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**CLARK V. BOARD OF SCHOOL DIRECTORS:  
REFLECTIONS AFTER 150 YEARS**

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David S. Walker, Mark S. Cady, Brent Appel, Edward  
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ABSTRACT

*On April 14, 1868, the Iowa Supreme Court issued its opinion in Clark v. Board of School Directors, establishing racial integration in public schools and declaring “all the youths are equal before the law.” The court instructed the Muscatine School Board to allow Susan Clark to attend a previously all-white grammar school, stating “the board cannot, in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing or the like.”*

*Now, over 150 years later, we take time to reflect on the impact of this groundbreaking decision. The following series of Reflections discuss the history leading up to the Clark decision, the key players, and the lasting impact this case has had on Iowa law. These Reflections also provide an opportunity to reflect on the current state of our society and legal system, reminding us to continue the legacy of Clark by fighting for equality in all areas of the law and speaking out courageously against injustice.*

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## COMMENCING THE CELEBRATION

### *Earl “Marty” Martin\**

On May 19, 2018, we gathered to celebrate the accomplishments of the Drake University Law School graduating class of 2018. In my commencement address, I discussed the much anticipated celebration to take place later that year—a celebration with a direct connection to our law school and its history. The following text is taken from my commencement address, with minor modifications.

In September 2018, we commemorated the 150 year anniversary of the Iowa Supreme Court’s groundbreaking civil rights decision in the case of *Clark v. Board of School Directors*. This opinion, published in June of 1868, rejected the “separate but equal doctrine” for public education in Iowa<sup>1</sup> 86 years before the United States Supreme Court would reach the same conclusion in *Brown v. Board of Education* in 1954.<sup>2</sup>

The *Clark* litigation was initiated by Alexander Clark on behalf of 12-year-old African American daughter, Susan Clark, who desired to attend Grammar School No. 2 in Muscatine, Iowa.<sup>3</sup> The case began, in the words of the Iowa Supreme Court’s *Clark* opinion, “on the 10th day of September, 1867, said school being in session, she [Susan Clark] presented herself, and demanded to be received therein as a scholar under the common school law; that said defendants refused . . .”<sup>4</sup> Again, in the words of the *Clark* opinion, the board of directors for the Muscatine School District defended their refusal on the grounds that “public sentiment in said independent district is opposed to the intermingling of white and colored children in the same schools, and the best interests of both races require them to be educated in separate schools.”<sup>5</sup>

The procedural posture of the matter at the Iowa Supreme Court was that Alexander and Susan Clark had prevailed at the Muscatine District Court and were defending that victory against an appeal by the board of

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\* President, Drake University

1. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 277 (1868).
2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).
3. *Clark*, 24 Iowa at 267–68.
4. *Id.* at 268.
5. *Id.*

directors.<sup>6</sup> After reciting the legislative history of both applicable provisions of the Iowa state constitution and relevant statutes, the court held, “[T]he board cannot, in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing, or the like.”<sup>7</sup> Again, this was declared by the Iowa Supreme Court 86 years before the U.S. Supreme Court would come to the same conclusion in *Brown*.

Drake’s connection to this remarkable event is that the Iowa Supreme Court opinion was authored by Justice Chester C. Cole, who, along with fellow lawyer George Wright, founded the Iowa College of Law, which would eventually become the Drake University Law School.<sup>8</sup> Additionally, Justice Cole served as the founding Dean of the Iowa College of Law and later served 15 years as Dean of the Drake Law School.<sup>9</sup> Cole Hall, named in Justice Cole’s honor, was constructed on our campus in 1904 as the first purpose-built home for our law school.<sup>10</sup>

When we gathered in September, we celebrated, in particular, two things about the fact that the Iowa Supreme Court rejected the separate but equal doctrine in 1868. First, we celebrated that fidelity to the rule of law resulted in a powerfully just outcome. Second, we celebrated the individual courage it took for that result to come about.

A popular representation of justice in the United States is Lady Justice, who is normally depicted as blindfolded with scales in one hand and a sword in the other. The scales depict the weighing of evidence on its own merits, while the sword represents the sanction or punishment that will befall wrongdoers when justice demands sanction or punishment. More importantly, for our purposes, Lady Justice is blindfolded to remind us that real justice before the law must be impartial; i.e., the result must be arrived at without fear or favor, regardless of wealth, community status, or race.

