***Clark v. Maryland*;**
The earliest beginnings
of Public School Desegregation Cases

The establishment of free public education in the city of Baltimore began in 18__.[1] Like most opportunities relating to academic or social interaction in nineteenth century Maryland, the vast majority of such opportunities were either segregated or excluded totally to people of African descent. On the heels of the 1896 Supreme Court ruling in *Plessy v. Ferguson*,[2] the entire country was engaged in a debate over race and the attendant rights that accompany citizenship. The *Plessy* decision set the precedent that "separate" facilities for blacks and whites were constitutional as long as they were "equal." This doctrine of "separate but equal" became the linchpin of racial desegregation cases all across the United States for the next 55 years covering a wide variety of social interactions, such as restaurants, theaters and restrooms. It was only natural that this debate would extend to the issue of mixed-race public education. The concept of free public education offered by government was relatively new in Maryland; the concept of integrated schools in Maryland even newer.[3] The road to integrating public schools would take 58 years and it would have its beginnings in the State of Maryland.[4] It is unclear, why Maryland would become the legal battleground for public

[1] Find out the start of free public schooling in Baltimore
[2] Plessy v. Ferguson, ____ US ____ (1896)
[3] See Footnote 1.
[4] Cite to Brown v. Board of Education.

school desegregation cases.[5] This paper will look at one of the earliest such cases, *Clark v. Maryland Institute*.[6]

On March 7, 1893 the Mayor of the Baltimore, Ferdinand Latrobe, and the Baltimore City Council enacted an ordinance (the "Ordinance") whereby the Mayor was authorized to enter into a contract with the Maryland Institute for the Promotion of Mechanic Arts for the instruction of certain appointed students.[7] Under the Ordinance, the city of Baltimore would pay the Maryland Institute $9,000.00 annually. In return, the city would be allowed to appoint 33 students annually to a four-year scholarship at the school. The contract duration was for eight years and pledged $72,000 of the public treasury to this agreement.[8] Councilman from each Ward of the city would be allowed to appoint a student from their respective Wards to fill the scholarship. A contract was drafted and on March 9, 1893, the City Solicitor, W.S. Bryan, Jr., approved the legal sufficiency of the contract. Pursuant to the Ordinance, the Mayor and The Maryland

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[5] Cite to Gaines v. Murray, Clark v. MD Institute, Nursing School Case

[6] 41 A. 126 (1898)

[7] 41 A. 126, 127; See also Order of Mandamus at para 10, page 4. The language of the ordinance read:

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

[8] Petition for Mandamus at para 11 at page 4

Institute for the Promotion of Mechanic Arts entered into a contract on March 10, 1893, just three days after the enactment of the Ordinance.[9]

The Maryland Institute and its History

The Maryland Institute for the Promotion of Mechanic Arts (commonly known as the "Maryland Institute", hereinafter the "school") was a prestigious institute of learning located in the heart of the city at Baltimore Street and Centre Market Space.[10] The school had been established and originally incorporated by Act of the Assembly of Maryland of 1849, chapter 114.[11]

The school offered basic and advanced freehand, mechanical and architectural-drawing classes.[12] In addition, the school offered a full range of art classes including, painting in waters and oils, sculpting bust and landscape drawing and painting.[13] The school offered day and evening programs and enrolled upward of 500 students.[14] The day school met daily, while the night school held classes on Monday, Wednesday and Friday evenings.[15] Students who were able to complete the four-year course entitled to a certificate upon graduation that was authorized under the authority of the State of

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[9] Petition for Mandamus at para 11, page 4-5
[10] Appellant's Brief at para 5, page 2
[11] Petition for Mandamus at para 2, page 1; The record indicates that the charter was renewed by Act of 1878, chapter 313); The corporate charter read: "Objects of its incorporation are the encouragement and promotion of manufactures and the mechanic and useful arts by the establishment of school and popular lecturers upon the science connected with them, the promotion of schools of art and design, etc., etc., and by such other menas for the promotion of the mechanic arts as experience may suggest."
[12] Petition for Mandamus at para 6, page 2.
[13] Id at para 7, page 2
[14] Appellees Brief at ____
[15] Petition for Mandamus at para 6, page 2

