to eradicate racial prejudice.[226] Chief Judge Carroll Bond, the lone dissenter, published no opinion.[227] As the court's reformer, he perhaps would have found the racial restrictions void as against public policy.

IV. *MEADE*'S AFTERMATH

The Baltimore branch of the NAACP could not afford to appeal the *Meade* case to the U.S. Supreme Court, and Houston and Marshall in the National office presumably thought the time not yet ripe for a high court attack on private racial discrimination in housing.[228] Even though a legal challenge was not forthcoming, over the long term, contractual restrictions were doomed to fail. Migration and World War II boomed Baltimore City's population close to the million mark and the blacks' share grew from eighteen percent to twenty-four percent.[229] Population growth ran far ahead of wartime construction.[230] The growing black community, trapped by the plan for *de facto* segregation, fought for more space "block by block" and year by year.[231] The white majority resisted mightily and sometimes violently but they

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221. *Id.* at 260.
222. *Meade*, 173 Md. at 309, 196 A. at 336.
223. *Id.* at 307, 196 A. at 335.
224. *Id.* at 302, 196 A. at 333.
225. *Id.* at 307, 196 A. at 335.
226. *Id.*
227. *Id.* at 309, 196 A. at 336.
228. Thompson, *supra* note 0, at 260.
229. In 1930, blacks constituted 143,000 of the city's 805,000 residents (18%). *The Political and Human Geography of Baltimore City: An Overview, 1729-1992*, MARYLAND STATE ARCHIVES: DOCUMENTS FOR THE CLASSROOM (Maryland State Archives, Annapolis, MD) Dec. 20, 1991, at 1. In 1950, blacks constituted 226,000 of the city's 950,000 residents (24%).
230. OLSON, *supra* note 121, at 371.
231. Power, *supra* note 117, at 322.

lacked the economic will to contain the pressure for black housing. Covenants or no covenants, white homeowners sold out to the "blockbusters" who resold or rented to blacks.[232]

The wartime spirit and the transaction costs of private enforcement discouraged white holdouts from enjoining Negro newcomers. Once the war was over a suburban housing boom accelerated white flight, leaving behind many houses formally restricted to white occupancy only, now owned and occupied by African Americans.[233]

A. Afterlife of the Advocates

The war years proved to be a time of professional growth and opportunity for the advocates involved in *Meade v. Dennistone.* Meade's lawyer, W.A.C. Hughes, continued to serve as legal counsel for the Baltimore branch of the NAACP.[234] In 1939, he prevailed in a federal district court decision equalizing salaries between white and black public school teachers throughout Maryland.[235] He went on to convince the Enoch Pratt Library and the City Welfare Department to hire qualified blacks, and while serving on the State Commission of Higher Education, he negotiated the transfer of Morgan College from the Methodist church to the State of Maryland.[236] A lifelong Republican, he never followed most of his fellow African Americans who switched to the Democratic Party.[237]

At the national level, Thurgood Marshall was also thriving. In 1938, he became legal director of the national NAACP.[238] As such, he was the master strategist of the NAACP's efforts to end racial segregation.[239] His first efforts were circumscribed by the Supreme Court precedents holding that the Equal Protection Clause of the Fourteenth Amendment only applied to public acts of discrimination, and that "separate but equal" public facilities were good enough.[240] Making the best of the bad law, he traveled throughout the South winning

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232. *Id.* at 321-22.

233. W. EDWARD ORSER, BLOCKBUSTING IN BALTIMORE: THE EDMONSON VILLAGE STORY 68 (1994).

234. Obituary of William Alfred Carroll Hughes, Jr., *supra* note 209.

235. Mills v. Lowndes, 26 F. Supp. 792 (D. Md. 1939).

236. Obituary of William Alfred Carroll Hughes, Jr., *supra* note 209.

237. *Id.*

238. Richard Lacayo, *Marshall's Legacy*, TIME, July 8, 1991, at 24.

239. *Id.*

240. Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896); The Civil Rights Cases, 109 U.S. 3, 17 (1883).

ninety-five percent of his cases by proving that the separate public facilities were not in fact equal.[241]