The holding of the Muscatine District Court, followed by the opinion and holding of the Iowa Supreme Court, upheld the rule of law in the face of what had to be wide-spread public sentiment against allowing, in the words of that time, “colored children to attend school with white children.”

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6. *Id.* at 269.

7. *Id.* at 277.

8. 1 CHARLES BLANCHARD, HISTORY OF DRAKE UNIVERSITY: BUILDING FOR THE CENTURIES 95 (1931).

9. *Id.*

10. *Dedication of New Law Building*, DRAKE DELPHIC, Nov. 18, 1904, at 1.

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That district judge and the Iowa Supreme Court justices joining the majority opinion explicitly rejected the argument that the law should take into account the color of Susan Clark's skin in rendering their rulings. Relying again on language in Justice Cole's opinion, these judicial officers embraced that "all the youths are equal before the law, and there is no discretion vested in the board of directors or elsewhere, to interfere with or disturb that equality."<sup>11</sup>

We celebrate the courage of the parties involved because, without that courage, there would have been no opportunity for such a powerfully just outcome. Certainly, Justice Cole and the justices who joined his opinion showed courage in rejecting the separate-but-equal argument of the defendants in that they would have understood that they were acting against public sentiment. Even more remarkable, the Muscatine District Court judge who held for Susan Clark in the first place showed great courage. This judge would have had to walk out of the courtroom and face a community who, according to the Board of Directors, was very much against integration. And yet, he did not let that sentiment and the inevitable hostility that would follow his act dissuade him from doing his duty as a judge.

We celebrate the courage of Alexander Clark. Mr. Clark was a political leader, an orator, a barber, a real estate investor, a conductor on the Underground Railroad, and a recruiter for the Union Army.<sup>12</sup> Well before initiating the *Clark* case, Mr. Clark had shown himself to be a man of conviction and action. It took great courage to prosecute this case on behalf of his daughter. It took even greater courage to send his daughter to the door of Grammar School No. 2 to demand entry, to assert her right to an education.

We celebrate the unbelievable courage of Susan Clark, the then-11-year-old African American girl who marshalled the strength on September 10, 1867, to claim the right to go to school with the white children of Muscatine. Susan Clark acted in full view of her community by presenting herself at the schoolhouse door and demanding entry. She did not assert her claim anonymously or from afar. She owned her cause, and I like to believe that her display of courage had a whole lot to do with the district court judge and Iowa Supreme Court justices finding the courage within themselves to do the right thing by Susan Clark and by the law.

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11. *Clark*, 24 Iowa at 277.

12. For a more detailed discussion of Alexander Clark's life achievements, see Retired Iowa Supreme Court Justice Robert Allbee's Reflection.

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At the May 2018 commencement, I encouraged our graduates to reflect particularly on Susan Clark and her actions as they prepared to go into the world as alumni of Drake University Law School, and I encourage you all to do the same. You are going to be presented with the challenge of choosing between doing what is convenient, easy, or expedient versus doing what is right. You are going to be presented with the opportunity of choosing to lend your voice and identity to a cause versus remaining silent or in the shadow of anonymity. You need to make the right choices in these instances for yourself. We need you to make the right choices in these instances for the rest of us.

A life well lived is inevitably, in some meaningful way, a life defined by acts of courage when courage is required. Find the courage in yourself to advocate for justice, to improve the lives of others, and leave your part of the world better than you found it.

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SHINE ON, YOU BRIGHT RADICAL STAR:  
*CLARK V. BOARD OF SCHOOL DIRECTORS*  
(OF MUSCATINE)—THE IOWA SUPREME  
COURT’S CIVIL RIGHTS EXCEPTIONALISM

*Russell E. Lovell, II\**

I. INTRODUCTION

In his 2018 State of the Judiciary Address, Iowa Supreme Court Chief Justice Mark Cady hailed *Clark v. Board of School Directors*<sup>1</sup> as one of the most important decisions in the court’s history, characterizing the case as “a defining moment” for the court.<sup>2</sup> Iowa Governor Kim Reynolds, in her Proclamation, quoted not only the Chief Justice but also from an essay written by Drake President Marty Martin, Drake Law Dean Jerry Anderson, and me published January 23, 2018, in the *Des Moines Register*, stating “the Chief Justice is perhaps too modest—the *Clark* ruling is one of the most important Court decisions in the history of American jurisprudence.”<sup>3</sup> In September 2018, Governor Reynolds signed a Proclamation that drew upon themes from the State of the Judiciary Address and the *Des Moines Register* essay and provides a good synopsis of why the *Clark* case reflects greatness:

