

March 1979

The Rev. John Bracken v. The Visitors of William And Mary College: A Post-Revolutionary Problem in Visitatorial Jurisdiction

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J. W. Bridge, *The Rev. John Bracken v. The Visitors of William And Mary College: A Post-Revolutionary Problem in Visitatorial Jurisdiction*, 20 Wm. & Mary L. Rev. 415 (1979), <https://scholarship.law.wm.edu/wmlr/vol20/iss3/2>

William and Mary Law Review

VOLUME 20

SPRING 1979

NUMBER 3

This is the first in a series of four articles commemorating the bicentennial of American legal education, dating from the establishment of the first chair of law and police, occupied by George Wythe, at the College of William and Mary on December 4, 1779. The colonial antecedents to the College's formal relation to professional legal education may be traced to the career of Sir John Randolph, a student at William and Mary, 1705-1713, who then prepared for the bar at Gray's Inn, London (1715-1717). Randolph's two sons, Peyton ("The Patriot") and John ("The Tory") followed his example, first at the College of William and Mary and subsequently at the Middle Temple. His grandson, Edmund, after study at the College on the eve of the Revolution, read for the bar under his father and uncle. The Randolphs and their cousins, Thomas Jefferson and John Marshall, were prototypes of various leaders of legal and political thought in colonial and early post-Revolutionary Virginia whose efforts "Americanized" English legal institutions and thus created a logical need for a new school to teach this "Americanized" law. This series of articles addresses some aspects of law and procedure and legal thought which were the backdrop for the establishment of the first American law school in 1779.

THE REV. JOHN BRACKEN V. THE VISITORS OF WILLIAM AND MARY COLLEGE: A POST-REVOLUTIONARY PROBLEM IN VISITATORIAL JURISDICTION

J.W. BRIDGE*

Introduction

The two hundredth anniversary of the first chair of law in the United States will occur in December, 1979. That chair was estab-

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lished in the College of William and Mary in Virginia and its first occupant was the distinguished lawyer, teacher, and patriot, George Wythe. This pioneering development was indebted to the genius and initiative of Thomas Jefferson, who claimed credit for it in his autobiography, writing,

On the 1st of June, 1779, I was appointed Governor of the Commonwealth, and retired from the legislature. Being elected, also, one of the Visitors of William and Mary College, a self-electing body, I effected, during my residence in Williamsburg that year, a change in the organization of that institution, by abolishing the Grammar school, and the two professorships of Divinity and Oriental languages, and substituting a professorship of Law and Police, one of Anatomy, Medicine and Chemistry, and one of Modern Languages.¹

Thus, the teaching of law, science, and modern languages at the College was made possible by the dismissal of three professors and the discharge of pupils at the Grammar School, which had been an integral part of the College from its inception. Such an event immediately raises serious human and legal questions; only a firm legal justification would support such a sweeping exercise of power affecting so many. Perhaps pride in the establishment of the first American law school² should be tempered by thoughts of the professors and students whose dispossession made it possible.

Two hundred years after the event, the plight of the displaced professors and students must remain somewhat speculative.³ A focus on the legal issues involved, however, is still possible. The text of the College Charter⁴ and of the relevant College statutes are ex-

The author is indebted to W.H. Cowley, Emeritus Professor of Education at Stanford University, who first drew his attention to the existence of Visitors in the United States, and to W.F. Swindler, John Marshall Professor of Law at the College of William and Mary, for patiently answering his many questions concerning the history of American law.

1. THE WRITINGS OF THOMAS JEFFERSON 50 (H. Washington ed. 1853) [hereinafter cited as JEFFERSON WRITINGS].

2. This is still disputed by some. See D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 37 (1965); J. MORPURGO, THEIR MAJESTIES' ROYALL COLLEDGE 196 (1976); Swindler, *America's First Law Schools: Significance or Chauvinism?*, 41 CONN. B.J. 1 (1967).

3. Some of the discharged pupils may have continued their studies at a private school set up by Bracken in Williamsburg. See Goodwin, *The Reverend John Bracken (1745-1818)*, 10 HIST. MAGAZINE PROTESTANT EPISCOPAL CHURCH 354, 380.

4. The College is still governed by the Royal Charter to the extent that the Charter's provisions are not inconsistent with the Code of Virginia and the general laws of Virginia. VA. CODE § 23-44.

tant. In addition, Daniel Call's *Virginia Reports* contain the record of an attempt by one of the dispossessed professors to obtain reinstatement. The 1779 reforms of the College of William and Mary had deprived the Rev. John Bracken of his posts of Grammar School Master and Professor of Humanity. In 1790, the Court of Appeals of Virginia dismissed Bracken's application for a writ of mandamus to compel Visitors of the College to restore him to his posts.⁵

The case of *Bracken v. Visitors of William & Mary College* has attracted little attention.⁶ All commentary to date has accepted the propriety of the decision,⁷ but none has subjected it to close legal analysis. The principal purpose of this article is to remedy that omission and consider the case in the context of the substantial body of English law at the time it was decided.

General Background

The College of William and Mary in Virginia was founded in accordance with the terms of a Charter granted by King William III and Queen Mary II in 1693 in response to a petition from the General Assembly of the Colony.⁸ The Charter⁹ appointed and named eighteen trustees who were empowered "to erect, found and establish a certain Place of universal Study, or perpetual College, for Divinity, Philosophy, Languages, and other good Arts and Sciences, consisting of one President, six Masters or Professors,

5. 7 Va. (3 Call) 573 (1790). Seven years later, the Supreme Court of Appeals of Virginia dismissed a further action of Bracken's claiming arrears in salary. *Bracken v. William & Mary College*, 5 Va. (1 Call) 161 (1797).

6. The fact that John Marshall appeared as counsel for the College has produced some comment, e.g., *THE PAPERS OF JOHN MARSHALL* 67-72 (C. Cullen & H. Johnson ed. 1977) [hereinafter cited as *MARSHALL PAPERS*]; and has prompted comparisons with the case of *Dartmouth College v. Woodward*, involving the validity of the college charter as a contract obligation under attack by the state legislature. E.g., Bartosic, *With John Marshall from William and Mary to Dartmouth College*, 7 WM. & MARY L. REV. 259 (1966); Campbell, *John Marshall, The Virginia Political Economy and the Dartmouth College Decision*, 19 AM. J. LEGAL HIST. 40, 41 n.3 (1975); Swindler, *Another Early College Charter Case*, [1977] Y.B. SUP. CT. HIST. SOC'Y 38.

7. Robert Polk Thomson is perhaps an exception, referring to the Visitors as stretching their powers. Thomson, *The Reform of the College of William and Mary, 1763-1780*, 115 PROC. AM. PHILOSOPHICAL SOC'Y 187 (1971).

8. For the text of the petition, see 1 A DOCUMENTARY HISTORY OF EDUCATION IN THE SOUTH BEFORE 1860, at 388-89 (E. Knight ed. 1949) [hereinafter cited as *KNIGHT*].