Maryland.[16] Alumni of the school also had the opportunity to compete for $500 scholarships distributed in sums of $50 and $100 increments.[17] In addition, graduates of the school were entitled to a free post-graduate education where students were able to practice and hone their skills.[18] The only requirement for admission into the post-graduate course was regular attendance.[19] The best sculpting students could also expect to study at the prestigious Rhinehart School of Sculpture (an affiliated school with the Maryland Institute).[20] The Rhinehart School offered the finest education an art student could receive in the United States at the time.[21] With all these advantages, it was clear that an education from the Maryland Institute was a valuable achievement and a coveted honor.

Although a private institution, the School received an annual appropriation from the State of Maryland for $3,000.[22] Coupled with the monies received from the city under the Scholarship Contract, the School was accepting in total $11,000 annually from the public treasury.[23] The School contended that the remainder, and vast majority, of it

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[16] Id.
[17] Id .
[18] Id.
[19] Id.
[20] Id. at para 7, page 2
[21] Petition for Mandamus at para 7, page 2; it was admitted by the School that the education received at the Rhinehart School could only be obtained by traveling to foreign countries.
[22]
[23] Id and see supra to $3000 footnote.

operating cost were raised exclusively by the tuition of paying students.[24] The Maryland Institute was also an overwhelmingly white student population.[25]

For 42 years from its inception, the School only enrolled white students.[26] In 1891, Harry Pratt, a student of African descent enrolled at the School.[27] This was the first "colored pupil" the school ever enrolled, but would not be the last. William Mills, another colored student was also accepted into the school in the fall term for 1892. Again, in the fall term of 1895, both William H. Davis and Howard Gross, two students of African descent, were also appointed and accepted to the School [28]

In the fall of 1895, the discussion of integrated school was the hot political topic.[29] The enrollment of 4 black students at the School caused a large controversy amongst the majority white students and their parents.[30] There was a large contingent of white students and parents that supported the prohibition of any other black students from

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[24] Appellants brief at ____

[25] Cite to appellant's brief talking about establishment of school for whites, and with minor exceptions has been maintained for whites.

[26] Id.

[27] Petition for Mandamus at para 12, page 5; the enrollment of Harry Pratt and William Mills took place before the enactment of the March 7, 1893 Ordiance and the Contract executed by the School and the City on March 10, 1893. The record indicates that these two students were appointed by Councilmen Harry S. Cummings and James Doyle. Harry S. Cummings was a leading black politician in 1891, he was also the first student of African descent to graduate from the University of Maryland Law School. CITE TO PROFESSOR BOGEN'S ARTICLE. It is unclear for the record the arrangement, the City and the School had before 1893 that allowed for the appointment of these two students.

[28] Petition for Mandamus at para 12, page 5; The record indicates that Harry Pratt graduated from the Maryland Institute with honorable mention. William Mills dropped out of the School. In the Fall of 1897, both Willam H. Davis and Hward Gross were still completing their studies at the Maryland Institute.

[29] See Appellee's Brief at ___

[30] Id

enrolling at the school.[31] The School under the "political" and social "pressure" succumbed to the demands of the white students and parents.[32] The school noted that it had been singled out in local newspapers in "great and unenviable notoriety" because of the enrollment of these black students.[33] Citing declining enrollment numbers amongst white students the school decided to adopt new bylaws that prohibited the admission of any students of African descent.[34] The bylaw drafted on November 11, 1895, by the School's board of managers read:

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

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

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[31] Id at
[32] Id at ___
[33] Id at ___
[34] Appellee's Brief at ____; The School cited the popular objection of all people to mixed-race schooling. Noting that student enrollment was down in the fall term of 1895 from 643 the previous year to 521. In the winter of 1896 enrollment was down to 447 students. In the winter of 1897 student enrollment had dropped to 403 students.

the Scholarship contract obligated the school to provide and the past practices and customs of the school in allowing appointed black students to enroll.

