IV. THE MICHIGAN SUPREME COURT AND BLACK RIGHTS
1850-1870

The Supreme Court of the State succeeded the Territorial Court through legislation enacted March 26, 1836. Originally comprised of the three circuit court judges, in 1838, the court became a four-member bench, consisting of a chief justice and three associate justices. In 1848, the number of judges was increased to five; the Constitution of 1850 changed the court to a bench of eight popularly elected circuit judges. The court was again reorganized in 1857 to consist of four elected appellate judges, who no longer sat as circuit court judges.

Between 1847 and 1890, the Michigan Supreme Court decided five cases that involved black claimants: three voting rights cases including the prominent People v. Dean decision; a nationally significant public accommodations case; and an important equal access to public schools case.

A. The Right to Vote

From 1835 to the start of the Civil War in 1861, blacks and their white supporters constantly attacked the “mainstay of caste” in Michigan -- the denial of the right to vote. However, as abolitionism intensified along

2. Marvin, supra note 1 at 386.
8. For discussions of black activism in Michigan during the Civil War period, including their initial exclusion and eventual entry into military service from Michigan as the First Michigan Colored Infantry (later the 102d Regiment United States Colored Troops), see NORMAN B. MCRAE, NEGROES IN MICHIGAN DURING THE CIVIL WAR (Michigan Civil War Centennial Observance Commission 1966). See generally BENJAMIN QUARLES, THE NEGRO IN THE CIVIL WAR (Little Brown and Company, 1st ed. 1953); FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SERIES II THE BLACK MILITARY EXPERIENCE (Ira Berlin et al. eds. 1982).
9. Ronald Formisano, The Edge of Caste: Colored Suffrage in Michigan, 1827-1861, MICHIGAN HIST. MAG., LVI/1 Spring 1972, at 19, 20; see McRae, supra note 8, at 8-29.
with mounting North-South tensions, racism also heightened within an “already Negrophobic white majority.”10 By 1860, as a result of white anxiety over the consequences of complete emancipation, “the colored suffrage issue in Michigan had become almost the sole property of blacks.”11

A primary reason for denying blacks the right to vote was the fear that it would encourage black migration to Michigan.12 Inextricably interrelated with the broader migration issue was the concern that resident blacks would compete for jobs with whites, primarily European immigrants.13 In contrast, immigrants were encouraged to settle in Michigan.14 For example, state officials published foreign language pamphlets that explained the voting rights of non-citizen immigrants and emphasized the fact that blacks couldn’t vote as an inducement for immigrants who did not want to live with blacks.15 By 1900, 57% of Michigan’s population was of foreign parentage.16 Among the larger states, this percentage was exceeded only by New York and Massachusetts.17

White fears were clearly more inchoate or anticipatory than real. The actual presence of blacks in Michigan was relatively minuscule as efforts to exclude them were more successful in Michigan than in other Midwest states.18 At no time during the entire nineteenth century did the percentage for discussions of meetings and conventions held in Michigan on behalf of black voting and other rights, including the 1843 State Convention of the Colored Citizens of Michigan held in Detroit. See also William McAdoo, The Settler State: Immigration Policy and the Rise of Institutional Racism in Nineteenth Century (1993) (unpublished doctoral dissertation, University of Michigan) (on file in microfilm in the University of Michigan Library System); See David Katzman, Before the Ghetto: Black Detroit in the Nineteenth Century 49 (1973).

10. Formisano, supra note 9, at 20.
11. Id.
12. McAdoo, supra note 9, at 181-183, 209-10; see also Katzman, supra note 9, at 33-37.
14. Id. at 181.
15. Id.
16. Id. at 274.
17. Id.
18. Id. at 263-76. Census data illustrate that efforts to discourage black settlement in Michigan were successful. When compared with other midwestern states (e.g., Ohio, Illinois and Indiana) over the period from 1840 to 1860, Michigan’s black population statistics as percentages of total population are strikingly small. Id. at 266-72. The black population in Michigan for the years 1840, 1850 and 1860 was reported as 707, 2,583 and 6,799, respectively. The total Michigan population was 751,110 in 1860. Population growth for blacks was non-existent when measured as a percentage of total populations between 1860-1920: 1860 - .9%; 1870 - 1.0%; 1880 - .9%; 1890 - .7%; 1900 - .7% and 1920 - .6%. Id. at 276.
of blacks ever exceed 1% of the state’s population. In fact, between 1860 and 1910, the black population percentage in Michigan actually declined from 1% to 0.6%.20

In 1850, only about 2,583 blacks lived among 397,654 whites in Michigan.21 In Detroit, however, the black population trebled between 1840 and 1850, but from only 193 to 587, which at the time was about one-quarter of the state’s total black population.22 The influx was attributed largely to the toughened enforcement of black codes in the South.23 From 1850 to 1860, Detroit’s black residents more than doubled to 1,403, while the city’s white population had increased to approximately 44,000.24

Opponents of black suffrage often exploited popular sentiments and 19th century scientific racialism in blatantly vitriolic and demagogic attacks on black people. As a classic example, in 1850, Democratic leader and Detroit Free Press editor, John S. Bagg, openly linking black voting rights with the specter of interracial sex between black males and white females, stated:

[He would not] go to the zoophyte and trace up the numerous gradations in animal life to our noble selves, and say what rank the African holds in the chain.” But if they vote the whole state would be “peopled by these dark bypeds—a species not equal to ourselves. . . . “What man would like to see his daughter encircled by one of these sable gentlemen, breathing in her ear the soft accents of love?”25

Later, the Free Press, under the leadership of editor Wilbur F. Storey,26 was one of many Democratic newspapers that “became a vocal and persistent champion of white supremacy and made ‘nigger’ baiting of ‘Black Republicans’ an almost daily habit.”27

19. Id. at 262.
20. Id. at 276.
21. Id. at 272.
23. Katzman, supra note 9, at 13.
24. J. Woodson, A Century With the Negroes of Detroit, 1830-1930, (1949) (master’s thesis, Wayne State University). Most were unskilled workers. Of the 168 blacks who were included in the 1860 census enumeration within 26 occupation categories, the five largest were: laborers (58); servants (30); barbers (25); teamsters (15) and sailors (12). Also listed were four physicians, two ministers and one private school teacher. Id.
25. Formisano, supra note 9, at 28-29.
26. Proceedings and Debates of the Constitutional Convention of the State of Michigan of 1850, Ch. 3 (Ingals State Printer 1850), for discussion of newspapers as “house organs” for the major political parties.
27. Formisano, supra note 9, at 35.
Finally, in 1850, after many petitions for the franchise had been refused by the Michigan legislature, the suffrage issue was submitted to a popular referendum. It was resoundingly defeated - 71.3% of 44,914 votes were against black suffrage. Blacks and their supporters persisted, nevertheless, and in 1855, 1857, 1859 and 1861, they renewed suffrage petitions. They were all refused, notwithstanding state government, in 1854, came under Republican control.