9. The text of the Charter is published as an appendix to H. HARTWELL, J. BLAIR & E. CHILTON, *THE PRESENT STATE OF VIRGINIA, AND THE COLLEGE* (H. Farish ed. 1940) [hereinafter cited as *HARTWELL*].

and an hundred Scholars, more or less, graduates and nongraduates"¹⁰ The trustees were given authority to make orders and statutes for the regulation of the affairs of the College¹¹ and to appoint the Masters, or Professors.¹² The property of the College initially was vested in the trustees; as soon as the College was erected and founded, however, the trustees were required to convey that property to the President and Masters or Professors, who were to be incorporated as a body politic with perpetual succession.¹³ The incorporated society would have the power "to plead, and to be impleaded, to sue, and be sued"¹⁴ under a common seal. When the transfer of property and incorporation was completed, trustees would become *functus officio*, their roles fulfilled. The surviving trustees and their successors would then assume new roles as the "true, sole and undoubted Visitors and Governors of the said College for ever."¹⁵ The Visitors were to be a self-perpetuating body with authority to make "Rules, Laws, Statutes, Orders and Injunctions" for the government of the College.¹⁶ They also were authorized to hold a court or convocation "as often as they shall think good and see Cause" for the purpose of treating, conferring, consulting, advising, and decreeing in connection with the statutes, orders, and injunctions of the College.¹⁷

Although only the academic organization of the College and the duties of the faculty were outlined in the Charter, the promoters of the College had a well-developed scheme in mind. The original proposals presented to the Virginia General Assembly in 1690¹⁸ described a College consisting of three schools: Grammar, Philosophy, and Divinity. These proposals recommended that the Grammar School be served by a master and an usher, and the Divinity School

10. *Id.* at 74, 75.

11. *Id.* at 75.

12. *Id.* at 77.

13. *Id.* at 75-78, 80.

14. *Id.* at 79.

15. *Id.* at 81.

16. *Id.* The Charter also limited these broad powers with the proviso, provided notwithstanding, that the said Rules, Laws, Statutes, Orders and Injunctions be no way contrary to our Prerogative Royal, nor to the Laws and Statutes of our Kingdom of *England*, or our Colony of *Virginia*, aforesaid, or to the Canons and Constitutions of the Church of *England* by law establish.

Id.

17. *Id.* at 84, 85.

18. See 1 KNIGHT, *supra* note 8, at 374-75.

by one professor. The proposals were adopted by the General Assembly, and the formal petition for a Charter submitted to the Crown in 1691 made reference to "a free Schoole and Colledge." Further particulars were included in the instructions to the Reverend James Blair, who was appointed to travel to England and submit the petition.¹⁹ Blair, Commissary of the Bishop of London in Virginia, who later became the first President of the College, was a leading promoter of the College and undoubtedly contributed much to the proposed scheme.²⁰ The instructions issued to him clearly reflect the original proposals, referring to "a Free Schoole & Colledge, wherein shall be taught the Lattin, Greek, & Hebrew tongues, together with Philosophy, Mathematicks and Divinity. . . ." ²¹ Not surprisingly, when the College opened its doors, the original scheme was implemented, and the three schools were established.²²

For various reasons,²³ the trustees' transfer of the College's property to the President and Masters or Professors and the subsequent incorporation did not take place until 1729.²⁴ By then the distribution of the six members of the faculty between the various schools conformed to a particular pattern: one for the Grammar School, two for the Philosophy School, two for the Divinity School, and one for the Indian School. The statutes that Blair and Stephen Fouace, the only other surviving trustee, appended to the transfer deed specified this distribution.²⁵

Background to the Bracken Case

Little is known of the early life of John Bracken.²⁶ By July, 1772,

19. *Id.* at 387-88.

20. For accounts of Blair's role in establishing the College, see P. ROUSE, JAMES BLAIR OF VIRGINIA 63-79 (1971); J. MORPURGO, *supra* note 2, at 33-34.

21. Blair's instructions are printed in 1 KNIGHT, *supra* note 8, at 377-80.

22. There was one major variation to the original scheme—an additional school for Indian boys financed by a bequest from the residue of the estate of noted scientist Robert Boyle "towards the propagating the Christian religion among the infidels." J. MORPURGO, *supra* note 2, at 33-34.

23. The delay was partly due to financial difficulties and partly due to the raging personal battle between Blair and Francis Nicholson, Lieutenant Governor (1690-92) and Governor (1698-1705) of Virginia, a promoter of the College and one of its trustees. J. MORPURGO, *supra* note 2, at 49-56, 79, 80; P. ROUSE, *supra* note 20, at 152-74.

24. P. ROUSE, *supra* note 20, at 214.

25. These statutes are printed in 1 KNIGHT, *supra* note 8, at 500-27 (in Latin and English).

26. The best available account of Bracken's life is at Goodwin, *supra* note 3.

he was in Virginia serving as a parish priest in Amelia County.²⁷ Within a year of that date, whether by good fortune or good connections, he was chosen Rector of Bruton Parish, the Virginia court church in Williamsburg and "the most coveted parish in the colony."²⁸ In 1775, the Mastership of the Grammar School and the Professorship of Humanity at the College of William and Mary fell vacant when the loyalist holder of those offices joined the Royal Governor, Lord Dunmore, in his flight from the colony.²⁹ Bracken seems to have assumed the departed professor's duties in 1775, although his appointment was not formalized until April, 1777.³⁰ He held these posts at the College concurrently with the Rectorship of Bruton Parish and continued to do so until December 25, 1779. On that date, the statute made by the Visitors of the College that abolished the Grammar School, and with it Bracken's College posts, became effective.³¹

The reforms of 1779 had their roots in long-standing dissatisfaction with the organization of the College that gathered momentum and gained a final impetus from the Revolution.³² In the 1760s, criticism began to focus on the academic disadvantages of having a grammar school and schools for advanced students in one institution.³³ These criticisms increasingly were coupled with demands for more far-reaching reforms that would transform the College into a university in which law and medicine would be taught. The climax of this first wave of reformist ideas was a comprehensive and detailed plan for restructuring the College that was published anony-

27. *Id.* at 355.

28. *Id.* at 355-56. Bracken's marriage in 1776 to the great-granddaughter of Robert "King" Carter, owner of much of Virginia's Northern Neck and one of the wealthiest colonists, may have helped his position considerably.

29. Bracken's predecessor at the College was the Rev. Thomas Gwatkin. The circumstances of his departure are described in J. MORPURGO, *supra* note 2, at 172-73.

30. It has been suggested that between November, 1775, and April, 1777, Bracken simply may have been substituting for Gwatkin, who had not abandoned all hopes of returning. Goodwin, *supra* note 3, at 376.