William L. Marbury Jr., the counsel who opposed Hughes and Marshall in *Meade v. Dennistone*, also became a national figure. Marbury left the advocacy of racial segregation behind to become a leader of the Baltimore bar. During World War II, he went to Washington where he served in the War Department.[242] He described his role as "Chief Counsel for the procurement or industrial side of the War Department."[243] After the war, Marbury was awarded the national Medal of Merit and was proposed as the next Solicitor General of the United States, but he had competition.[244] As fate would have it his rival was another Baltimore lawyer, Philip B. Perlman.[245] Twenty years before, Perlman, then City Solicitor of Baltimore, served on Mayor Jackson's Committee on Segregation along with Marbury's father.[246]

In 1946, William L. Marbury, Jr. returned to practice in the Baltimore bar and resumed his public service as a chairman of a 1946 gubernatorial commission charged with the reform of higher education in Maryland.[247] On the race issue, the Marbury Commission crafted a compromise. Rather than integrating the public colleges and universities, the separate black public colleges were to be strengthened, and out-of-state scholarships were to be provided for black graduate students in subjects where "separate but equal" programs were not provided.[248]

V. CIVIL RIGHTS IN THE COURTS

The spirit of national unity and goodwill following World War II made the time seem right for a movement improving the civil rights of African Americans. NAACP Chief Counsel Thurgood Marshall, however, still faced two adverse nineteenth-century precedents. First, the holding that the Fourteenth Amendment only applied to public acts of discrimination, and not private acts of discrimination, was proving to be a serious curtailment of the effectiveness of civil rights litigation.[249] Public officials had found that by behind the scenes facilitation of racial segregation by private actors they could discriminate

241. Lacayo, *supra* note 238, at 24.
242. MARBURY, *supra* note 105, at 150.
243. *Id.* at 171.
244. *Id.* at 251. The position of Solicitor General went to Phil Perlman. *Id.*
245. *Id.*
246. Power, *supra* note 149, at 62.
247. MARBURY, *supra* note 105, at 254.
248. *Id.* at 254-55.
249. The Civil Rights Cases, 109 U.S. 3 (1883).

with constitutional immunity—witness *Meade v. Dennistone*.[250] Second, still on the books was the precedent holding that "separate but equal" state actions affecting the races satisfied the constitutional requirements of equal protection.[251] Case by case challenges that the separate treatment of African Americans was not in fact equal was time consuming and costly.[252] These precedents needed to be overruled if the civil rights movement was to be successful.

When NAACP chief counsel, Thurgood Marshall, had heard in 1947 that the two candidates for Solicitor General of the United States were William L. Marbury, Jr. and Philip B. Perlman, he must have been discouraged. The Solicitor General of the United States served as the "Nation's Lawyer." One of the jobs of the office is to intervene in the U.S. Supreme Court *amicus curiae* when private litigants are advancing private claims that also serve the national interest. Both Marbury and Perlman had long-standing records as advocates for racial segregation in Maryland.[253] Marshall could not have been optimistic that he would have a "friend in court" when he challenged these adverse precedents in the Supreme Court.

As things turned out, President Truman appointed Perlman (rather than Marbury) as Solicitor General.[254] Perlman had earned the job as a Democratic loyalist.[255] In 1932, Perlman headed the Maryland campaign for Franklin Delano Roosevelt and remained an active supporter of Roosevelt in the next three campaigns.[256]

A. Shelley v. Kraemer

In 1947, Thurgood Marshall found a case he had been waiting a decade for. The Court of Appeals of Maryland had decided in *Meade v. Dennistone* that racial discrimination in housing did not violate the Fourteenth Amendment when based upon private covenant rather than public action.[257] The NAACP had foregone any appeal and its tacit acceptance of this public-private dichotomy had proved a serious curtailment on the effectiveness of civil rights litigation. *Shelley v. Kraemer*[258] was the case to test it in the high court.

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250. 173 Md. 295, 196 A. 330 (1938).
251. Plessy v. Ferguson, 163 U.S. 537 (1896).
252. *See* Thompson, *supra* note 0, at 259 (noting the costs associated with trying just one case).
253. Power, *supra* note 149, at 62.
254. *Id.* at 64.
255. *Id.* at 65.
256. *Id.* at 64.
257. Meade v. Dennistone, 173 Md. 295, 306-07, 196 A. 330, 335 (1938).
258. 334 U.S. 1 (1948).