Suffrage, however, had become the “lightning rod” on the question of the status of free blacks in the North and “[i]n no other state does the suffrage [issue] seem to have channeled or dominated the discussion of race as much as in Michigan.” Accordingly, it could not have been unexpected that the earliest cases by black claimants in the Michigan Supreme Court would involve the franchise.

Since the Michigan Constitution restricted voting to white male citizens over twenty-one years of age, it was not possible to muster judicial challenges on behalf of blacks, generally. Rather, the several voting cases that were decided by the Michigan Supreme Court between 1847 and 1866 involved mixed race males or so-called mulattos. These claimants, in essence, argued they were white within its constitutional meaning. In this context, the court had to confront, ultimately, the troublesome question: For purposes of voting, what is a white man? By determining whiteness, the legal meaning of a Negro was also defined.

During the years immediately following the Civil War, legal distinctions between the races became increasingly more important. As a result, many states, either by statute or constitutional provision, defined precisely what constituted a Negro. Definitions of Negroes varied widely from “one-fourth negro blood,” or “one-eighth negro, or African American.”

28. Id. at 30. See generally for excellent discussions of the race/suffrage issues during this period. Discussed also are the decidedly different attitudes whites harbored toward granting voting rights to new, poor and unschooled white immigrants.
29. Id.
30. Id. at 36-38.
31. Id. See McAuliffe, supra note 9, at 137-74, for discussion of the emergence of Michigan’s Republican Party.
32. Formisano, supra note 9, at 20.
33. Id.
34. Id. The term was regarded pejoratively by many blacks. It is a derivation from the Spanish mulato or the Latin mulus, meaning mule, the sterile hybrid offspring of a male ass and a female horse.
35. Id.
blood,"\textsuperscript{37} to “having any African blood in their veins.”\textsuperscript{38} Although voting was limited to white males in Michigan, there was no statute or constitutional provision that determined race. This vexing problem, therefore, was left to the Michigan courts.

1. \textit{Gordon v. Farrar}\textsuperscript{39}

In \textit{Gordon v. Farrar}, the plaintiff sued the election inspectors for the second ward in Detroit who had refused his vote in a federal election held November 4, 1844.

Gordon was described as:

partly of Saxon and partly of African descent, but the Saxon blood in him greatly predominates over the African. He is of a complexion as white as, or whiter, than many persons descended from European nations; but there is a mixture of African blood in his composition, though he has less than one-half.\textsuperscript{40}

A Wayne County Circuit Court jury found for Gordon and awarded him twelve and one-half cents in damages.\textsuperscript{41} Gordon’s judgment, however, was a special verdict conditioned on whether the inspectors had authority to determine voter qualifications based on race, inasmuch as the statute regulating their duties contained no such provision.\textsuperscript{42} The trial judge reserved this question for an opinion by the supreme court.\textsuperscript{43}

The supreme court, notwithstanding the absence of statutory authorization, decided that if race had to be determined in qualifying voters, the responsibility properly belonged to the inspectors.\textsuperscript{44} The court also ruled that such decisions were judicial and not ministerial as the plaintiff had alleged.\textsuperscript{45} Since the inspectors “acted judicially” in adjudicating the question, “Is this person white?” they, like judges, were immune from civil suit or indictment. The court, accordingly, ordered judgment for the defendants.\textsuperscript{46}

2. \textit{People v. Dean}\textsuperscript{47}

\begin{thebibliography}{9}
\bibitem{37} 1866 Ga. Laws 235, cited in \textit{Bardolph, supra} note 36, at 80.
\bibitem{38} \textit{Tenn. Code Ann.} \S 40-1 (1866), cited in \textit{Bardolph, supra} note 36, at 80.
\bibitem{39} \textit{Gordon v. Farrar,} 2 Doug. 411 (1847).
\bibitem{40} \textit{Id.} at 412.
\bibitem{41} \textit{Id.}
\bibitem{42} \textit{Id.} at 413.
\bibitem{43} \textit{Id.}
\bibitem{44} \textit{Id.}
\bibitem{45} \textit{Id.}
\bibitem{46} \textit{Id.} at 415-16.
\bibitem{47} \textit{People v. Dean,} 14 Mich. 406 (1866).
\end{thebibliography}
Nineteen years after Gordon, the question of black voting rights again came before the Michigan Supreme Court. Significant changes had occurred since Gordon, in law and within the Supreme Court itself. A new state constitution was adopted in 1850. Blacks were still denied the vote, but “detribalized” Indians and non-citizen immigrants were newly granted the right.

In 1866, the court consisted of the distinguished bench of Chief Justice George Martin, and the so-called “Three C’s” -- Justices James V. Campbell, Isaac P. Christiancy and Thomas M. Cooley. The latter three justices had supported anti-slavery causes before joining the court. When Benjamin F. Graves succeeded Justice Martin on January 1, 1868, the court was comprised of Chief Justice Cooley and Associate Justices Campbell, Christiancy and Graves. This court became known as the “Big Four” and has been called “the ablest State court that ever existed.”

Campbell and Cooley were faculty members of the Law Department of the University of Michigan during their terms on the court. Cooley and Christiancy had been activists in the Free-Soil battle “which furnished the background for the Republican party.” Before assuming an important role in the founding of the Republican party, Christiancy was a leader in the antislavery wing of the Democratic party. Thus, a very able and an ostensibly sympathetic, court was called upon to review William Dean’s conviction for illegal voting, and “to settle the position of persons of mixed blood under our Constitution.”

At trial, Dean took the position that the darkness of his skin was due to his Indian heritage. Witnesses for the prosecution testified that they

48. Id. at 408.
49. Mich. Const. of 1850, art. 7, § 1, required that a Native American elector be a “civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe . . . “ See McAdoo, supra note 9, Ch. VI, The Dual Thrust of Nativism in Michigan: Foreign-Born and Black Settlement Before the Civil War, at 224-81, for discussion of immigrant voting rights and other incentives that encouraged their settlement.
50. Wise, supra note 4, at 1531.
52. Id. at 290.
53. Wise, supra note 4, at 1532-34.
54. Id. at 1538
55. Vander Velde, supra note 52, at 279.
56. Id. at 280.
considered Dean a mulatto, not a white man. A prosecution expert witness, a prominent Detroit physician, testified that nothing in Dean’s appearance, except his color, which was “not different from . . . Europeans of bilious temperament,” indicated African blood. His opinion, however, was that African blood, much diluted and not exceeding one-sixteenth part, was present. The expert, who had examined Dean, further testified, “that the only clear indication of African blood is a peculiarity in the cartilages of the nose, and this was an infallible indication . . . .”