WHEREAS, the 1868 Iowa Supreme Court decision in *Clark v. Board of Directors* (hereinafter “*Clark v. Muscatine Schools*,”) holding racial segregation of the public schools was unconstitutional, is one of the most important court decisions in the history of American jurisprudence and was hailed by Chief Justice Mark Cady in his 2018 State of the Judiciary Address as “a defining moment” for the Iowa Supreme Court; and

WHEREAS, for 86 years, the Iowa Supreme Court stood virtually alone in rejecting government-imposed segregation, based on the equal

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1. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266 (1868).

2. MARK S. CADY, 2018 STATE OF THE JUDICIARY 12 (2018), <https://www.iowacourts.gov/collections/229/files/424/embedDocument/>.

3. Earl “Marty” Martin, Jerry Anderson & Russell Lovell, *Celebrate the 150th Anniversary of a Defining Moment in Iowa and U.S. History*, DES MOINES REG. (Jan. 19, 2018), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2018/01/19/celebrate-150th-anniversary-defining-moment-iowa-and-u-s-history/1044133001/>.

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rights clause of the Iowa Constitution's Bill of Rights, until the United States Supreme Court decision in *Brown v. Board* in 1954;

WHEREAS, the *Clark v. Muscatine Schools* decision continues to have great vitality and relevance today, not only in its rejection of segregation and racism, but also as the precedent that recognized the Iowa Supreme Court can construe provisions of the Iowa Constitution's Bill of Rights to provide Iowans with greater individual rights protection than the United States Supreme Court has afforded under the Federal Constitution; and

WHEREAS, Justice Chester Cole, the author of the Court's opinion, was the co-founder and long-time dean and faculty member of the Drake Law School, and Alexander Clark, Jr. and Alexander Clark, Sr., the brother and father of Susan Clark (the plaintiff), were the first African American graduates of the University of Iowa College of Law. Both law schools in the state have close ties to the *Clark v. Muscatine Schools* decision; and

WHEREAS, in collaboration with the Iowa Supreme Court, Drake University and its law school, and the University of Iowa College of Law will host a series of celebratory programs and events the week of September 24-29 to commemorate the historic *Clark v. Muscatine Schools* decision and the extraordinary civil rights leadership of Chester Cole and Alexander Clark, Sr.:

NOW, THEREFORE, I, Kim Reynolds, Governor of the State of Iowa, do hereby proclaim September 24-29, 2018, as THE SESQUICENTENNIAL CELEBRATION OF THE IOWA SUPREME COURT'S CLARK V. MUSCATINE SCHOOLS CASE WEEK in Iowa.<sup>4</sup>

Was all of the above hyperbole? Or can the representations and the theme of the Sesquicentennial Celebration's t-shirt be backed up: "Shine On, Bright Radical Star:<sup>5</sup> *Clark v. Board of Directors* (Iowa 1868)"?

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4. KIM REYNOLDS, PROCLAMATION 1 (2018), [https://libguides.law.drake.edu/ld.php?content\\_id=44558361](https://libguides.law.drake.edu/ld.php?content_id=44558361).

5. The "Iowa, Bright Radical Star" quote is attributed to Ulysses S. Grant during his 1868 presidential campaign in recognition of his neighboring state's exceptional leadership on civil rights for African Americans. Though historians seem uncertain as to the precise thinking of Grant when he made his "bright radical star" quotation, I believe it's likely that the Iowa Supreme Court's path-breaking decision in *Clark v. Board of School Directors*, just a few months earlier, and the bravery of Iowa African American troops in the Union cause were prominent in his mind.