31. The statute was enacted on December 4, 1779. An extract from it is printed in 1 KNIGHT, *supra* note 8, at 546-48.

32. For a detailed account of these reforms, see Thomson, *supra* note 7.

33. Jefferson, himself, may have been annoyed at such an arrangement. He wrote, "The admission of the learners of Latin and Greek filled the college with children. This rendering it disagreeable and degrading to young gentlemen already prepared for entering on the sciences" T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150-51 (W. Peden ed. 1955) [hereinafter cited as JEFFERSON NOTES].

mously in November, 1776.³⁴ Almost immediately the matter was taken up by Thomas Jefferson in his capacity as a member of the Committee of Revisers set up by the Virginia General Assembly to carry out a revision of the laws of Virginia.³⁵ Jefferson was given the task of drafting "a systematical plan of general education"³⁶ and did so in the form of three bills, the second of which was entitled "A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support."³⁷ Jefferson proposed the transfer of the activities of the Grammar School to a new system of public schools and further, "to amend the constitution of William and Mary college, to enlarge its sphere of science, and to make it in fact a University."³⁸ The scheme involved an increased number of chairs, including fine arts, law, history, and medicine.³⁹ Jefferson's proposals met the fate of those of many zealous reformers throughout history; the bill was not presented to the Virginia General Assembly until 1785 and then appears to have been abandoned.⁴⁰

Jefferson's bill proposed that the everyday government of the College be placed in the hands of the faculty.⁴¹ Further, any differences between the faculty and the Visitors would be resolved by a group of three Chancellors given judicial powers to settle such disputes.⁴² The 1779 reforms, however, did not follow this pattern. Instead of bolstering academic freedom, the Visitors were given a decisive voice in matters of teaching methods.⁴³ Because the reforms were carried out by the Visitors and not the Virginia legislature, the bias favoring visitatorial authority could be anticipated. Still, the change does reflect the tension and hostility that existed between

34. See J. MORPURGO, *supra* note 2, at 178; Thomson, *supra* note 7, at 206.

35. See generally 2 THE PAPERS OF THOMAS JEFFERSON 305 (J. Boyd ed. 1950) [hereinafter cited as BOYD].

36. JEFFERSON WRITINGS, *supra* note 1, at 47. On Jefferson's role as an educationalist, see R. HONEYWELL, THE EDUCATIONAL WORKS OF THOMAS JEFFERSON (1931).

37. The text of the bill is printed in 2 BOYD, *supra* note 35, at 535.

38. JEFFERSON WRITINGS, *supra* note 1, at 48.

39. 2 BOYD, *supra* note 35, at 540.

40. *Id.* at 543. Jefferson attributed the bill's failure partly to fear that it would confirm Anglican ascendancy at the College, which was an establishment of the Church of England. JEFFERSON WRITINGS, *supra* note 1, at 48.

41. See 2 BOYD, *supra* note 35, at 540.

42. *Id.* at 549.

43. See 1 KNIGHT, *supra* note 8, at 547.

the faculty and the Visitors.⁴⁴ Thus, Bracken's action against the Visitors, while directly prompted by the 1779 reforms, was also the culmination of long-standing bitterness and rivalry between the faculty and the Visitors.

Bracken has been credited with a hot temper,⁴⁵ but he did not make his first move against the College until about September, 1782. On September 1st, the faculty decided to retain Edmund Randolph as counsel for the College "in case Mr. Bracken should commence any Suit against the Society for arrears of Salary or for any other cause."⁴⁶ Bracken did not file suit against the Visitors until October, 1787, however.⁴⁷ This prolonged delay may have been the result of attempts to settle the matter or to persuade Bracken to drop the action. But Bracken wanted restoration to his College posts, and his obduracy seems to have aroused the passions of everyone involved. In a letter dated December 14, 1789, Thomas Jefferson commented on George Wythe's resignation from the Chair of Law and Police, indicating that Wythe was "disgusted with some conduct of the professors, and particularly of the ex-professor Bracken and perhaps too with himself for having suffered himself to be too much irritated with that."⁴⁸ At that time Bracken's action was still awaiting judgment. The General Court of Virginia found the case difficult and adjourned it to the court of appeals.⁴⁹ On December 8, 1790, that court dismissed Bracken's action. No reasoned judgment was given; the court merely stated that it reached its decision "on the merits of the case."⁵⁰

Counsel's Arguments in the Bracken Case

Bracken sought a writ of mandamus against the Visitors, directing them to restore him "to his place and office of grammar Master, and professor of humanity."⁵¹ Bracken was represented by John

44. See generally J. MORPURGO, *supra* note 2, at 97-155.

45. Thomson, *supra* note 7, at 198.

46. *Journal of the Meetings of the President and Masters of William and Mary College*, 15 WM. & MARY COLLEGE Q. HIST. MAGAZINE (First Series) 1, 267 (1906) [hereinafter cited as *Journal of the Meetings*].

47. *Bracken v. Visitors of Wm. & Mary College*, 7 Va. (3 Call) 573, 579 (1790).

48. 6 THE WORKS OF THOMAS JEFFERSON 22-23 (P. Ford ed. 1904) [hereinafter cited as FORD].

49. 7 Va. (3 Call) at 579.

50. *Id.* at 599.

51. *Id.* at 579.

Taylor; the Visitors were represented by John Marshall. The fundamental issue before the court was the legality of the reforms carried out by the Visitors in 1779. The parties were in agreement that in absence of any amending Virginia legislation, the Royal Charter of the College retained its legal validity,⁵² but counsel differed in their approach to interpreting the Charter.

Marshall opened the proceedings on behalf of the Visitors and his argument, on the whole, was neither very sophisticated nor technical. He urged that, subject only to a few fundamental Charter provisions, the Visitors were given very broad powers. Marshall submitted that these fundamental provisions established "that there should be a president and six professors: and, perhaps, that divinity, philosophy and the languages should be taught in the College."⁵³ Since Bracken's action arose out of the abolition of the Grammar School, Marshall further contended that only the part of the 1779 Statutes relating to the Grammar School was in issue. He was influenced by the fact that there was no express reference to the Grammar School in the Charter and therefore concluded that the abolition of the Grammar School fell within the Visitors' general authority to make regulations for the College: "Their power of legislation . . . extended to the modification of the schools, in any manner they should deem proper, provided they did not depart from the great outlines marked in the Charter: which are divinity, philosophy and the languages."⁵⁴ On the specific issue of the application for mandamus, Marshall contended that because the Grammar School had been abolished lawfully, Bracken's posts no longer existed. Therefore, mandamus would not lie to restore a professor to a non-existent office.⁵⁵

These arguments defending the action of the Visitors were based partially on English case law concerning the authority of Visitors of eleemosynary corporations.⁵⁶ The case law, within limits, recognized

52. Taylor eloquently stated that "the charter is the magnet, from whence every part of this business must take its direction. It is the constitution of the College, and, like all other constitutions, ought to be preserved inviolate." *Id.* at 581. Marshall openly conceded the point. "Much argument has been used to prove, that the Visitors are bound by the College charter. . . . That is a position I never designed to controvert." *Id.* at 595.

53. *Id.* at 596.

54. *Id.* at 580.

55. *Id.* at 581.