The trial judge rejected Dean’s requested jury instruction that a trace of African blood, not exceeding one-sixteenth, qualified him to vote. Instead, the court instructed the jury that if they found Dean had a portion of African blood equal to one-sixteenth, he was not a white man and should be convicted. Dean was convicted, and his appeal to the Supreme Court raised directly the question: What constitutes a white man within the meaning of the Michigan Constitution?

On behalf of the people, the Attorney General argued that white prejudice against Negroes “has not been confined to the negro, mulatto, quadroon and mustee [an octoroon], but it has extended to all known to have any African blood in their veins.” Thus, all “colored persons” should be excluded as electors. Dean’s attorney argued that white in the constitution referred to race, not color. Therefore, whichever blood predominates, white or black, the person would be of that race.

In an opinion authored by Justice Campbell and joined by Justices Christiancy and Cooley, the court discussed the history and laws related to race voting restrictions as well as racial classifications and the need for judicial restraint when interpreting positive law. Following its analyses, the court held “that persons are white within the meaning of our Constitution, in whom white blood so far preponderates that they have less than one-fourth of African blood; and that no other persons of African descent can be so regarded.” Since Dean was within the rule enunciated, a new trial was ordered.

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60. Dean, 14 Mich. at 426.
61. Id.
62. Id.
63. Id.
64. Id. at 427-28.
65. Id. at 428-29.
66. Id. at 413.
67. Id.
68. Id. at 425 (emphasis added).
69. Id.
By including the word “less” in the rule, the court established a restrictive standard. Negroes, mulattoes, and even so-called quadroons were excluded as electors.\textsuperscript{70} Thereafter, for a “colored man” to qualify as a voter, he had to be more “white” than a quadroon.\textsuperscript{71}

Chief Justice Martin, in a fourteen page dissent, strongly attacked the majority opinion.\textsuperscript{72} He discussed the Northern origin of race prejudice and the growing hostility toward the Negro as the historical bases for his view that the meaning of “white” within the constitution meant the blood of a voter, not his color, and that this was more properly determined by “a preponderance of blood” ruling.\textsuperscript{73} As to the absurdity of any other rule, Judge Martin sarcastically referred to the examination of Dean’s nose, and suggested that to enforce the majority rule in preventing illegal elections, the constitution should be amended “to authorize . . . nose pullers, or nose inspectors . . . “\textsuperscript{74}

Notwithstanding the \textit{Dean} decision, election officials routinely refused to enroll electors they arbitrarily considered black. This practice continued until the late 1880s, and by 1884, some black DetroiterS were able to vote only with the aid of United States marshals.\textsuperscript{75} In Nankin Township, the jurisdiction that had refused the vote to William Dean, six men who were within the court’s definition of white had to obtain writs of mandamus in order to vote.\textsuperscript{76} The group included William Dean’s son who had claimed to be “less than one thirty-second of Indian blood . . . the balance being pure white . . . “\textsuperscript{77}

Michigan’s machinations over black voting rights had an interesting juxtaposition with national post-Civil War legislation.\textsuperscript{78} Arguments in the \textit{Dean} case were heard on May 1, 1866.\textsuperscript{79} Less than two months earlier on March 13, 1866, the first federal law to protect the civil rights of blacks, the Civil Rights Act of 1866, was enacted by the Congress.\textsuperscript{80} Intended to protect recently freed slaves from the discriminatory black codes, the 1866

\begin{flushright}
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} at 425-43 (Martin, J. dissenting).
\textsuperscript{73} \textit{Id.} at 438. See Vander Velde, \textit{supra} note 51, at 288-289, for a discussion of Justice Martin’s dissent.
\textsuperscript{74} \textit{Dean}, 14 Mich. at 438-39.
\textsuperscript{75} \textit{Katzman}, \textit{supra} note 9, at 102-03.
\textsuperscript{76} \textit{Id.} at 36.
\textsuperscript{77} People \textit{ex rel.} Dean \textit{v. Nankin Bd. of Registration}, 15 Mich. 156 (1866) (for a report on the younger Dean’s mandamus section).
\textsuperscript{78} \textit{Katzman}, \textit{supra} note 9, at 37.
\textsuperscript{79} \textit{Dean}, 14 Mich. at 406.
\textsuperscript{80} 14 Stat. 27 (1866). The act was vetoed by President Andrew Johnson and was reenacted on April 9, 1866.
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Act in effect overturned the *Dred Scott* decision by granting to “all persons born in the United States . . . full and equal benefit of all laws and proceedings . . . enjoyed by white citizens . . . .”\(^{82}\) One day before the *Dean* case was heard, a joint committee of the Congress reported on an amendment that in 1868 was ratified as the Constitution’s fourteenth.\(^{83}\) The fourteenth amendment, which allayed concern over the constitutionality of the Civil Rights Act of 1866, included a provision intended to penalize the Southern states that denied the franchise to blacks.\(^{84}\)

Meanwhile, in 1868, Michigan voters defeated a proposed new constitution that included Negro suffrage as its most controversial provision by a 110,582 to 71,733 margin.\(^{85}\) Only after ratification of the fifteenth amendment to the United States Constitution guaranteeing the right to vote against abridgment “by any State on account of race, color, or previous condition of servitude,”\(^{86}\) the Michigan electorate in November 1870 approved by a close vote, 54,105 to 50,598, a constitutional amendment that ended the state’s racial bar to voting.\(^{87}\)

On November 8, 1870, with the word “white” stricken from voting qualifications, black males cast their historic first ballots as they had, finally, become Michigan citizens.\(^{88}\)

Ironically, in 1872, after slavery had been abolished and the right to vote secured for all American citizens, a case that involved both issues came before the Michigan Supreme Court.\(^{89}\)

83. *Bardolph*, supra note 34, at 45-47.
85. *Katzman*, supra note 9, at 37. See H. *Dilla, The Politics of Michigan, 1865-1878 75-92* (1912), for discussion of the proposed constitution, including its support by the Republican-dominated legislature as well as the opposition from Democrats.
86. U.S. Const. amend. XV, § 1.
87. *Katzman*, supra note 9, at 37.
3. The People ex rel. Hedgman v. Board of Registration, First Ward

*Hedgman* was a mandamus action that sought to compel the petitioner’s registration as a voter. The case arose after adoption of the fourteenth and fifteenth amendments, and involved the citizenship status of a foreign-born child of former American slaves.