The Appointment of John H. Clark, Jr.

On November 5, 1895, J. Marcus Cargill was elected to the First Branch of the City Council of the city of Baltimore from the Eleventh Ward, a predominantly black district within the city.[35] Councilman Cargill, was not just a politician, he was also a medical doctor with an office located within his district at 430 Biddle Street.[36] [Dr. Cargill's practice and his status as a black doctor would have meant his patients were predominantly, if not all, black citizens from his district.] As a newly elected Councilman, Dr. Cargill was entitled to nominate a student from his Ward under the existing Scholarship Contract between the city and the Maryland Institute. Councilman Cargill was fully aware that the school had adopted new bylaws prohibiting the appointment of black students.[37] On February 21, 1896, Councilman Cargill appointed Robert H. Clark, Jr. as the student from the Eleventh Ward that would attend the prestigious Maryland Institute for the fall term of 1896.[38] Clark's father, Robert H. Clark, Sr., was an attorney who resided at 1130 Druid Hill Avenue.[39] As a taxpayer of the Eleventh Ward, his son, Robert Jr. was eligble for the appointment. However, the school replied that it would not accept the appointment of Clark due to his race and

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[35] Appellants brief at para 14
[36] Appellant Brief at para 14
[37] 41 A. 126 at page 127 (1898)
[38] Appellant Brief at para 16
[39] Appellant Brief at para 17

instructed Councilman Cargill to select a "reputable white pupil" as his appointee.[40] Councilman Cargill decided not to make another appointment for the fall term of 1896 and left the seat from his ward vacant.[41] On October1, 1986, Mayor Alcaeus Hooper selected Carrie E. Keyworth to fill the vacancy of the Eleventh Ward left open by Councilman Cargill.[42] In accordance with the provisions of the Scholarship Contract, if a City Council member left a vacancy from his Ward, the School was obligated to notify the Mayor and the Mayor could fill the vacant the spot with a student of his own choosing.[43]

In the fall of 1896, Councilman Cargill attempted again to appoint Robert H. Clark, Jr. to the School.[44] On Monday evening, October 4, 1896 at 7:30pm, Robert H. Clark Jr., accompanied by his father and another attorney[45] appeared in front of the doors of the Maryland Institute for the Promotion of Mechanic Arts. Once again, Clark was

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[40] Appellant Brief at para 17
[41] Appellant Brief at para 17
[42] Appellant Brief at para 18
[43] Appellant Brief at para 18
[44] Appellant Brief at para 18
[45] Appellant Brief at para 19; The Appelant's Answer to the Petition states that the second man accompanying Robert Clark, Jr. was one of the attorneys in that filed the Petition for Mandamus. It is unclear weather this attorney was W. Ashbie Hawkins or _____. W. Asbie Hawkins lived at _____ in 1897 and is quite possibly the unnamed attorney. Ironocally, Hawkins had been expelled from the University of Maryland Law School under similar circumstances. Both Harry S. Cummings and Charles W. Johnson had graduated from the University of Maryland Law School in 1889. By the time Hawkins enrolled in 1890, opposition by white students at the University of Maryland was strong enough to have Hawkins barred from the law school. Hawkins finished his legal education at Howard University in the spring of 1891. Hawkins spent his career working to overturn desegregation laws in Maryland and this case was on of his earliest attempts.

denied admission to the school due to his race.[46] This time Clark would attempt to resolve his dispute with the School using the rule of law. On October 16, 1897, Clark and his attorneys filed a Petition for Mandamus in the Superior Court of Baltimore City.[47]

The Lower Court Legal Proceeding

The Petition for Mandamus, filed by Clark, argued that his exclusion from the school was void and without effect based on four principle arguments. First, the refusal to admit him violated the Ordinance enacted by the City Council in 1893. Second, his exclusion violated the Scholarship contract that was entered into by the School and the City. Third, the revision of the bylaws was in direct contravention of the school's charter. Last, that his exclusion was a direct violation of the Fourteenth Amendment of the United States Constitution.[48]