56. Marshall relied on *The King v. The Bishop of Ely*, 1 Black. W. 72, 96 Eng. Rep. 39 (K.B. 1756); *The King v. The Bishop of Chester*, 1 Black. W. 22, 96 Eng. Rep. 12 (K.B. 1747);

the exclusive nature of visitatorial authority. But perhaps the most important aspect of Marshall's pleading was his emphasis on a flexible approach to interpreting the Charter—an approach that could reflect the needs of the time.⁵⁷ As a recent commentator explained:

In a certain sense it was a plea for the right of the board of visitors to replace the traditional professorships instituted in the seventeenth century with a new academic staff competent to teach subjects that the board emphasized in the new curriculum. Rather than turning to an interpretation of the charter, Marshall supported a principle of flexibility in educational policy that would in most cases not be restricted by the exact terms of the 1693 document.⁵⁸

The arguments of John Taylor, Bracken's counsel, however, were based on a close analysis of the documents constituting the College, in striking contrast to Marshall's approach. Taylor attempted to convince the court that, first, for the purposes of its government the College had a corporate nature; second, the powers of the Visitors were not only subject to the Charter but also to the Transfer Deed and the original Statutes made by the surviving trustees; and third, the Visitors had acted *ultra vires*.⁵⁹ Taylor regarded the Charter, the Transfer Deed, and the original Statutes as comprising the constitution of the College. He asserted that a body such as the College was created by and subordinate to its constitution, which the College was forbidden to either violate or change by its own act. In the context of William and Mary, he based his view on an examination of the respective roles of the trustees, the Visitors, and the faculty. Taylor argued that the Charter gave to the trustees the power and duty to establish the College, and until that duty had been accomplished, the Visitors had no existence, let alone authority.⁶⁰ The trustees' duty was accomplished by means of the Transfer Deed and the Statutes annexed to it. Therefore, Taylor maintained, the Visi-

and *Philips v. Bury*, 1 Ld. Raym. 5, 91 Eng. Rep. 900 (K.B. 1694). Based on such precedent, the court admitted as law the proposition that mandamus would not lie in the case of a private eleemosynary institution where visitors were appointed. 7 Va. (3 Call) at 580.

57. "In institutions, therefore, which are to be durable, only great leading and general principles, ought to be immutable . . . [A] particular branch of science, which at one period of time would be deemed all important, might at another, be thought not worth acquiring." 7 Va. (3 Call) at 581.

58. MARSHALL PAPERS, *supra* note 6, at 70.

59. 7 Va. (3 Call) at 581.

60. *Id.*

tors' authority was subordinate to and limited by those documents which were the means of fulfilling the intentions of the Royal founders of the College.⁶¹

Against this background, Taylor then argued that the Visitors' reforms of 1779 exceeded their powers. He referred specifically to the Charter's express commitment to religion and its teaching, which was abandoned after 1779, and to the substitution of the teaching of modern languages for ancient languages.⁶² Taylor regarded the action of the Visitors as an unlawful assumption of the power to create schools that the Charter gave only to the trustees: "By the constitution of the College, the Visitors were to make Statutes for the government of the College; not for its erection or abolition."⁶³ For these reasons, Taylor concluded that "this visitorial act of 1779, so far from being warranted by, is subversive of the College Charter, and that it exceeds any visitorial power."⁶⁴ He argued that mandamus would lie for his client because the College was not a private eleemosynary corporation but "a corporation for public government . . . whose proceedings must therefore be subject to the control of this Court."⁶⁵

The different approaches of Marshall and Taylor to the interpretation of the Charter strike a modern note. Marshall adopted a liberal, flexible approach; he accepted the Charter as binding but was willing to interpret it in a creative, innovative way in response to the changes in educational needs resulting from both the Revolution and the simple passage of time. Taylor, on the other hand, was a strict constructionist whose avowed aim was to discern the intentions of the original founders of the College and interpret the Charter accordingly.⁶⁶

61. *Id.* at 582-83.

62. *Id.* at 584-85.

63. *Id.* at 587.

64. *Id.* at 589. The act being void, there was nothing to deprive Bracken of his office or salary.

65. *Id.* at 590. The College had the right to elect a member to the General Assembly, and through control of the office of Surveyor General, could appoint all the surveyors to the different counties throughout Virginia.

66. This early confrontation between two schools of constitutional thought was a foreshadowing of the future. Taylor later became one of the earliest supporters of states' rights. Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) annoyed Taylor considerably and prompted him to write his *Construction Construed and Constitutions Vindicated* in 1820.

Evaluation of the Bracken Case in the Light of Prevailing English Law

By the time Bracken's action was heard, English law concerning chartered corporations had reached a high state of development.⁶⁷ The College of William and Mary clearly was established in accordance with that law, although special features of this colonial educational venture necessitated some modifications in procedure. In late seventeenth century England, a new college would not have appeared overnight, but normally no undue delay would have occurred. In England, aided by past precedent, a charter would have been granted with the necessary endowments, and the collegiate society would have been established and supplied with a regulatory code of statutes. In colonial Virginia, however, the situation was novel and beset by the uncertainties of distance and finance. The process leading to the establishment of William and Mary as an operational institution necessarily was prolonged. Partly for this reason the Charter resorted to the expedient of creating a body of local trustees to represent and act on behalf of the Royal founders. The Charter gave the trustees authority "to erect, found, and establish"⁶⁸ the College in accordance with the founders' intentions as soon as local circumstances permitted.

Such a course of action was not in itself novel. The Crown could delegate authority to private persons, subject to the strict terms of the Royal grant, to establish a corporation, to appoint its members, and to determine the way it shall be maintained.⁶⁹ Such a corporation remained a Royal foundation notwithstanding the use of intermediaries: William and Mary falls into this category. The trustees must have intended not only to erect the College and vest its property in the President and Masters, but also to exercise the legislative power that the Charter gave them to provide a set of rules to govern its corporate life. The Charter dealt in generalities and did not completely reflect the proposals for the College that had been accepted by the Crown, particularly the provision for the Grammar School. Therefore, the similarity between the Statutes made by the trustees and the proposals for the Charter was not chance, rather

67. See generally 1 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 376-91 (G. Sharswood ed. 1893) [hereinafter cited as BLACKSTONE].

68. HARTWELL, *supra* note 9, at 74.

69. 1 BLACKSTONE, *supra* note 67, at 379-82.

this must have been intended from the beginning.⁷⁰ Who better than James Blair, not only a surviving trustee but the man who actually had negotiated the Royal Charter, would be aware of the promoters' plans for the College and the Royal affirmation of them. As noted earlier, the trustees were not in a position to accomplish the Royal intentions until 1729, and although some memories may have become dulled during the intervening years, Blair's certainly had not. This long-delayed exercise of legislative authority by the trustees was patently designed to realize the original aims of the Charter. Those aims can be understood fully only when the Charter is read together with the original Statutes that amplified and perfected the bare Charter outline. John Taylor's argument that the scope of the Visitors' authority must be decided in the light of the Charter, the Transfer Deed, and the original Statutes was fully justified.

The institution of Visitors followed long-established English legal practice and was to be expected in the establishment of a College by Royal Charter.⁷¹ In its earliest form, visitation appears to have been an ecclesiastical device for supervising the administration of the church and the correction of offenses at diocesan and parochial levels.⁷² In the course of time the institution of visitors was extended to certain lay corporations that had strong ecclesiastical connections. These were known as eleemosynary corporations, founded for the promotion of learning and the support of persons engaged in literary pursuits.⁷³ The classic examples of eleemosynary corporations are the individual colleges of the English Universities of Oxford and Cambridge. In contrast, lay corporations with purely secular origins and purposes were not subject to visitation but were under the jurisdiction of the ordinary courts of law.⁷⁴ In *Philips v. Bury*,⁷⁵ which was before the English courts at the time William and Mary received its charter, the nature of these two types of lay

70. Both the statutes and Charter were based on the only models acceptable to most Virginians; these were the administrative pattern common in British universities. J. MORPURGO, *supra* note 2, at 80.