John Hedgman, Canadian born, was age 35 years in 1872. His parents were born into slavery in Virginia, and in 1834, they escaped to Canada, where they resided thereafter. At age twenty, Hedgman moved to Michigan. He argued that the Fourteenth Amendment, which made all persons born in the United States citizens, required citizenship for children born of citizens in a foreign country. While this position was correct, the court first had to decide whether or not Hedgman’s parents were ever United States citizens.

Justice Cooley, who authored the opinion, made clear his abhorrence of slavery. The court, nevertheless, found that because Hedgman’s slave parents were not citizens before the fourteenth amendment was enacted and were not subject to American jurisdiction after its adoption, having previously fled to Canada, they were not citizens and, therefore, neither was the petitioner, their offspring. The abolition of slavery, the court noted, did not abolish the history that preceded it, nor its consequences. Hedgman, the court advised, like any other British subject, could become a citizen under the naturalization laws if he wished.

As freedom came to blacks in the South during the post-Civil War period of Reconstruction, the black struggle in Michigan must have seemed poignantly ironic since “their poor unfortunate southern brothers were voting, being elected to public offices, and attending integrated schools before the free Negroes of Michigan were allowed to do so.”

90. *Id.*
91. *Id.*
92. *Id.* at 52.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 53.
97. *Id.*
98. *Id.* at 56.
99. *Id.* at 54.
100. *Id.* at 56.
101. McRae, *supra* note 8, at 86.
B. The Right to Equal Public Accommodations: *Day v. Owen*\(^{102}\)

The caste system in Michigan hardened during the 1850s, notwithstanding the protests and other organized efforts by blacks in Michigan, particularly those in Detroit. There were, however, some positive responses from the Republican-dominated Michigan Legislature. In 1855, blacks were given the limited right to vote in school district elections, and, as previously noted, Michigan’s personal liberty law was enacted.\(^{103}\) However, “there were few bright days for Michigan’s blacks in the decades preceding the Civil War.”\(^{104}\) In the 1840s, Detroit had inaugurated a segregated public school,\(^{105}\) and with the derailment of black suffrage, “separate and unequal” became the rule in law as well as in fact.\(^{106}\) The social and political conditions for blacks during the 1850s were aptly described as follows:

In summarizing the suffrage struggle of the fifties, it has been generally assumed that the formation of the Republican party in the 1850s immediately helped blacks, but any weighing of this proposition must first confront the complexities of sectional, racial and ethnic politics in that decade.

... .

The slavery extension controversy raised the question of where blacks could go, and whatever their feelings about the South, most Michigan whites did not want blacks coming to Michigan. “Creeping amalgamation” was a spectre haunting the 1850s, and especially those Republicans who wanted to assure free blacks minimal legal and political rights -- but who also must defend their flanks against incessant Democratic “niggering” and win elections.

... .

Alien suffrage debates since 1835 had demonstrated that colored rights had always been linked to other minority group social and political issues. The Democrats had exploited the Negrophobia of their ethnic supporters to reinforce party loyalty. As the Democratic political hegemony disintegrated after 1853, they desperately sought to stimulate racial fears in an attempt to undercut the Republicans’ use of the sectional issue and shore up their crumbling majority.

... .

\(^{102}\) *Day v. Owens*, 5 Mich. 520 (1858).
\(^{103}\) *See infra* Ch. 3 note 42 and accompanying text.
\(^{104}\) KATZMAN, *supra* note 9, at 40.
\(^{105}\) KATZMAN, *supra* note 9, at 40.
The reasoning in *Day v. Owens* typified the major defense of caste which could square itself with American equalitarian beliefs. Caste justified caste.\(^7\)

As suggested above, *Day* was an important case in Michigan racial and legal history. It gave legal approval and legitimacy to the common treatment of blacks in Michigan--separate and unequal.

In *Day*, the plaintiff, a black abolitionist attempted to book passage on the defendant’s steamer, *Arrow*, that travelled between Detroit and Toledo.\(^8\) Day offered to pay for an unoccupied cabin.\(^9\) The defendant refused Day cabin passage and told him he could travel only on the boat’s deck.\(^10\) Rather than occupy the deck, Day travelled overland to Toledo.\(^11\) He later sued for damages and argued that because the defendant was a common carrier, it was obligated “to receive all persons who apply for transportation.”\(^12\) The defense claimed that because of its regulations and the customs of the country and navigation, “colored persons were not received as cabin passengers”\(^13\) and that such practice was reasonable because if plaintiff had been allowed the use of a cabin, he “would have been offensive to the other cabin passengers.”\(^14\)

The Michigan Supreme Court decided that because the defendant was a common carrier, the plaintiff did have a right to be carried, and this right was superior to any of the defendant’s contrary rules and regulations.\(^15\) Accordingly, the defendant had a general duty of carriage, and if Day been refused passage altogether, liability would have followed.\(^16\) The mode of carriage, however, was on a different footing. The court held that defendant could adopt reasonable rules, such as those that refused “colored persons” cabin accommodations and relegated them to boat deck spaces, if the rules were calculated to make travel “most comfortable and least annoying . . . to a large majority of the passengers ordinarily carried.”\(^17\) The regulation in question, therefore, did not depend on the color of the plaintiff or other black travelers since they were all excluded from cabins, but rather it addressed the effect they would have on white boat passengers. The law, the court stated, imposed a duty to carry on the

\(^{107}\) Formisano, *supra* note 9, at 38-40.
\(^{108}\) *Day*, 5 Mich. at 521.
\(^{109}\) Id.
\(^{110}\) Id.
\(^{111}\) Id.
\(^{112}\) Id. at 522.
\(^{113}\) Id.
\(^{114}\) Id.
\(^{115}\) Id. at 525.
\(^{116}\) Id.
\(^{117}\) Id. at 526
defendant, but it could not require a carrier to accommodate a particular individual and, thereby, “incommode the community at large.” Judgment for the defendant was affirmed.

The Day decision became America’s “leading antebellum case involving racial separation in transportation.” Unlike the United States Supreme Court’s pernicious Plessy v. Ferguson decision that normalized “separate but equal” in American law, Day, which Plessy cited as authoritative, established a “separate and unequal” principle in Michigan law. The decision was a major setback for black equality in Michigan as it gave the imprimatur of law to the customs that excluded blacks “from ordinary social and familiar intercourse with white persons . . .”

C. Equal Access to Public Schools: The People ex rel. Workman v. Board of Education

Michigan’s race caste system was ubiquitous. Blacks experienced separate and unequal treatment in all important facets of their social, civil and political existence. The depths of the caste system was most evident, however, in the draconian measures undertaken to maintain Michigan’s public schools as segregated and grossly unequal. The practices in Detroit, the state’s largest school district, were the most illustrative.