Clarks' theory of the case was that the City Ordinance was enacted for the public benefit. The words and effect of the Ordinance were to make scholarships available to any student in Baltimore, irrespective of race. Because no racially exclusive terms were contemplated in the Ordinance regarding the term "pupil," the city council's intent was clear and no future modification could alter the Council's intent. The very use of any racially exclusive terms within the Ordinance would have made it void on its face under existing federal law.[49]

In his second argument, Clark argued that the Scholarship Contract negotiated between the School and the City also used racially neutral terms. Any attempt to modify

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[46] Appellant Brief at para 18
[47] Petition for Mandamus at para XVIII, page 7.
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[49] See Yick Wo v. Hopkins, 118 US 356

the existing arrangement by the School was a breach of contract. He noted that the School had agreed to accept students appointed by the city council irrespective of race and was bound to honor the contract.[50] Augmenting this argument, Clark's attorneys noted that as agents of the city government, the Mayor and the City Council were precluded from entering any racially discriminatory contract by the 14th Amendment of the United States Constitution.[51] The argument was an attempt to clarify and solidify any dispute over the ambiguous term "pupils" used in the Scholarship Contract. If Clark could show that the only meaning the city could have attributed to the term was a racially neutral meaning, it would have substantially proved that the contract was at least void because there was "no meeting of the minds."[52] Giving effect to the bylaw provisions would have been "unlawful, unconstitutional and utterly void."[53]

In his third argument, Clark attempted to show the court that the school's charter had not envisioned any racially exclusive admission policy and that the revised bylaw attempted to circumvent the established purpose of the School.[54] More importantly, the School had already admitted black students in the past and currently had two black students enrolled at the time Clark was seeking admission.[55] In so allowing the

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[50] Petition for Mandamus at Para 19, page 7
[51] XIV Amend., US Constitution;
[52] Under the common law a contract is voidable if one can prove that the parties to the bargain did not have a fundamental understanding at contract formation over the terms of the contract.
[53] Petition for Mandamus at para 19, page 7
[54] See Petition for Mandamus at ____
[55] See supra to other footnote relating to other colored art students

admission of these four students, Clark argued that the School acknowledged its open admission policy and was estopped from making any derivation to the contrary.[56]

Clark's final argument in the Petition urges the Court to take notice of the appropriations of the State and the City to the School. In total $11,000 of taxpayer money was being diverted to the School. Clark's petition argued that the acceptance of such public monies made the School a public or *quasi*-public institution funded by the government. As such, the School was bound by the same prohibitions of the 14th Amendment of the United States Constitution. Any attempt to exclude Clark on the basis or race was an abridgment of the privileges and immunities clause as citizens of the United States. Furthermore, such act of the School was a deprivation of Clark's rights without due process of law and denied him the equal protections of the law.[57]

Buttressing his arguments, Clark argued that the school was so unique in its qualities that a similar education could not be obtained anywhere else in Baltimore.[58] Specifically, he states "not only do the public schools fall immeasurably below the [Maryland Institute], in these particular branches, but there are few or none of the private schools offer the advantages that compare with the acknowledged superiority of the said school of art and design."[59] This argument was possibly in anticipation of the Court's response in the wake of *Plessy v. Ferguson*. Although, Clark does not cite to Plessy in his Petition, the argument offered attempts to eliminate any chance that he might be directed to another "separate but equal" art school.

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[56] See Petition for Mandamus at ____
[57] See Petition for Mandamus at ____
[58] Petition for Mandamus at para 19, page 7
[59] Id.