71. See Bridge, *Keeping Peace in the Universities: The Role of the Visitor*, 86 LAW Q. REV. 531 (1970). See generally H. PICARDA, *THE LAW AND PRACTICE RELATING TO CHARITIES* (1977); see also *Patel v. University of Bradford*, [1978] 3 All E.R. 841.

72. See G. MOORE, *INTRODUCTION TO ENGLISH CANON LAW* 45, 47-49 (1967); R. RODES, *ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND* 135-38 (1977).

73. See Bridge, *supra* note 71, at 532-33.

74. *Id.*

75. 1 Ld. Raym. 5, 91 Eng. Rep. 900 (K.B. 1694).

corporation and the role of visitors were settled. In an opinion which subsequently was upheld by the House of Lords,⁷⁶ Sir John Holt distinguished two types of corporations: a civil corporation, having exclusively secular origins, and an eleemosynary corporation, for private charity. A civil corporation, Holt stated, was not subject to its founder or visitors but to the general law of the land, while an eleemosynary corporation was the creature of its founder and subject to the jurisdiction of the visitors appointed by him.⁷⁷

One of the issues in the *Bracken* case was the corporate nature of the College of William and Mary. John Taylor pointed to certain public aspects of the College and argued that it was "a corporation for public government."⁷⁸ John Marshall, on the other hand, relying expressly on Sir John Holt's opinion, argued that it was an eleemosynary corporation and, as such, subject to the jurisdiction of its Visitors.⁷⁹ On this issue Marshall clearly had a strong and convincing argument. The College, modeled on the precedents of Oxford and Cambridge, was established expressly "for promoting the Studies of true Philosophy, Languages, and other good Arts and Sciences, and for propagating the pure Gospel of Christ:"⁸⁰ in other words, for eleemosynary purposes. The College's public aspects were incidental and peripheral to those purposes. As an eleemosynary corporation, it was "wholly subject to the rules, laws, statutes and ordinances which the founder ordains, and to the visitor whom he appoints, and to no others . . ."⁸¹ The duty of a visitor, under the common law, was to judge according to the statutes governing the college, to remove unfit faculty members, and to hear appeals.⁸² These expressions of English legal authority concerning the powers and duties of visitors were applicable to William and Mary because its Charter expressly provided that the acts of the Visitors "be no way contrary to our Prerogative Royal, nor the the laws and Statutes of our Kingdom of England, or our Colony of Virginia, . . . or to the

76. *Philips v. Bury*, 1 Shower 35, 1 Eng. Rep. 24 (H.L. 1694).

77. 1 Ld. Raym. at 8, 91 Eng. Rep. at 902-03.

78. See text accompanying note 65 *supra*.

79. Marshall associated the College with private charitable hospitals, each founded with charitable funds and subject to the will of the founder. "In many of the cases, colleges and hospitals are classed together as private eleemosynary corporations . . ." *Id.* at 591-92.

80. HARTWELL, *supra* note 9, at 74.

81. 1 Ld. Raym. at 8, 91 Eng. Rep. at 902-03.

82. *Id.*, 91 Eng. Rep. at 903.

canons and constitutions of the Church of England by law established.”⁸³

The Visitors were bound by the scheme set out in the Charter in its character as the constitution of the College,⁸⁴ because even when visitors were given legislative authority, that authority did not extend to altering the general constitution of the corporation.⁸⁵ This is an application of the general rule “that a grant made by the Crown at the suit of a subject is to be taken most beneficially for the Crown and against the subject; in other words, the subject has no right to claim under a grant or charter anything which the Crown has not granted by express, clear and unambiguous terms.”⁸⁶ One of the results of the Visitors’ reforms of 1779 was the abolition of the teaching of divinity, which was one of the express objects of the Charter. On this point Taylor clearly had an impregnable case. Marshall wisely chose not to emphasize the issue of divinity, although he did admit that it was one of “the great outlines marked in the Charter”⁸⁷ from which the Visitors should not depart. As Taylor expressed it, “The old charter has the support of religion for an object. The modern one exchanges it for the ‘rarer parts of science as more immediately subordinate to the leading objects of society’.”⁸⁸ Even if the Visitors’ legislative powers were given the most generous interpretation, those powers could not be used, in the absence of express authority, to change a fundamental feature of the Charter. This aspect of the 1779 reforms was patently *ultra vires*.

Bracken’s action, of course, was not related directly to the divinity issue but to the abolition of the Grammar School. Accordingly, Marshall concentrated his arguments on that aspect of the Visitors’ actions. As previously indicated, although there was no mention of the Grammar School in the Charter, it was an important part of the scheme presented to the Crown⁸⁹ and figured predominantly in the original Statutes made by the surviving trustees at the time of the incorporation of the College.⁹⁰ The critical question is whether the

83. HARTWELL, *supra* note 9, at 81.

84. See text accompanying note 52 *supra*.

85. See *Ex parte Bolton School*, 2 Bro. C.C. 661, 29 Eng. Rep. 367 (Ch. 1789).

86. 9 HALSBURY’S LAWS OF ENGLAND 739 (4th ed. Lord Hailsham 1974). See also 2 BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 664 (G. Sharswood ed. 1890).

87. 7 Va. (3 Call) at 580-81.

88. *Id.* at 584.

89. See 1 KNIGHT, *supra* note 8, at 388-89.

90. *Id.* at 509-13.

Visitors were bound by those original Statutes or whether they had complete discretion to change them by virtue of their legislative authority. In other words, when Sir John Holt, in *Philips v. Bury*, said that visitors should "judge according to the statutes of the college,"⁹¹ did he intend this to apply to the original statutes creating the College or those statutes as amended from time to time by the Visitors?

In a case decided in the 1750s, the King's Bench held that a visitor could not alter the original statutes.⁹² In the context of an English college, the statutes would have been part of the complete "Charter package" enacted close to the time of the Charter itself to elaborate upon the structure outlined therein in accordance with the founder's intentions. Clearly the power of the visitors would be subject to those statutes. In the case of William and Mary, the founder's authority to enact statutes was delegated to trustees, whose exercise of that authority was delayed substantially. Nevertheless, the statutes made by the trustees in 1728 were in a real sense "founders" statutes because they were designed to fulfill the objectives of the scheme approved by the Crown, which included provision for a Grammar School. If this proposition is sound, then the Visitors were bound by those statutes, and their abolition of the Grammar School was *ultra vires*.

The Visitors' legislative powers under the Charter were "full and absolute Liberty, Power and Authority, of making, enacting, framing and establishing such and so many Rules, Laws, Statutes, Orders and Injunctions, for the good and wholesome government of the said College, as to them . . . and their Successors, shall from time to time, according to their various Occasions and Circumstances, seem most fit and expedient."⁹³ That the exercise of these powers was subject to the laws of England and Virginia and to the

91. 1 Ld. Raym. at 8, 91 Eng. Rep. at 903.