Calhoun County’s Reverend John D. Pierce, a Congregational minister who was known as the “Father of the Michigan School System,” became the state’s first Superintendent of Public Instruction in 1836, a post he held until 1841. Rev. Pierce was an avowed segregationist who believed white supremacy was “divinely ordained.” During his six years as superintendent, black children, whose parents paid general school taxes as well as private school fees, were completely barred from the state’s public schools. Also, it was during Pierce’s tenure that Detroit’s segregated school districts were created.

118. Id. at 527.
119. Id. at 528.
121. Plessy v. Ferguson, 163 U.S. 537 (1896).
122. Id. at 548.
125. McAdoo, supra note 9, at 199.
126. Id.
127. KATZMAN, supra note 9, at 199.
128. McAdoo, supra note 9, at 200. See KATZMAN, supra note 9, at 22 for discussion of the early private church affiliated school that was established for black children.
In 1839, Detroit’s City School Inspectors established school district no. 8 as a special segregated district for black children only. No appropriations were made, however, to hire a teacher or maintain a school in district 8 until 1841 when a legislative act made provision for limited funds and authorized the Detroit school inspectors to organize a tax-supported school district “not described by metes and bounds, but composed of the colored children of said city, between the ages of five and seventeen, inclusive.” Not only did the 1841 law establish a segregated school district, it forbade the white school districts from receiving funds for the education of black children or to count them in the annual school census that determined school districts’ shares of the state’s public school funding.

In 1842, the Michigan legislature passed a law, “An Act relative to free schools in the city of Detroit.” This Act granted to the Detroit Board of Education “full power and authority . . . relative to anything whatever that may advance the interest of education, the good of government and prosperity of common schools in the said city, and the welfare of the public concerning the same.” This provision gave Detroit officials the legal justification for the de jure segregated school system that endured until 1869 when the Workman case upheld legislation that desegregated Michigan’s public schools.

On February 28, 1867, the Republican legislature passed a bill that eliminated de jure school segregation in Michigan. This act, was the culmination of over three decades of persistent struggle by black parents to eradicate inferior black schools that school officials eventually admitted were “poorly calculated for school purposes.” The legislation also made moot a writ of mandamus that former Governor Austin Blair had filed a

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129. McAdoo, supra note 9.
130. ACT OF MAR. 27, 1841, NO. 29, 1841 ACTS OF THE LEGISLATURE OF THE STATE OF MICHIGAN 48, 48 (organizing public school district in Detroit) (HathiTrust Digital Library, original from University of Michigan), https://catalog.hathitrust.org/Record/000060523; see also McAdoo, supra note 9, at 200-02.
131. ACT OF MAR. 27, 1841, NO. 29 § 7; McAdoo, supra note 9, at 201-202.
132. ACT OF FEB. 17, 1842, NO. 70, 1842 ACTS OF THE LEGISLATURE OF THE STATE OF MICHIGAN 112 (relative to free schools of Detroit) (Hathi Trust Digital Library, original from University of Michigan).
133. Id. at 114.
134. See KATZMAN, supra note 9, at 22-25 for discussion of early history of education for Detroit blacks, private as well as public.
135. ACT OF FEB. 28, 1867, NO. 34, 1867 I ACTS OF THE LEGISLATURE OF THE STATE OF MICHIGAN 42 (residents have equal rights to education) (HathiTrust Digital Library, original from University of Michigan).
136. KATZMAN, supra note 9, at 25 (citing the Twenty-Sixth Annual Report of the Board of Education, at 33 (Detroit, 1869)).
month earlier in the Michigan Supreme Court to admit a black student, George Washington, to the Jackson public schools.137

The Democratic Detroit Board of Education, notwithstanding the mandate from the Republican legislature, ignored the 1867 law.138 Ignored as well was a second school statute enacted in 1869 with the intent that Detroit schools comprise a single school district “public and free to all children residing within the limits thereof . . . .”139 Detroit’s black community increased its pressure to force the school board to comply with the state law.140 Eventually, black parents again turned to the courts. On this occasion, they supported a test case - a mandamus action by Joseph Workman that sought to compel the board of education to admit his son, Cassius Workman, to an all-white tenth ward school.141 An earlier lawsuit had been filed by Elijah Willis on behalf of his son, Robert J. Willis. This suit was withdrawn because of a technicality over Mr. Willis’ citizenship.142 He was a former slave who had escaped and settled in Chatham, Canada before moving to Detroit shortly before the Civil War.143 Willis and a committee of Detroit’s leading black citizens assisted with the Workman case.144 Young Robert Willis eventually became one of Michigan’s earliest and most prominent black attorneys.145

In 1867, a year after the Dean decision, Justice Martin, the case’s sole dissenter, died. He was replaced by Justice Benjamin F. Graves, an “independent thinker” who had been a “vigorous worker in the antislavery

137. KATZMAN, supra note 9, at 50, 84.
138. Id. at 86.
139. ACT OF FEB. 24, 1869, NO. 233, 1869 II ACTS OF THE LEGISLATURE OF THE STATE OF MICHIGAN 71, 71 (act relative to free schools in Detroit) (emphasis supplied) (HathiTrust Digital Library, original from University of Michigan); KATZMAN, supra note 9, at 87.
140. See KATZMAN, supra note 9, at 86-87.
141. Id. at 87 (citing Thrun, School Integration in Michigan, 38 Mich. Hist. 9 (March, 1954)).
142. McRAE, supra note 8, at 85.
145. He graduated from the University of Michigan Law Department in 1893 and practiced law until his death in 1937, at which time he was considered Michigan’s oldest practicing lawyer. Injured Oldest Attorney Released from Hospital, Det. Free Press, Jan. 8, 1936, at 4; Obituaries, Det. News, July 10, 1937, at 18.
cause. Two years later, the Supreme Court decided \textit{Workman} and upheld a legislative mandate to desegregate Detroit’s public schools. Unlike \textit{Dean}, which turned on constitutional construction, \textit{Workman} required judicial interpretation of Michigan’s public school laws. In this regard, the court’s task was not particularly onerous. The case’s legislative history was complex, however. Justice Cooley wrote for the majority and recounted the case facts as they related to the legislation introduced above.

The general state law governing primary schools divided townships into school districts, each having considerable powers to manage the district’s schools and to elect district school officials. Most were single schools districts. With the larger school districts, however, it became necessary to enact laws creating union school districts with larger boards of education, and to give these boards more authority in the management of their schools. The City of Detroit was such a large district, and, in 1842, the legislative act “relative to free schools in the city of Detroit” made Detroit a single district, and gave its board of education “full power and authority . . . to advance the interests of education . . . in [the] city.” Previously, as Justice Cooley noted, Detroit had been an “anomaly of a district within a district; the former including only the colored population; but this was inconsistent with the free school act, and was therefore repealed by implication.”