On October 16, 1897, Judge Albert Ritchie issued an order to the School to show cause why the Writ of Mandamus should not be granted.[60] Additionally he ordered that a copy of the Petition for Mandamus be delivered to the School before October 20, 1897.[61]

The School's Response

On November 1, 1897, the School requested the trial to grant a three-day extension to file its answer.[62] Judge Ritchie granted the request and on November 3, 1897, the School filed its answer to the Petition for Mandamus.[63] The School admitted to most of the well-known facts relating to the controversy.[64] However, the School denied or made exception to some facts that would be central to the resolution of the case; namely the operations and funding of the School. By doing so, the school framed the argument in the context of a debate over public versus private mission of the School.

The School attempted to reframe the allegations relating to its relationship with the Rhinehart School by stating that the post-graduate training offered by Rhinehart was solely conducted by a Committee of the Rhinehart School. The School stated that it had no control over the program and that Committee of the Rhinehart School could abolish the program at whim.[65] The School attempted to show that the School was a private institution and could adopt racially exclusive regulations as any other private entity had

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[60] Order of the Superior Court of Baltimore, October 16, 1897
[61] Id.
[62] Filed with Superior Court of Baltimore, November 1, 1897.
[63] Defendant's Answer to the Petition, filed November 3, 1897
[64] See id at page 1; School admits to plaitiff allegation in Paragraph 1, 2, 3,4, 5, 6 and 7. Such facts related generally to names, addresses, dates and the enactment to the Ordinance and the Scholarship Contract.
[65] Id at page 2

the power to adopt.[66] The Institute stated that the adoption of the restrictive bylaw was done with the intent of saving the School from financial ruin and thus trying to preserve the School's beneficial public purpose.[67] It further stated that, to no avail, it had tried to reason with the white students and parents, thus trying to change popular sentiment about mixed race schooling.[68] Another fact the School was reluctant to concede was that the School was established with the vision of mixed-race schooling. It admitted that other colored students had been allowed to enroll at the School, but that this experiment was tolerated until it failed.[69]

As noted the School's legal arguments depended largely in part on convincing the trial court that it was not bound by the 14th Amendment because it was a private entity. As such, the school responded that (i) the Scholarship Contract between the School and the City was a private contract and that Clark had no standing to enforce any right under a breach of contract action; (ii) that the 14th Amendment only meant to constrain state action and did not apply to private citizens or institutions; and (iii) that the Writ of Mandamus was not the proper remedy under which Clark could seek relief.[70]

On November 29, 1897, Clark's attorneys filed an Agreement of Facts with the court, whereby they stipulated to a limited number of facts alleged in the defendant's

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[66] Id.
[67] Id
[68] 41 A. 126; Appellate Court noted that "[n]ot withstanding earnest and zealous efforts on the part of the board of managers and the faculty of teachers to reconcile the white pupils, their parents and guardians to the innovation, [enrollment of colored students] caused a great decrease in the number of pupils."
[69] Defendant Answer to the Order at page __
[70] Id at ___.

response.[71] In addition, Clark's attorney filed a Demurrer to the School's answer.[72] The Demurrer was only one paragraph long and briefly stated that the School had not shown in its answer why the Writ of Mandamus not be issued and that the points contained in the School's answer were insufficient at law.[73]

The Trial Court's Opinion

Judge Ritchie delivered his opinion on December 10, 1897.[74] In his opinion, Judge Ritchie stated that Clark resting his claims under the Ordinance and the Scholarship Contract.[75] The trial court noted that the City of Baltimore had established a "liberal and advanced system of public school for both races."[76] The court acknowledged that there was no school that offered a curriculum equivalent to the one offered by the defendant.[77] It further noted that Clark's exclusion was based totally on his race.[78] The acknowledgment of these facts were a small victory for the plaintiff in light of the recent decision in *Plessy v. Ferguson.*[79] If the rule of law dictated "separate but equal" then Judge Ritchie's statements suggest that there was no equal alternative open to Clark. However, the trial court did not see the case this way. In fact, vague references are made