This Article will examine the *Clark* decision's powerfully inclusive vision of equality, an equality that envisioned full citizenship for African Americans and people of color, and will confirm *Clark*'s historical significance. Examination of *Clark* in the context of the Iowa Supreme Court's historical civil rights decisions will demonstrate that *Clark* was NOT an outlier, as the court's jurisprudence of that era rejected inequality. All five Iowa Supreme Court precedents were courageous and bold, recognizing important civil rights law principles many years—indeed, in *Clark* and *Coger v. Northwestern Union Packet Co.*<sup>6</sup> nearly a century—in advance of their eventual adoption and recognition by the United States Supreme Court.

*Clark*'s national leadership shines as exceptional. *Clark*, as the Iowa court's very first construction of the equality clauses of the Iowa constitution, embraced a vision of full citizenship racial equality. Not only was it the first court in the nation to hold racial segregation of public schools unlawful, it was the only nineteenth-century court to hold school segregation *unconstitutional*. *Clark*'s national leadership was confirmed, and vindicated, 86 years later by the United States Supreme Court decision in *Brown v. Board of Education* in 1954.<sup>7</sup> *Brown* breathed new life into the Fourteenth Amendment, which had long been dormant due to its own grudging jurisprudence, and resuscitated the nation's promise of equality.<sup>8</sup> *Brown* and *Clark* were also alike in that the equality principles each case established went far beyond prohibiting racial segregation of schools.

*Clark* continues to shine on today as the lead precedent for the Iowa Supreme Court's independent analysis under the Iowa constitution's bill of rights. While the Iowa court cannot provide its residents with less protection than required by the federal Constitution, it can provide—and it has provided—its residents with greater protection so long as it does not violate the federal Constitution in doing so. It is my hope that all Iowans, and especially those associated with the Drake Law School and the University of Iowa College of Law, upon reading the Reflections included in this Clark 150 Article, will be very proud of the close historical ties that both law schools in the state have to this great case and the leaders who brought it about—Alexander Clark, Sr. and Chester C. Cole. I am hopeful this Article will not only serve as a primary resource but will also encourage Iowans not to hesitate to tell this great Iowa story.

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6. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 146 (1873).

7. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

8. *See id.* at 487–88.

## II. THE CLARK CASE

To fully appreciate the *Clark* case, we must go back in time to 1868. It is hard today to comprehend both the outright racial prejudice of the vast majority of white citizens and also the implicit bias of the most progressive of whites. As Justice Brent Appel's Reflection describes, although Iowans eventually played a leadership role in opposing slavery, that by no means meant that Iowans favored full equality for African Americans. Racism was rampant even in the North, including Iowa.<sup>9</sup> The pre-Civil War years were still a time when all but a very few progressive whites could not imagine or fathom blacks as equals.<sup>10</sup> Due to slavery, most blacks had been subordinated their entire lives and, under criminal penalty, had been kept illiterate as well.<sup>11</sup> The person who was about to become President, General U.S. Grant, was a notable exception because of his first-hand observation of the courage and skill of the 200,000 African Americans who had fought in the U.S. Army during the war. President Grant was one of the rare whites who could see the humanity of blacks and their innate potential and proved to be a staunch supporter of full citizenship for them throughout his Presidency.<sup>12</sup>

Alexander Clark had established himself as a leading citizen of Muscatine and Iowa—a prominent businessman, property owner, and a leading civil rights advocate for black equality. In the Iowa Public Television documentary, *Lost in History: Alexander Clark*, the historian Paul Finkelman describes Alexander Clark, Sr. as the most important African American west of the Mississippi River during the period from 1840 to 1880.<sup>13</sup> A full discussion of Alexander Clark's life and involvement in everything from the Underground Railroad to Iowa's campaign for African American suffrage is available in the Reflection from retired Iowa Supreme Court Justice Robert Allbee.

In 1867 Alexander Clark, on behalf of his 12-year old daughter, Susan, took up another cause. He wrote a letter to the *Muscatine Journal* in which

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9. Brent Appel, *Clark v. Board of School Directors*, in *Clark v. Board of School Directors: Reflections After 150 Years*, 67 DRAKE L. REV. 169, at 237, 244–45 (2019).

10. *See id.*

11. *See generally* Kim Warren, *Literacy and Liberation*, 33 REVS. AM. HIST. 510 (2005) (reviewing HEATHER ANDREA WILLIAMS, *SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM* (2005)).