92. *St. Johns College v. Todington*, 1 Burr. 158, 201, 97 Eng. Rep. 245, 270 (K.B. 1757) (opinion of Lord Mansfield) ("[W]here the body of statutes has been given by the founder, I should doubt extremely 'whether a visitor can alter those statutes or give new laws . . .'"); *accord*, *Green v. Rutherford*, 1 Ves. Sen. 462, 472, 27 Eng. Rep. 1144, 1149 (Ch. 1750) (opinion of Lord Hardwicke) ("If there are particular statutes, they are . . . [the visitor's] rule, he is bound by them; and if he acts contrary to or exceeds them, acts without jurisdiction; the question being still open whether he has acted within his jurisdiction or not, if not his act is a nullity.")

93. HARTWELL, *supra* note 9, at 81.

canons of the Church of England⁹⁴ has been noted already. The prevailing view of the English courts was that, in the absence of express authority, Visitors could not change the constitution of a chartered corporation. Thus, as general and broad as the powers of the William and Mary Visitors were, they were not given the express authority necessary to alter the constitution of the College.

Evidence suggests that, even prior to the 1779 reforms, those concerned with the affairs of the College were aware of the legal restraints on the powers of the Visitors. In 1768, at the height of an earlier dispute between the Visitors and the faculty, the faculty wrote to Richard Terrick, Chancellor of the College: "[T]he Remedy for the Disorders of which both the Visitors & we complain must come from some higher Power to which both they & we are bound to submit, whether that shall take its Rise from Petition to the King for a new Charter, or from an Appeal to His Majesty as supreme Visitor of the College, which we suppose him to be"⁹⁵ Thus, the argument was that any fundamental change in the constitution of the College could be accomplished only by the Crown.⁹⁶ This view seems to have been shared by the Chancellor himself. Two years earlier, he had told the Visitors that their claim of the power to arbitrarily change statutes and narrowly construct the conduct of the professors placed the College on a foundation so fundamentally wrong that William and Mary could never contribute to the advancement of religion and learning.⁹⁷

After the Revolution, the College of William and Mary was, as the English Attorney-General phrased it, "no longer a corporation with respect to this country, as a creature of the great seal of this country."⁹⁸ The power to change the Charter and original Statutes was vested now in the General Assembly of the newly-independent Virginia as Jefferson's *Bill for Amending the Constitution of the College of William and Mary* implied. That bill referred to certain

94. See text accompanying note 16 *supra*.

95. *Journal of the Meetings*, *supra* note 46, at 229.

96. A revision of a charter could not take place on the initiative of the Crown; rather, it required the consent of the corporation. See *The King v. Pasmore*, 3 T.R. 199, 240, 100 Eng. Rep. 531, 553 (K.B. 1789).

97. Thomson, *supra* note 7, at 195.

98. Attorney General *ex. rel.* Bishop of London v. College of William and Mary, 1 Ves. Jun. 243, 244, 30 Eng. Rep. 323, 323 (Ch. 1790). This case involved an unsuccessful attempt after the Revolution to restore payment to the College of the Boyle bequest for the education of Indian boys. See note 22 *supra*.

articles in the College's constitution "which being fixed by the original Charter . . . cannot be reformed by the said trustees, whose powers are created and circumscribed by the said charter."⁹⁹ An express aim of the bill was that in future the Visitors should not "be restrained in their legislation, by the royal prerogative, or the laws of the kingdom of England; . . . or the canons or constitution of the English Church, as enjoined in the said charter."¹⁰⁰ These provisions recognized that unless and until the Virginia General Assembly exercised its power to amend the constitution of the College, the College remained subject to the law of England. When Jefferson proposed his reforms in 1779, he departed from the path of legal orthodoxy as expressed in his bill. He still regarded the Charter as binding, but only regarding the number of professorships, not the subject curriculum of the professorships.¹⁰¹ This position is manifestly untenable. Logically, the subject areas antecede the professorships which are designed to serve them. Jefferson's construction clearly was an exercise in special pleading designed to justify the redirection of the College's reduced resources to purposes that fitted Jefferson's educational plans.¹⁰²

The arguments that have been advanced here lead to the conclusion that the Visitors of the College of William and Mary had an enlarged and legally unjustifiable view of their role and authority. The explanation for their position lies partly in the ready availability of the Visitors. They were able to concern themselves with the minutiae of College activities rather than remaining remote figures like their English counterparts who visited at relatively infrequent intervals.¹⁰³ This parochial character of the College, accentuated by its physical isolation and fed by local pride, produced a climate in which animosity developed between the professional academicians and their lay Visitors. These circumstances surrounding the College made it difficult for its Visitors to adopt the limited role that the Charter and original Statutes clearly assigned to them. Upon incorporation, the President and professors acquired a legal status conferred directly upon them by the Charter,¹⁰⁴ such status was inde-

99. See 2 BOYD, *supra* note 35, at 538.

100. *Id.* at 539.

101. See JEFFERSON NOTES, *supra* note 33, at 151.

102. See the extracts from the 1779 Statutes printed in 1 KNIGHT, *supra* note 8, at 547.

103. See Thomson, *supra* note 7, at 188-89.

104. See HARTWELL, *supra* note 9, at 78-81.

pendent of and in no way subservient to that of the Visitors. The original Statutes established a separation of powers between the President and professors, and the Visitors. The ordinary government of the College¹⁰⁵ was vested in the president and professors. Lesser matters were to be dealt with by "the President's order by word of mouth;" more serious matters were to be dealt with at meetings of the faculty.¹⁰⁶ The Visitors, described as the "College Senate" in the original Statutes,¹⁰⁷ were required to "maintain and support the ordinary authority of the President and Masters in the administration of the daily government of the College, and [to] refer all common domestick complaints to them."¹⁰⁸ The Visitors were not to be troubled "except in matters of great moment, where there is some Difficulty to be got over, or some Corruption or ill Practice to be reformed, or a new Statute to be made, or some other weighty Business to be transacted."¹⁰⁹ As the Charter expressly directed, these visitatorial powers were to be exercised at occasional courts or convocations.¹¹⁰ In accordance with English academic tradition, the role of the Visitors was not to create or change the College, but to provide assistance, advice, and support in the running of the College as established. As John Taylor explained, "In the creation [of the College], the Crown used the medium of trustees. It was necessary that the work of the trustee should be completed, before the visitors could act at all. The very term visitors implies so much: Something was to be visited. This something was the College establishment, as fixed by the charter and trustees. It was to be visited, for the purpose of supporting it, according to the laws of the founder, not for the purpose of subverting those laws."¹¹¹

THE CHOICE OF REMEDY

If the action of the Visitors in discontinuing the teaching of divinity, abolishing the Grammar School, and dismissing members of the

105. "Let the ordinary Government of the College be in the President and the Six Masters." 1 KNIGHT, *supra* note 8, at 519.

106. More serious matters included statutes found inconvenient or needing change, "election" of officers necessary for College business such as workmen and library keepers, and complaints and grievances. *Id.*

107. *Id.* at 507.