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[71] Agreement of Facts filed with the Superior Court of Baltimore, November 29, 1897; stipulating that Plaintiff acknowledged (i) the appointments of Carrie Keyworth and Samuel C. Martin by the Mayor, (ii) that the Peabidy Institute donated all monetary prizes to the School; and (iii) that the School's catalogue would become part of the School Answer and matters of facts contained therein.
[72] Plaintiff's Demurrer, filed on November 29, 1897
[73] Id.
[74] Opinion of Superior Court of Baltimore, dated December 10, 1897
[75] Id.
[76] Id.
[77] Id.
[78] Id.
[79] See Supra note ___.

to the "doctrine of separate but equal," but no specific mention to *Plessy* is made in the trial court's opinion.[80] The trial court realized that if it expensed an inquiry into the School being a public institution, it would not have to answer the question of "separate but equal" and any constitutional arguments.

Judge Ritchie's opinion is methodical in the way it lays out his evidence in analyzing the School's private nature. He begins by looking at the establishment of the School and its charter. He notes that the school was established in 1849 for the benefit of "white males and females."[81] It is unclear why Judge Ritchie thought the specific mention to "white females" was necessary. The reference to gender was never raised in either the Plaintiff's or Defendants trial documents. This reference may have been made to validate the acceptance of the Mayor's 1896 appointee, Carrie Keyworth, in lieu of, Robert Clark. In entering the Scholarship Contract, the School was like any other citizen or corporate entity having the legal capacity to do so. The court saw the evidence of declining enrollment as strong and credible reasons for the school to adopt changes in its admission policy. Noting the popular criticism surrounding mixed race schools, which the court stated that the Plaintiff acknowledged.[82] Once the Court had laid the proper framework for the School's private nature it expounded upon why the 14th Amendment was inapplicable in the case.

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[80] Id.
[81] Id.
[82] Id at page 20. The plaintiff's Demurrer to the Answer, filed with the Court on November 29, 1897, does not contain reference to conceding this point. If Plaintiff conceded that both races objected to mixed race schooling, it is absent from the written record.

The signing of the Scholarship Contract did not make the School a public or even quasi-public institution either. The court saw this as a contract between a municipality and any independent contractor. Noting that if the City signed a contract with a street paving company, the signing of the contract did not make that company a public agent anymore than the Scholarship contract made the School a public agents. Additionally, the court noted the School could have entered into any contract with another party for the education of 33 students and determining the School's status by the party it contracted with was an undesirable to in deciding what should trigger the substantive law's applicability.

The acceptance of public funds by the School did not change the School's status from private either. Relying on precedent in *St. Mary's School v. Brown*[83] where another court stated that the Maryland Institute was:

> "not a municipal agent, was subject to no municipal controls, occupied no municipal relation, was not subject to any of the ordinance or regulations adopted by the City under its authority from the State to establish a system of public schools, and that it was no part of the system established."[84]

In St. Mary's the appellate court dealt with the acceptance of public funds by a consortium of schools (the Maryland Institute for the Promotion of Mechanic Arts was one of these schools) located within the city of Baltimore.[85] The funds donated to these schools by the city were raised through the city's taxing authority.[86] In addition, the city

[83] 45 MD 310
[84] Id.
[85] Id.
[86] Id.

was allowed to appoint trustees to some of the boards of these schools.[87] Since the opinion in *St. Mary's*, the court opined that no change in the school's governance had taken place and that it was still a private institution.

After showing that the School was essentially a private institution, the Court addressed Clarks' arguments relating to a violation of his *privileges and immunities* under the 14th Amendment by stating that it did not apply. The court noted that "no **State** can abridge the privilege and immunities of citizens of the United States." (emphasis added). The trial court believed that free education is not a privilege and immunity incident to federal citizenship.[88] The bundle of rights that were protected by the privileges and immunities clause was never clearly delineated by the trial court. However, it emphatically believed that the concept of free education was not contained within that sphere of rights incident to citizenship. Because free education was a creature solely undertaken by State legislation, the right to it could not be protected or respected among the several states. If the federal government had take the opportunity to create a system of national education, then the Court believed that a Writ of Mandamus was the appropriate remedy to compel the admission of a citizen who had been denied admission by the use of racially exclusive policies.[89]