12. *See, e.g.*, RON CHERNOW, *GRANT* 654–56, 685 (2017).

13. Iowa Pub. Television, *Lost in History: Alexander Clark*, YOUTUBE (Dec. 11, 2015), [https://www.youtube.com/watch?v=QR7BL\\_mAFxA](https://www.youtube.com/watch?v=QR7BL_mAFxA).

he expressed his concern about the unequal quality of the city's segregated schools, the better funding of the white schools, and the reality that the "colored" school had never qualified a student to pass the entry exam for high school.<sup>14</sup>

Clark requested that Susan be allowed to attend the Grammar School No. 2, which was the neighborhood school in the subdistrict in which she resided, rather than a separate colored school more than a mile away.<sup>15</sup> The Muscatine School Board denied Clark's request, citing its racial segregation policy as the reason for the denial and stating this policy reflected the prevailing views of the white parents of school-age children in Muscatine.<sup>16</sup>

Given the mindset of most whites at the time, the segregation policy was seen as a reasonable—even benign—classification for the school board to make as the black children were not being denied education or excluded from the public schools.<sup>17</sup> Although Clark had been a fearless advocate for racial equality for nearly two decades, he no doubt had to weigh very carefully the decision to challenge the school board's segregation policy in court. Make no mistake, initiation of this civil rights lawsuit by an African American to alter the social order of the community risked retaliation by members of the community. That Alexander Clark was a successful businessman, property owner, and community leader arguably reduced the risk somewhat; on the other hand, because of his business and personal resources, he also had much more to lose.<sup>18</sup>

The petition filed by the Clarks states the suit was brought on behalf of Susan Clark by her father, Alexander Clark, Sr., as her next friend, and

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14. See *Alexander Clark Fights for Equal Rights*, IOWA PUB. TELEVISION, <http://www.iptv.org/iowapathways/myath/father-fights-equal-rights> (last visited Feb. 5, 2019).

15. See *id.*

16. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 268, 270 (1868).

17. See, e.g., *id.* at 280 (Wright, J., dissenting).

18. On July 1, 1878, the Clark's Muscatine home caught fire and was destroyed: "The cause was never determined, but some believed that a racist arsonist angry over young Alexander's impending law school enrollment [at the University of Iowa] was to blame; both he and their live-in housekeeper had seen people outside the house shortly before the fire." David Junius Brodnax, Sr., "Breathing the Freedom's Air": The African American Struggle for Equal Citizenship in Iowa, 1830–1900, at 279 (Dec. 2007) (unpublished Ph.D. dissertation, Northwestern University) (on file with Northwestern University), [https://libguides.law.drake.edu/ld.php?content\\_id=46151953](https://libguides.law.drake.edu/ld.php?content_id=46151953).

alleges he was a resident landowner and tax payer in the city of Muscatine.<sup>19</sup> The petition reiterated the concerns Clark originally expressed in his letter to the *Muscatine Journal* and to the Muscatine School Board.<sup>20</sup>

The school board did not dispute that Susan Clark resided within the boundaries of Grammar School No. 2 (her neighborhood school subdistrict), was qualified for admission, and applied for admission on September 10, 1867.<sup>21</sup> The school board's answer admitted their rejection of Susan Clark was based on her race in accord with the board's segregation policy.<sup>22</sup> It stated the board had offered to create a grammar class in the colored school and to hire a competent teacher.<sup>23</sup> It also asserted "that public sentiment in said independent district is opposed to the intermingling of white and colored children in the same schools, and the best interest of both races require them to be educated in separate schools."<sup>24</sup>

Muscatine attorneys J. Scott Richman and James Carshaddan represented the Clarks in the district court. On appeal the Attorney General of Iowa, Henry O'Connor, acting in his private capacity, also served as their co-counsel.<sup>25</sup>

The district court ruled in favor of the plaintiff and issued a writ of mandamus ordering admission of Susan Clark to the neighborhood school.<sup>26</sup> The school board appealed to the Iowa Supreme Court, and in a 3–1 decision, the court affirmed the ruling in Clark's favor.<sup>27</sup> Justice Chester Cole, joined by Justices Joseph Beck and John Dillon,<sup>28</sup> authored the majority opinion. In the opening sentence, Cole set forth the analytical framework that would guide the court's disposition of the case: "In view of the principle of equal rights to all, upon which our government is founded,

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19. *Clark*, 24 Iowa at 267.