In 1867, the legislature amended the primary school law to provide that: “All residents of any [school] district shall have an equal right to attend any school therein.” The Detroit Board of Education took the position that it was exempt from the primary school law because of the special 1842 legislation under which it operated, and it, accordingly, did not comply with the 1867 act.

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146. Vander Velde, \textit{supra} note 51, at 291.
147. \textit{Id}. at 293.
148. \textit{See id}. at 292-293.
149. \textit{Id}. at 291.
150. \textit{Id}.
151. \textit{Id}.
152. People ex rel. Workman v. Bd. of Educ., 18 Mich. 400, 409, 406 (1869) (citing \textit{ACT OF FEB. 17, 1842, No. 70, 1842 ACTS OF THE LEGISLATURE OF THE STATE OF MICHIGAN} 114 (relative to free schools of Detroit) (Hathi Trust Digital Library, original from University of Michigan)).
153. \textit{Id}. at 409.
154. \textit{Id}. (citing \textit{ACT OF FEB. 28, 1867, No. 34, 1842 I ACTS OF THE LEGISLATURE OF THE STATE OF MICHIGAN} 42, 43 (relative to free schools of Detroit) (Hathi Trust Digital Library, original from University of Michigan)).
By 1869, Detroit had two black schools, and a third was under construction.\textsuperscript{156} Black students numbered 185, white students 6,942.\textsuperscript{157} Thirty-eight of the black students lived in wards over two miles from the black schools.\textsuperscript{158} To attend their designated all-black schools, these students had to pass other, closer, white public schools.\textsuperscript{159} Also, the white schools had upper grades, while, as the court noted, “the colored school is a primary school only” and their exclusion from the white schools was “an absolute prohibition of an enjoyment of the higher grades of the free schools.”\textsuperscript{160}

In April, 1868, Joseph Workman attempted to enroll his child, “a mulatto, of more than one-fourth African blood”,\textsuperscript{161} in the Duffield Union or the Tenth Ward School. Admission was refused, and a lawsuit was filed.\textsuperscript{162} The case came to the Supreme Court in the form of a writ of mandamus to require the Detroit Board of Education to show cause why the Workman child should not be admitted to the Duffield School.\textsuperscript{163}

In addition to the position that it was not controlled by the 1867 legislation, the Detroit Board argued that the separation of children by race was reasonable since state law forbade their intermarriage and “that there exists among a large majority of the white population of Detroit a strong prejudice or animosity against colored people, which is largely transmitted to the children in the schools, and that this feeling would engender quarrels and contention if colored children were admitted to the white schools.”\textsuperscript{164}

The court acknowledged the Detroit Board’s broad powers under the special act. Such legislation, however, it readily found, was complimented by the general 1867 primary school law: “It is too plain for argument that an equal right to all the schools . . . was meant to be established.”\textsuperscript{165} The majority opinion was joined by Justices Christiancy and Graves.\textsuperscript{166} Justice Campbell, a Detroiter, dissented, taking a position that the general law placed very broad discretion in the Board “over the various complications and difficulties incident to a heterogenous city population.”\textsuperscript{167}

\begin{itemize}
  \item \textsuperscript{156} Workman, 18 Mich. at 400.
  \item \textsuperscript{157} Vander Velde, supra note 51, at 293.
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Workman, 18 Mich. at 404.
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Id. at 401.
  \item \textsuperscript{162} Id.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id. at 407.
  \item \textsuperscript{165} Id. at 410.
  \item \textsuperscript{166} Id. at 414.
  \item \textsuperscript{167} Id. at 418.
\end{itemize}
Following the Workman decision, in 1870, Cassius Workman and Robert J. Willis were admitted to the previously all-white Duffield Union School. Thus, eighty-five years before Brown v. Board of Education imposed a similar result on the nation, the Michigan Supreme Court validated legislation intended to assure equal rights to attend public schools. The case also illustrated that during the second half of the nineteenth century, the Michigan legislature, similar to the National Congress’ role vis-a-vis the United States Supreme Court, outstripped the Michigan Supreme Court through its efforts to improve the status of black citizens under Michigan law.

The favorable result in the Workman case, as has often been the case with civil rights decisions, was not self-actualized. The Detroit school board continued to flout the law and maintained its segregated public schools. Black children routinely were turned away from white schools. When the school board did comply with the law, it was usually compelled by the prospect of expensive fines from mandamus actions that could not be defended successfully. Some compliance by the board was “sham” integration as when black students admitted to newly integrated schools were segregated into all black classes. Black students reportedly were abused by their white classmates “without rebuke or correction from the teachers,” and were constantly reminded that they were unwelcome in the previously all-white schools. The board of education, “[r]esponding to the anguish of white parents and teachers,” used limited school funds to replace double desks with single ones so that black and white students would not sit next to one another. After intense and persistent pressures from black parents, black organizations and their supporters, the Detroit Board of Education, in 1871, very reluctantly agreed to full compliance with the law.

Black children were segregated in Michigan school districts other than Detroit. In 1880, eighteen segregated schools were reported in Michigan and some systems, Ypsilanti for example, remained segregated into the twentieth century.

168. McRae, supra note 8, at 85.
170. Vander Velde, supra note 51, at 293.
171. See Katzman, supra note 9, at 87-90 (citing Thrun, School Integration in Michigan, 38 Mich. Hist. 9 (March, 1954)).
172. Katzman, supra note 9, at 87.
173. Id. at 88-89.
174. Id. at 89.
175. Id. at 90.
176. Id. at 89.
177. Id. at 90.
D. From 1870 toward Brown v. Board of Education

Between 1858 and 1948, the Michigan Supreme Court decided four public accommodation cases. The first, Day v. Owen \(^{178}\) was decided before the Civil War, and before the Michigan Legislature enacted the state’s first civil rights act in 1885.\(^ {179}\) The second, and Michigan’s most renowned civil rights case before the Sipes v. McGhee \(^ {180}\) decision in 1947, was Ferguson v. Gies.\(^ {181}\) Ferguson was decided in 1890, and was the first civil rights case considered by the Supreme Court under the 1885 Civil Rights Act.\(^ {182}\) The plaintiff’s attorney in Ferguson was D. Augustus Straker, a prominent African American attorney who was probably the first Black lawyer to appear before the Michigan Supreme Court.\(^ {183}\)

1. William W. Ferguson v. Edward G. Gies\(^ {184}\)

William W. Ferguson, who later became a lawyer and the first Black elected to the Michigan legislature (1893-94),\(^ {185}\) was refused service in the defendant Gies’ restaurant. The establishment was divided into two sections: a “restaurant side” and a “saloon side.”\(^ {186}\) The former was set up for dining while the latter was equipped primarily with the beer tables normally found in saloons.\(^ {187}\) The defendant’s “house rule” allowed only White patrons to eat in the restaurant section.\(^ {188}\) His offer to serve Ferguson supper in the “saloon side” was refused, and Ferguson filed suit.