Shelley presented the same facts and the same legal questions as *Meade v. Dennistone.* Thirty of thirty-nine neighbors in a St. Louis neighborhood had mutually agreed to restrict their property so that it could only be used and occupied by those of the "Caucasian race," and the Missouri Supreme Court enforced the restriction.[259] Marshall argued on behalf of Shelley, a Negro purchaser of one of the restricted parcels, that the covenants denied Shelley "equal protection of the law" under the Fourteenth Amendment.[260] Not surprisingly, the Mount Royal Protective Association—forever vigilant in efforts to protect its Baltimore neighborhood from Negro invasion—filed a brief as amicus curiae in support of the constitutionality of the restrictive covenants.[261] But surprisingly, U.S. Solicitor General Philip Perlman intervened in support of Shelley, arguing that private restrictions prohibiting the sale of houses to Negroes were not in the public interest.[262]

Philip Perlman had switched sides on the "race question."[263] In 1925, as City Solicitor of Baltimore, he had led the Mayor's Committee on Segregation in its efforts to exclude blacks from white neighborhoods.[264] In 1948, as Solicitor General of the United States, he argued to the Supreme Court that residential racial restrictions were unconstitutional.[265] Perlman's conversion can be explained in terms of party politics. In 1925, virtually all of Baltimore's black voters were Republicans, and the Democratic Mayor Jackson had no sympathy for their dearth of houses. But Roosevelt's New Deal had brought blacks into the Democratic Party, and the Party's leadership now was intent upon satisfying some of their demands. Perlman's change of mind was symptomatic of a metamorphosis in the body politic—a movement away from discrimination and towards racial equality had begun.[266]

The assumption that racially restrictive covenants involved only private discrimination and not public discrimination was vulnerable to constitutional challenge. The institution of *private* property is a *public* institution. The Anglo-American property system is an outgrowth of the feudal system whereby the King claimed title to all land as his public domain. Over the ensuing one thousand years, the English

259. *Id.* at 5, 6.
260. *Id.* at 7-8.
261. *Id.* at 4.
262. Power, *supra* note 149, at 65.
263. *Id.* at 67.
264. *Id.* at 62.
265. *Id.* at 65.
266. *Id.* at 66-67.

Crown and sovereign states have transferred parcels to the private owners subject to a continuing public oversight pursuant to which the legislatures and the courts have shaped and reshaped the perquisites of private ownership. Special public attention has been paid to maintenance of free and open land markets. State legislatures, city councils, and the courts have decided when contractual restraints on alienation violate public policy and when they do not. Hence, the decision whether or not to enforce restrictive covenants is a discretionary public choice and therefore ought to be subjected to Fourteenth Amendment scrutiny.[267] The Supreme Court so held in *Shelley v. Kraemer.*[268]

B. Brown v. Board of Education of Topeka

NAACP Chief Counsel Thurgood Marshall faced another major obstacle in his efforts to desegregate American society. Still on the books was *Plessy v. Ferguson,* a nineteenth-century precedent holding that "separate but equal" state actions affecting the races satisfied the constitutional requirements of equal protection.[269] Marshall had traveled the South throughout the 1930s and 1940s winning scores of cases with the proof that the separate treatment of African Americans was not in fact equal.[270] Notwithstanding these efforts, institutionalized segregation continued to have the force of law, the most striking example being the racially segregated school systems in the border and southern states.

In the aftermath of World War II, America's progressive white leaders embraced equal treatment of the races, but clung to the desirability of segregation. For example, Philip Perlman had been transformed by his argument in *Shelley v. Kraemer.*[271] When national civil rights leaders called to express their profound gratitude he became committed to the civil rights struggle.[272] But old prejudices die hard. According to the recollection of a colleague, Solicitor General Perlman remained opposed to the integration of public primary and secondary schools, thinking the racial mixing of black children and white children to be contrary to the general welfare.[273]

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267. Shelley v. Kramer, 334 U.S. 1, 20 (1948) (holding that by enforcing restrictive covenants, states violated rights guaranteed by the Fourteenth Amendment).

268. *Id.*

269. 163 U.S. 537, 550-51 (1896).