108. *Id.*

109. *Id.*

110. See HARTWELL, *supra* note 9, at 84-85.

111. 7 Va. (3 Call) at 583-84.

faculty was in fact *ultra vires*, the question of availability of a judicial remedy remained. By the time Bracken's action was brought, the principle that visitatorial jurisdiction was both exclusive and final was settled law. Sir John Holt, in *Philips v. Bury*, stressed that visitors' "determinations are final, and examinable in no other court whatsoever."¹¹² Lord Mansfield succinctly stated in a later case that "a visitor . . . is a summary Judge and a Judge without appeal."¹¹³ The justification for this absolute authority is based on both legal and public policy considerations. Someone who founds an eleemosynary corporation is legally entitled to have that foundation conducted in accordance with his wishes. In the words of Lord Hardwicke:

The original of all . . . [visitatorial] power is the property of donor [sic], and the power every one has to dispose, direct, and regulate his own property; . . . therefore if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder or his heirs, or the person especially appointed by him to be visitor, to determine according to his own creature. . . . [The] nature of this power is *forum domesticum*, the private jurisdiction of the founder¹¹⁴

The justification based on public policy was that actions involving eleemosynary corporations before the courts "may take off these learned bodies from their studies, and ingross their time very improperly."¹¹⁵ That the Visitors of William and Mary were intended to fit into this pattern emerges from both the Charter and the original Statutes.

In accordance with settled English law, when Visitors act within the scope of their authority, their actions are not open to challenge in the courts. This principle also applies to Visitors' exercise of discretionary powers, provided the action taken is within the limits of the discretion: "cases shew that the acts of a visitor, whether right or wrong, are not to be examined in the Courts of Law; but those are cases where he has acted within his jurisdiction, and they

112. 1 Ld. Raym. at 8, 91 Eng. Rep. at 903.

113. *The King v. The Bishop of Ely*, 1 Black. W. 71, 82, 96 Eng. Rep. 39, 44 (K.B. 1756).

114. *Green v. Rutherford*, 1 Ves. Sen. 462, 472, 27 Eng. Rep. 1144, 1149 (Ch. 1750).

115. *Attorney General v. Talbot*, 3 Atk. 662, 676, 26 Eng. Rep. 1181, 1188 (Ch. 1747).

proceed upon this principle, that he is the judge whom the founder has thought proper to appoint."¹¹⁶ The William and Mary Visitors were given discretionary legislative power. The Charter confers this power with the express intent that it should be exercised in a way which "shall from time to time, according to their various Occasions and Circumstances, seem most fit and expedient."¹¹⁷ This same discretionary power was enunciated further in the final clause of the original Statutes which says that, under the Charter, the Visitors "may add new statutes, or may even change these, as their Affairs and Circumstances from Time to Time shall require."¹¹⁸ That clause, however, was incapable of giving the Visitors any powers greater than those they were given under the Charter itself. The Charter subjected them to the general law and did not give them the necessary power required by that law to enable them to change the constitution of the College. Thus, the Visitors' power to change the original Statutes was limited to matters of detail and not of substance, making their 1779 reforms beyond the scope of their authority.

English case law clearly indicates that the courts could intervene in such a case. In an authority relied upon by Marshall, the court said, "[T]here is no doubt that this Court will interpose in one way or other whenever any person takes upon him to exercise a jurisdiction which he has not"¹¹⁹ Similarly, in another case of the same period, "If there are particular statutes, they are . . . [the Visitor's] rule, he is bound by them; and if he acts contrary to or exceeds them, he acts without jurisdiction."¹²⁰ But the mandamus sought by Bracken was not an available remedy. Mandamus will lie against visitors in certain circumstances, as for example to compel them to obey the general law.¹²¹ If a visitor refuses to act when he is under a legal duty to do so, mandamus may be used to compel him to act, although not as a means of interfering in the actual exercise

116. *The King v. The Bishop of Ely*, 2 T.R. 290, 336, 100 Eng. Rep. 157, 181 (K.B. 1788) (opinion of Ashhurst, J.).

117. HARTWELL, *supra* note 9, at 81.

118. 1 KNIGHT, *supra* note 8, at 527.

119. *The King v. The Bishop of Chester*, 1 Wils. K.B. 206, 209, 95 Eng. Rep. 576, 577 (K.B. 1747) (opinion of Lee, C.J.).

120. *Green v. Rutherford*, 1 Ves. Sen. at 472, 27 Eng. Rep. at 1149-50 (opinion of Lord Hardwicke).

121. *See The King v. St. John's College*, 4 Mod. 368, 87 Eng. Rep. 448 (K.B. 1694).

of his authority.¹²² Failure to observe any procedural requirements of the charter and statutes also may be remedied by mandamus.¹²³ But for the purpose for which Bracken sought mandamus, reinstatement, it was not available. Mandamus clearly will not lie to restore a fellow of a College.¹²⁴ Taylor seems to have been influenced in his choice of mandamus as a remedy by his conviction that William and Mary was not an eleemosynary corporation but rather a public corporation subject entirely to the jurisdiction of the courts. That was the fatal flaw in his argument. If he had conceded the eleemosynary nature of the College, there were other remedies that he could have sought on behalf of his client.

The writ of prohibition was one alternative.¹²⁵ Prohibition, a remedy of great antiquity, can be used by the courts to prevent a person or body endowed with judicial authority from exceeding his or its jurisdiction.¹²⁶ Marshall asserted that in this case the Visitors were exercising legislative and not judicial powers.¹²⁷ But this abusive exercise of legislative power had the direct consequence of depriving Bracken of his membership in the College's corporate body. Bracken's case is comparable to *Bently v. Bishop of Ely*,¹²⁸ in which a visitor abused his authority by expelling the Master of a College. There the court granted prohibition to prevent such an unauthorized expulsion.¹²⁹ In *The King v. The Bishop of Ely*, the court regarded questions about the membership of corporations as essentially judicially in nature: "The exercise of a Visitor's power . . . is a judicial act; and a Judge cannot determine without hearing the parties concerned."¹³⁰ As Taylor argued, the Visitors' power of dismissal was only for cause,¹³¹ and, as Marshall conceded, "Mr.

122. See *The King v. The Bishop of Ely*, 2 T.R. 290, 100 Eng. Rep. 157 (K.B. 1788).

123. See *id.* at 338 n.(a), 100 Eng. Rep. at 182 n.(a).

124. *E.g.*, *Mr. Parkinson's Case*, 3 Mod. 265, 87 Eng. Rep. 175 (K.B. 1689).

125. Certiorari was not available because the system of law administered by a visitor was the law of the founder and not the law ordinarily applied by courts. Gordon, *Certiorari to an Ecclesiastical Court*, 63 LAW Q. REV. 208 (1947).

126. For the application of prohibition to visitors, see Bridge, *supra* note 71, at 544-45.

127. 7 Va. (3 Call) at 588.

128. 1 Barn. K.B. 192, 94 Eng. Rep. 132 (1729).

129. *Id.*

130. *The King v. The Bishop of Ely*, 2 T.R. 290, 336, 100 Eng. Rep. 157, 181 (K.B. 1788).

131. Such a vacancy must have been created by death, resignation, or deprivation. Deprivation is a technical term meaning loss of employment for delinquency or good cause. 7 Va. (3 Call) at 586, 589.