Because Clark's arguments failed to show a cause of action under the 14th Amendment, the court saw his claims him as a beneficiary of a contract trying to sue under which he had no remedy to enforce the breach of the contract. Furthermore, the

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[87] Id.
[88] Id.
[89] Id. See also People v. Gallagher, 93 N.Y. 435; Ward v. Flood, 48 Cal., 36; State v. McCam 21 Ohio St., 210; Lehews v. Brummell, 103 Mo., 550

Writ of Mandamus was not the appropriate remedy to enforce an action for breach of contract because the Writ "relates only to the enforcement of duties incumbent by law."[90] Because Clark did not have standing to sue under the contract the court did not have to decide and give effect to the word "pupil" in the Ordinance and Scholarship Contract. In dicta, the court mentioned that the use of the word "pupil" did, however, mean white student.[91] It reasoned that the parties drafted the language at a time when mixed race schooling was not contemplated; and that the Scholarship contract was no longer executory and that both parties had performed.[92] In addition, the City Solicitor had given an opinion stating that there had been no breach by the School and that in the event there had been a breach, the School had waived it right to enforce the contract once it accepted the bylaw modifications.[93]

Finding no colorable claims in Clark's favor, the Order of the court was entered on December 10, 1897 and Clark's Demurrer to the Answer was overruled. In addition, the Writ of Mandamus was dismissed.[94]

The Appellate Proceedings

Phelps and Hawkins immediately filed an appeal on Clark's behalf. The Petitioner's Order of Appeal was filed the same day as the trial court opinion.[95]

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[90] Id at page 24
[91] Id.
[92] Id.
[93] Id.
[94] Id.
[95] See Petitioner's Order of Appeal, dated December 10, 1897.

Clark's formal arguments on appeal were filed with the Court of Appeals on February 15, 1898.[96] Surprisingly, the School filed its appellate brief four days earlier than Clark.[97] He argued on appeal that the trial court had erred in holding that the 1) 14th Amendment to the Constitution of the United States has no application to the case, nor the construction of the ordinance and 2) That the ordinance and contract in question constitute merely a private contract; that the petitioner had no rights in the case other than mere contract rights; that there is no public or legal duty imposed on the Respondent or any other than of a merely private contractual nature, and that this is merely a suit to enforce contract rights of a private character for which mandamus will not lie.

The Appellate Opinion

The Maryland Court of Appeals delivered it opinion in Clark v. Maryland Institute on June 28, 1898.[98] The case was argued before Chief Judge McSherry, and Judge Bryan, Fowler, Briscoe, Page, Boyd and Pearce.[99] The unanimous opinion of the court was drafted by Judge Bryan.[100] The opinion of the Court essentially recited verbatim the trial court's application of the law. The Court refused to find a violation of Clark's constitutional rights under the 14th Amendment because they felt the school was essentially private. It could not find any State action that came within the purview of the 14th Amendment. In a notable quote by the court, Judge Bryan wrote:

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[96] See Petitioner's Appeal Record and Brief, submitted February 15, 1898.
[97] See Respondent's Appeal Record and Brief, submitted February 11, 1898.
[98] 41 A. 126 (1898)
[99] Id.
[100] Id.

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

Judge Bryan and the Maryland Appellate Court, on the cusp of a new century could not have envisioned in 1898 the inescapable problem of the 20th century: "The Color Line."[101] Although this case was not a victory for Robert Clark, the case is an excellent study of the initial arguments used by blacks and black attorneys to bring about equality in education. Although, the Maryland Institute was not a public institution, the appropriation of public monies today under identical circumstances would bring the state within the purview of the fourteenth amendment. The desegregation of the public would take another 56 year in the case of *Brown v. Board of Education*. However, one can see that much of what was articulated in Brown has its roots in *Clark v. Maryland*.

[101] *Souls of Black Folks*, Dubois, W.E.B (1903); written work where Dubois coins the phrase "The Color Line" and indicates that it will be the problem of the 21st century.