270. Lacayo, *supra* note 238, at 24.

271. Power, *supra* note 149, at 65.

272. *Id.*

273. Philip Elman, *The Solicitor General's Office, Justice Frankfurter and Civil Rights Litigation, 1946-1960: An Oral History,* 100 HARV. L. REV. 817, 825 (1987).

Perlman resigned as Solicitor General of the United States in 1952.[274] Ironically, his resignation may have further contributed to the progress of the civil rights movement. Thurgood Marshall brought a test case to challenge the constitutionality of segregated public schools in 1953. Together Marshall and Attorney General Tom Clark convinced the Supreme Court that separate school facilities were inherently unequal in the landmark case of *Brown v. Board of Education*[275] and the second impediment to effective civil rights litigation tumbled.

CONCLUSION

The case of *Meade v. Dennistone* arose in an era when courts and commentators were reconsidering "the nature of the judicial process."[276] When Benjamin Cardozo addressed the topic at Yale Law School in 1921, he opined that the guarantees and prohibitions of constitutions and statutes, and the influences of precedents, customs, politics, and sociology all had a role to play when courts consider the validity of legally imposed restraints or prohibitions.[277]

This certainly seems to have been the case in *Meade* when the Court of Appeals of Maryland considered the validity of a prohibition barring Negro occupancy of a dwelling. The great generalities of the constitutional guarantee of "equal protection of the law," and the prohibition against deprivation of "property without due process of law" called for a look to precedents and customs. The nineteenth-century cases in the U.S. Supreme Court had held that "separate but equal" satisfied the guarantees of equal protection and that due process of the law was unconcerned with private deprivations of property.[278] Racial residential segregation in housing continued to be the custom and to have widespread political support among the ruling white majorities. Moreover, a rationalization for racial segregation was in vogue amongst the intelligentsia. Disciples of English philosopher Herbert Spencer's Social Darwinism posited that Negroes were eugen-

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274. Power, *supra* note 149, at 65.

275. 347 U.S. 483, 495 (1954).

276. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); JEROME FRANK, LAW AND THE MODERN MIND (1930); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) (discussing core concepts of law instead of giving law a specific definition); Ezra Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931) (discussing the characteristics of realist jurisprudence).

277. CARDOZO, *supra* note 276, at 14, 19, 31, 43.

278. Plessy v. Ferguson, 163 U.S. 537 (1896); The Civil Rights Cases, 109 U.S. 3 (1883).

ically inferior.[279] Turn-of-the century census data supported the view that Negroes were a dying race: blacks showed a higher mortality rate and lower birth rate than whites.[280] Because "blacks were degenerating with no future . . . [the] prognosis pointed . . . to the need to segregate or quarantine" them until they disappeared.[281] Hence precedents, customs, politics, and sociology all conjoined to support the Court of Appeals' decision in 1938.

Some things changed. Rather than dying off, Baltimore's black population inexorably grew from 143,000 in 1930, to 166,000 in 1940, to 226,000 in 1950.[282] President Franklin Delano Roosevelt's New Deal during these years brought Negroes into the Democratic Party, and its leaders pledged to meet some of their demands. The valiant service of African Americans in World War II led to greater acceptance of blacks by the white community. Herbert Spencer's Social Darwinism fell into intellectual disrepute. All this may have led the United States Supreme Court to rethink its precedent to foreclose judicial enforcement of private racial discrimination and to reject the proposition that "separate" was "equal." NAACP General Counsel Marshall was at last free to sue Jim Crow out of Baltimore, Maryland, and the Nation with the Fourteenth Amendment.

But some things stayed the same. The custom of racial segregation remained deeply engrained in the national culture. And Thurgood Marshall was destined to spend the rest of his professional life (first as an advocate and later as a Justice of the United States Supreme Court) challenging the vestiges of discrimination in housing, schools, and other aspects of American life.

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279. Benno Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era: Part 1: The Hayday of Jim Crow*, 82 COLUM. L. REV. 444, 453 (1982).

280. *Id.*

281. GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914, at 255 (1971).

282. *The Political and Human Geography of Baltimore City: An Overview, 1729-1992*, MARYLAND STATE ARCHIVES: DOCUMENTS FOR THE CLASSROOM (Maryland State Archives, Annapolis, MD), Dec. 20, 1991, at 1.