20. *See id.* at 268.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. ROBERT R. DYKSTRA, BRIGHT RADICAL STAR: BLACK FREEDOM AND WHITE SUPREMACY ON THE HAWKEYE FRONTIER 229 (1993).

26. *See Clark*, 24 Iowa at 277.

27. *Id.*

28. For a background of Cole, see generally David Walker, *Remembering the Dedication of Cole Hall and the Man for Whom It Was Named*, in *Clark v. Board of School Directors: Reflections After 150 Years*, 67 DRAKE L. REV. 169, at 217 (2019). For personal background on Justices Beck and Dillon, see Appel, *supra* note 9, at 240.

it would seem necessary, in order to justify a denial of such equality of right to any one, that some express sovereign authority for such denial should be shown.”<sup>29</sup>

The court examined in detail the Iowa statutes governing the common schools, particularly as they addressed the schooling of children of color and their interface with the equality and education amendments to the Iowa constitution in 1857.<sup>30</sup> The court’s ultimate decision reflects a melding of Iowa constitutional and statutory law, and therefore, close examination of the court’s reading of the legislative and constitutional history is necessary.

#### A. Legislative History and 1857 Constitutional History

In 1846, the legislature established a system of common schools that would be free but expressly restricted schooling to white persons.<sup>31</sup> This racially exclusionary law was re-enacted in 1851, at which time the law exempted the real and personal property of African Americans and mulattos from taxation for school purposes, implicitly recognizing the unfairness of taxing persons of color whose children were excluded from public schools.<sup>32</sup>

Although Justice Cole made the “principle of equal rights to all” the principal basis for his ruling,<sup>33</sup> his opinion surprisingly did not mention the ways in which the 1857 constitution significantly advanced the cause of racial equality. The constitution was amended in two articles to articulate broad statements of equality and eliminate certain racial exclusions, and the convention put on the ballot a proposed extension of the right to vote to African Americans.<sup>34</sup> Although it involved only one word, a most important change was made to the first sentence in the bill of rights, article I, section 1, substituting *equal* for *independent*: “All men . . . are free and equal.”<sup>35</sup> Justice Cole did mention the new constitution’s article IX, section 12 that expanded the state’s commitment to free education through public schools, and he highlighted a key portion of its text: “The Board of Education shall

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29. *Clark*, 24 Iowa at 269.

30. *Id.* at 272–77.

31. *Id.* at 270.

32. Iowa Code § 1160 (1851).

33. *Clark*, 24 Iowa at 269.

34. See Mark S. Cady, *A Pioneer’s Constitution: How Iowa’s Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 *DRAKE L. REV.* 1133, 1137–40 (2012) [hereinafter Cady, *A Pioneer’s Constitution*].

35. *Id.* at 1138.

provide for the education of *all the youths of the State*, through a system of common schools.”<sup>36</sup>

Not all the 1857 constitutional history favored racial equality. On the specific issue of school segregation, there is constitutional history that the court did not discuss that sheds some mixed light on the framers’ intentions. As Professor Todd Pettys’s *The Iowa State Constitution* treatise points out, during the consideration of the article IX amendment that provided for the education of “all the youths of the State,” some delegates wanted to continue the exclusion of nonwhites from the public schools.<sup>37</sup> Delegate James Wilson pointed out there was nothing in the proposed amendment “that would require the state to place black and white children in the same schools; if legislators preferred to establish racially segregated schools . . . they could do so.”<sup>38</sup> By a vote of 10–22, the delegates rejected a constitutional provision that would have restricted public schooling to white children; the delegates then adopted, by a vote of 22–10, the provision requiring that public education be provided to “all the youths of the State.”<sup>39</sup> Thus, the constitutional history confirmed new article IX required that all children, regardless of race, be afforded a free public education, but it did not address whether integration was required or whether school districts had the discretion to segregate students based on their race.<sup>40</sup>

In the year after the constitutional convention, in 1858, the legislature enacted 96 education statutes, including one requiring local school boards to “provide for the education of colored youth in separate schools” except by the unanimous consent of persons sending their children to the school in the subdistrict.<sup>41</sup> All 96 statutes, including the segregation statute, were struck down by the Iowa Supreme Court in *District Township of Dubuque v. City of Dubuque* as ultra vires because the constitution delegated educational authority over the common schools to the board of education during the period from 1858 to 1863.<sup>42</sup>

In 1860, the board of education reasserted its legislative authority and enacted a law providing for a system of common schools in each subdistrict

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36. *Clark*, 24 Iowa at 271.