Bracken has not been complained of.”¹³² The action of the William and Mary Visitors thus is doubly to be condemned; it was not only an unlawful exercise of legislative power but also an unlawful means of depriving three members of the corporation of their positions. Further, even where a visitor has a power of deprivation, “he should . . . [use] it in a formal manner, and should at least . . . [convene] the parties interested to give them an opportunity of making a defence.”¹³³ This supports Taylor’s contention that Bracken should have been summoned and heard before being deprived, and then only for some delinquency or other good cause.¹³⁴ Given the Visitors’ personal commitment to their reforms, Bracken could not have expected an objective determination of his position. If he had sought and obtained a writ of prohibition in good time, however, it would have had the effect of preventing the Visitors from continuing with the course of action that eventually deprived him of his position.¹³⁵

On the basis of obiter dicta in two mid-eighteenth century cases, two other remedies might have been available to Bracken. The first is an action for damages: “an action for damages will lie against the visitor for exceeding his jurisdiction”¹³⁶ Of course, a successful action of this sort would not have restored Bracken to his College posts, but would have compensated him for his loss.¹³⁷ Secondly, Bracken might have had grounds for an action in ejectment. In *The King v. The Bishop of Chester*,¹³⁸ the court refused to grant mandamus to restore a person to a canonry because that remedy was not available against a visitor. In addition to discussing the availability of prohibition, two judges suggested the appropriateness of an action in ejectment.¹³⁹ Presumably, the possessory action in ejectment

132. *Id.* at 598.

133. *The King v. The Bishop of Ely*, 2 T.R. at 336, 100 Eng. Rep. at 181.

134. 7 Va. (3 Call) at 589-90.

135. See *Green v. Rutherford*, 1 Ves. Sen. at 471, 27 Eng. Rep. at 1149 (opinion of Lord Hardwicke); *The King v. The Bishop of Chester*, 1 Wils. K.B. at 209, 95 Eng. Rep. at 577 (opinion of Lee, C.J.).

136. *Green v. Rutherford*, 1 Ves. Sen. at 470, 27 Eng. Rep. at 1148 (opinion of Sir John Strange).

137. This is comparable to Bracken’s later action for arrears in salary since both turned upon the legality of his deprivation. See *Bracken v. William & Mary College*, 5 Va. (1 Call) 161 (1797).

138. 1 Wils. K.B. 206, 95 Eng. Rep. 576 (K.B. 1747).

139. See *id.* at 209, 95 Eng. Rep. at 577-78 (opinions of Lee, C.J., and Dennison, J.).

was available because of the relationship between a canonry and the corporeal property of the church in question. A similar analogy might have been drawn in Bracken's suit between a fellowship and the corporeal property of the College; however, there appears to be no reported instances of actions either for damages or for ejectment being brought against visitors.¹⁴⁰

CONCLUSIONS

The burden of this Article has been to demonstrate that English corporate law and usage did not, as has been suggested recently,¹⁴¹ support the case of the Visitors of the College of William and Mary in defending the action brought against them by the Rev. John Bracken. The argument has been made that their 1779 reforms were unlawful; more than stretching their legal powers, the Visitors abused them. If these arguments are sound, then why did the Virginia Court of Appeals decide in favor of the Visitors? There were perhaps two principal reasons for this: one a technical legal reason and the other a practical political one.

From the legal point of view, John Taylor's general conception of the role of the Visitors and their relationship with the faculty was in accordance with English law and academic tradition. He made a fatal error of judgment, however, either through misunderstanding or lack of information; he did not concede that the College was an eleemosynary corporation. Taylor was confident that it was a public corporation and subject to the jurisdiction of the courts, hence, his insistence on mandamus as a remedy. He seems to have been unaware of the possible availability of the writ of prohibition and other remedies against college visitors. The unavailability of law books and reports, aggravated by post-Revolutionary confusion and uncertainty, must have caused problems in colonial times. There is evidence, however, that copies of both Blackstone's *Commentaries* and Matthew Bacon's *New Abridgement of the Law* were available in Virginia during this period.¹⁴² Both works deal with corporations,

140. In any event, Bracken was restored to his posts in 1792 when the Grammar School was re-established and was President of the College from 1812 to 1814. Goodwin, *supra* note 3, at 383, 386-87.

141. See MARSHALL PAPERS, *supra* note 6, at 70.

142. See Swindler, *John Marshall's Preparation for the Bar—Some Observations on His Law Notes*, 11 AM. J. LEGAL HIST. 207, 207-08 (1967).

visitation, and remedies against visitors.¹⁴³

The decision in the *Bracken* case reflected the mood of the times. The political arguments were against Bracken. The period was a time of change; a time to break the old English mold and cast a new Virginia one. This feeling was fostered by the recent history of the College. Repeated struggles between the faculty and the Visitors had tarnished the image of the College, prompting feelings that the College, as established, had not lived up to expectations. Against this background, Bracken, as a representative of the "Old Order", clearly was at a disadvantage. The political context of the case also may have been a source of the difficulty the Virginia courts had with it and may explain the laconic nature of the judgment.

Additionally, George Wythe's opinion on the *Bracken* case is worthy of speculation. As a scholarly and experienced lawyer, he probably was familiar with the law relating to visitors.¹⁴⁴ Indeed, Wythe may have been the source of the legal advice that formed the basis of the faculty letter to the Chancellor in 1768 suggesting that their dispute with the Visitors was determinable only by a higher power.¹⁴⁵ The reforms of 1779 had provided him with his Chair; yet ten years later he resigned, at least in part because of Bracken's conduct.¹⁴⁶ The source of Wythe's irritation could have been uneasiness over the questionable legality of the Visitors' action; Wythe was, after all, an early constitutionalist. In his well-known opinion in *Commonwealth v. Caton* concerning the powers of legislators, he observed, "[P]ointing to the constitution, [I] . . . will say, to them, here is the limit of your authority; and, hither, shall you go, but no further."¹⁴⁷

Finally, the fact that the happenings at William and Mary helped fashion a form of collegiate and university government which has become a hallmark of the American system of higher education should not be overlooked. As two modern commentators ably explain its significance: "[T]he reform of William and Mary . . . was a major episode in the history of higher education in early America.

143. See M. BACON, 2 NEW ABRIDGEMENT OF THE LAW 1-32 (1811); 1 BLACKSTONE, *supra* note 67.

144. He certainly owned a copy of Bacon's *New Abridgement of the Law*. See Swindler, *supra* note 142, at 208 n.4.

145. See *Journal of the Meetings*, *supra* note 46.

146. See FORD, *supra* note 48.

147. 7 Va. (4 Call) at 8.

At root this was a struggle to shape an inherited institution into a form able to serve peculiarly American interests without destroying the institution's capacity to transmit values important to the survival of the western heritage";¹⁴⁸ "[t]here emerged during the colonial period that pattern of outside control which would permanently characterize American colleges. In the early government . . . of William and Mary there were some signs of the growth of a system of dual control under which the faculty would rule subject to veto by an outside body. But . . . such a system [did not] last. . . . By the mid-18th century, when William and Mary College was flourishing, the gentry had clearly prevailed over the academics. . . . American colleges would not be self-governing guilds of the learned."¹⁴⁹

148. Thomson, *supra* note 7, at 187-88.

149. D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE 177-78* (1958).