The trial judge discussed the Dred Scott case, the emancipation of slaves, and the legislature’s 1885 civil rights law before instructing the jury in his version of “full and equal accommodations.” In essence, he followed Day v. Owen, and charged the jury that “full and equal accommodations” did not mean identical, but rather “substantially the

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184. Ferguson, 82 Mich. at 358.
186. Ferguson, 82 Mich. at 359.
187. Id.
188. Id. at 360.
same accommodations." Thus, while Ferguson could not be denied service totally, Gies could, “under the law, reserve certain tables for white men and others for colored men..." The jury found for the defendant. Ferguson appealed, and the Supreme Court reversed.

Justice Allen B. Morse, writing for a unanimous court, discarded Day v. Owens as but a reminder of the injustice and prejudices of a time past, and held that discrimination based on color alone was unlawful. At a time when anti-Negro sentiments and support for the “separate but equal” principle were pervasive, the manner in which this court expressed its approval of the 1885 civil rights law is noteworthy:

[1]n Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that are denied to the Black man.

... This statute exemplifies the changed feeling of our people towards the African race and places the colored man upon a perfect equality with all others, before the law in this State.

... [T]hat the skin of one man should not be as white as that of another furnishes no more reason that he should have less rights and privileges under the law than if he had been born white, but cross-eyed, or otherwise deformed.

... And I should have but little respect or love for Deity if I could for one moment admit that the color was designed by Him to be forever a badge of inferiority, which would authorize human law to drive the colored man from public places, or give him less rights therein than the white man enjoys.

One commentator characterized Justice Morse’s opinion as a “product of the heart” but, in the context of its time, an espousal of the “white man’s burden” philosophy. Apparently, these “excesses” did not dampen Black enthusiasm for Ferguson. Black attorney Fitzhugh L. Styles, in his

189. Id. at 361-62.
190. Id. at 362.
191. Id.
192. Id. at 369.
193. Id. at 362-363.
194. Id. at 363-367. In arterial of the case, plaintiff was awarded nominal damages. Id. at 369, n.1.
seminal 1937 book, *Negroes and the Law*, wrote: “[T]he decision in this case was a great victory for the colored people of Michigan.”

Notwithstanding the enactment of civil rights legislation, after the turn of the twentieth century, a pervasive racial caste system, continued to dominate all aspects of the lives of Michigan’s black citizens, in public accommodations, housing, education and employment. While the consequences of de-facto segregation and discrimination are widely documented by behavioral scientists and others, insights are provided by the few cases that reached the Michigan Supreme Court during the first half of the twentieth century.

2. **People v. Bob-Lo Excursion Company**

   *People v. Bob-Lo* was a criminal case. The defendant company was convicted in a bench trial in the Detroit Recorder’s Court for violating the Michigan civil rights statute. It was fined $25.00. At trial, the defendant admitted that, on June 21, 1945, it had refused passage on its boat to Sarah Elizabeth Ray because she was “colored”. On that day Miss Ray and twelve white students from Detroit Commerce High School were on a school outing to the defendant’s Bob-Lo Island amusement park. After the group had purchased tickets and boarded the boat, defendant’s agents insisted that only Miss Ray leave the boat and over her protests, they escorted her ashore.

   Bob-Lo Island (or Bois Blanc) is part of Ontario Province, Canada. The defendant claimed it was engaged in foreign commerce as its boats navigating from Detroit to Bob-Lo Island crossed the international boundary between the United States and Canada. Therefore, the defendant maintained, it was exclusively within Congress’ jurisdiction pursuant to the commerce clause of the U.S. Constitution, and not subject

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196. See Fitzhugh L. Styles, *Negroes and the Law* 240 (1937). See also Bolden v. Operating Corporation, 239 Mich. 318 (1927). (Plaintiff, a Black dentist, was refused a first floor seat in the defendant’s theater. At trial, the defendant attacked the constitutionality of the amended 1885 civil rights statute, and whether it, a penal law, could confer a civil cause of action. On both issues, the Supreme Court found against the defendant).


198. *Id.*

199. *Id.* at 688.

200. *Id.*


203. *Id.* at 689.
to the Michigan statute. On appeal, a unanimous Michigan Supreme Court held that the Michigan civil rights acts was applicable, and that it did not impose an undue burden on the defendant’s business in foreign commerce. The court also noted that the statute was in accord with the anti-discrimination provisions of the federal civil rights act and the interstate commerce act.

The defendant appealed to the United States Supreme Court, and in Bob-Lo Excursion Co. v. Michigan the judgment of the Michigan Supreme Court was affirmed. The Court held that the commerce clause of the Federal Constitution did not prohibit the defendant’s conviction under the state’s civil rights statute. While defendant’s business in foreign commerce was subject to federal regulation, the Court found that, in this case, the local interest in preventing racial discrimination were of greater concern, and they were not inconsistent or “out of harmony” with federal policy.

Bob-Lo Excursion Co. had two other interesting aspects. Briefs of Amici curiae supporting the appellee were filed by the American Jewish Congress, and for the N.A.A.C.P. by Thurgood Marshall, Osmond Fraenkel, O. John Rogge and Marian Wynn Perry. Also, a member of the Court at this time was Frank Murphy, the second associate justice from Michigan. Justice Murphy, a staunch civil libertarian, and former Recorder’s Court judge, mayoral of Detroit, governor of Michigan and Attorney General of the United States, was a stark contrast to former Associate Justice Henry B. Brown, the author of the majority opinion in Plessy v. Ferguson.

E. Racial Restrictive Covenants in the Use and Occupancy of Real Property

204. Id.
205. Id. at 694.
209. Id. at 34 (Jackson, J. and Vinson, C.J. dissenting).
210. Id. at 37-40.
213. See Littlejohn & Hobson, supra note 187, at 1644; KEVIN TIERNEY, DARROW: A BIOGRAPHY (1979) (discussing the nationally prominent “Sweet” murder trial and Justice Murphy’s role as the trial judge. In 1925, Dr. Ossian Sweet was tried for the murder of a member of a White mob that attempted to prevent Dr. Sweet and his family from moving to a previously all-White neighborhood in Detroit).
214. See discussion of Justice Brown supra at notes 33-37
In 1920, 40,438 Blacks lived in Detroit. By 1944, this number increased five times to 201,000, approximately 12 percent of the city’s population. Available housing for Blacks, however, did not increase proportionately. So called “Ghettoization” worsened.

Racial restrictive covenants were one legal means used to limit Black housing in Detroit and in other Michigan cities. These covenants involved mutual agreements among property owners to restrict the use of occupancy of their respective properties. The legal result was a reciprocal negative easement, which created a servitude that attached to and “ran with” the land as to subsequent purchasers. Typically, the covenants would provide: “this property shall not be used or occupied by any person or persons except those of the Caucasian race.

1. Parmalee v. Morris

In Parmalee v. Morris, the Michigan Supreme Court upheld the following restrictions: “No building shall be built within twenty feet of the front line lot. Said lot shall not be occupied by a colored person, nor for the purpose of doing a liquor business therein.”

The defendants, Mr. and Mrs. Morris, “both colored”, were from Pontiac and were represented by a Black attorney, W. Hayes McKinney, with the prominent black firm, Barnes and Stowers, of counsel. The Morris’ argued that racial restrictions were contrary to public policy, and contravened the Thirteenth and Fourteenth Amendments of the United States Constitution. The court’s opinion was comprised almost entirely of quotes. Included were the trial court’s recitations from Civil Rights Cases and Plessy v. Ferguson restarting the absence of state action in private property discrimination, and the opinion that law could not eradicate racial distinctions in purely private matters. Finally, the court ended its unanimous decision with a decidedly spurious question and answer:

The issue involved in the instant case is a simple one, i.e., shall the law applicable to restrictions as to occupy contained in deeds to real estate be enforced or shall one be absolved from the provisions of the law simply

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216. Id.
218. Id. at 619.
220. Id.
221. Id.
222. Id. at 626.
223. Id. at 626-28.
because he is a negro? The question involved is purely a legal one and we think it was rightly solved by the chancellor under the decisions found in his opinion. 224

Ironically, in 1925, the supreme court in Porter v. Barrett, 225 following the precedent announced in an 1874 case, Mandlebaum v. McDonell, 226 had declared restrictions against alienation or the sale of real property “to a colored person” void. As a result, black citizens were in a curious legal quandary. On one hand, they could purchase property, notwithstanding private restrictive sale covenants. 227 On the other hand, they could not occupy or use it, when confronted with private restrictive use covenants. 228

During the 1940s, the need for housing, exacerbated by black population influxes caused by World War II and an ever industrializing Detroit, became more critical. Attorneys, black and white, mounted persistent and more intense legal assaults on the legal recognition of restrictive covenants. The effort was spearheaded by black lawyers from Detroit: Francis M. Dent and Willis M. Graves. In no less than nine Supreme Court covenant cases 229 decided between 1941 and 1948, Graves and Dent represented black clients in four. Clearly, their most significant case was Sipes v. McGhee.

2. Sipes v. McGhee

In Sipes, the Supreme Court affirmed a decree restraining Black defendants, Orsel McGhee and his wife, Minnie, from using or occupying a house on Seebaldt Avenue in an all-White Detroit neighborhood. 230 The defendants, seeking to overturn Parmalee v Morris, raised familiar arguments based on state public policy and the Fourteenth Amendment. Many amicus curiae briefs were filed. Included were: numerous home owners associations; briefs on behalf of the Wolverine Bar Association by Ernest Richards and Hobart Taylor Jr.; the N.A.A.C.P. led by Thurgood Marshall; the Detroit Chapter, National Lawyers Guild,

224. Id. at 632.
228. Id.
The Supreme Court, in what appeared an almost stubborn fidelity to stare decisis, reinforced its long and almost uninterrupted history of judicial willingness to follow rather than lead, declined to overrule Parmalee:

In this appeal we are obliged to differentiate between public rights and private or contractual rights. The former is unquestionably the responsibility of the State, but the action of a State court in requiring or refusing enforcement of private contractual rights is, in our opinion, not within the prohibitions of the 14th Amendment. To hold otherwise would be to nullify many statutory enactments and overrule countless adjudicated cases. The unsettling effect of such a determination by this Court, without prior legislative action or a specific Federal mandate, would be, in our judgment, improper. After a careful study, we are not persuaded that the rule laid down in the Parmalee Case was wrong, or is wrong now.

The court did, however, make an oblique reference to the prospect of coming change. The court, in an interesting, but apparently not embarrassing, juxtaposition between justice and law, stated:

So far as the instant case is concerned, these pronouncements are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples. These arguments are predicted upon a plea for justice rather than the application of the settled principles of established law.

In the following year, change came decisively. Sipes was a companion case to a Missouri case, Shelley v. Kraemer. In Shelley, a unanimous U.S. Supreme Court struck down state judicial enforcement of restrictive agreements as an unconstitutional denial of equal protection of the laws.

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231. Id. at 627.
232. Id. at 627-31.
233. Id. at 628.
235. Id.
CONCLUSION

This history of Detroit and Michigan laws and cases ends with the 1940s. The country was on a precipice of major social change. *Shelley v. Kraemer*, a landmark case, that was a fitting prelude for the momentous decision in *Brown v. Board of Education* in 1954. Brown positioned the country for the massive legal and social changes in the 1960s that gave equal rights under law to all American citizens.

This article, it is hoped, provides insights into limitations as well as the efficacy of law as a means for social change. America is a “country of laws,” but law in action is a human enterprise. The history in Detroit and Michigan, as elsewhere, shows that when social change involves radical departures from well established customs and values, the legal system moves slowly, if at all, and that law’s affinity for the status quo can be as large as its capacity to force change.236

In American race relations, real and dramatic progress was made during the 1960s and the 1970s. Laws, particularly those that imposed economic sanctions, helped to end much of the conduct that helped to create and sustain negative racial attitudes. A Federal Constitution, in a democratic country with broad equalitarian principles, ultimately prevailed. The declaration and enforcement of rights promoted equality in law, but not necessarily in life. A changed legal status has yet to affect a disparate quality of life for many blacks in the United States.

Institutional discrimination and de facto segregation are the challenges for the future. They, too, involve social interests, customs and values that are deeply “institutionalized”, in human behavioral patterns rather than law. Accordingly, the challenges facing blacks in the future are different. While less overt and more subtle, they in some respects, will be as demanding and difficult as those past. Accordingly, history helps to understand them. As Justice Oliver W. Holmes Jr. so aptly stated:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it, we must know what it has been, and what it tends to become.237

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236. *See generally*, Littlejohn & Hobson, *supra* note 188.