37. TODD E. PETTYS, *THE IOWA STATE CONSTITUTION* 32 (2d ed. 2017).

38. *Id.*

39. *Id.* at 33.

40. *Id.*

41. *See* *Dist. Twp. of Dubuque v. City of Dubuque*, 7 Iowa 262, 266 (1858).

42. *Id.* at 264.

for the education of “youth between the ages of five and twenty-one years.”<sup>43</sup> The *Clark* court noted the act made “[n]o exemption from taxation of the property of colored persons.”<sup>44</sup> In 1862, and again in 1864, new legislation made reference to the “instruction of youth.”<sup>45</sup> In 1864, the legislature abolished the board of education and reasserted its authority over management of the common schools.<sup>46</sup>

Justice Cole drew the following conclusions from this Iowa legislative history. First, “since the act of March 12, 1858, there has been no mention of, or discrimination in regard to, color, made.”<sup>47</sup> Second, the legislative history confirmed an evolution from total exclusion of children of color to racial segregation of them (unless their inclusion was approved by unanimous consent of all parents) to “allowance of equal common school privileges to all.”<sup>48</sup>

## B. Clark’s *Constitutional Analysis*

### 1. *Justice Cole’s Majority Opinion*

Justice Cole’s rationale reflects a melding of constitutional and statutory analysis. The constitutional principle of equality emphasized in the very first sentence of his opinion is at the core of his reasoning, but Justice Cole also relied on article IX, section 12, which required that provision shall be made “for the education of *all the youths of the State* through a system of common schools.”<sup>49</sup> The court emphasized that this “constitutional declaration has been effectuated by enactments providing for the ‘instruction of youth’ . . . without regard to color or nationality.”<sup>50</sup>

The school board relied heavily upon Chief Justice Leland Shaw’s analysis in *Roberts v. City of Boston* that, despite the Massachusetts constitution’s equality clause, the school board retained vast discretion regarding pupil assignments, including the discretion to segregate students

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43. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 271 (1868).

44. *Id.*

45. *Id.* at 271–72.

46. *See id.* at 271.

47. *Id.* at 272.

48. *Id.* at 273.

49. *See id.* at 271.

50. *Id.* at 274.

based on race.<sup>51</sup> While the common schools were required to provide education to all children, regardless of race, the constitution and laws were silent with regard to each school board's authority to establish segregated schools, leaving the issue to the discretion of each school board.<sup>52</sup> The school board argued that it had plenary power to make rules and regulations to govern the school and that segregation was the policy preference of the district's inhabitants; therefore, its segregation rule was not unconstitutional.<sup>53</sup>

Justice Cole acknowledged that, under Iowa law, school boards did have considerable discretion<sup>54</sup> but found the Iowa constitution's equality and education clauses fix "the *equality of right* in all the youths," thus limiting the boards' discretion.<sup>55</sup> Justice Cole reasoned that if the school board had the discretion to "exclude African children from our common schools, and require them to attend (if at all) a school composed wholly of children of that nationality, they would have the same power and right" to exclude and segregate children of German, French, Irish, English, and other nationalities.<sup>56</sup> Justice Cole's inclusive vision saw these white ethnic groups and African Americans "together constitut[ing] the American [nationality]," and state-imposed segregation would run counter to the equality principle of article I.<sup>57</sup> Although Justice Cole did not expressly characterize equality under the Iowa constitution as color blind, that would be the contemporary characterization: "Our statute does not either in letter or in spirit, recognize or justify any such distinction or limitations of right or privilege on account of nationality."<sup>58</sup>

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51. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 208 (1849). The Massachusetts constitution's equality clause, both in its text and its organizational placement within the structure of the constitution, is virtually identical to the Iowa constitution's equality clauses. Compare MASS. CONST. pt. I, art. I, with IOWA CONST. art. I, § 1. Neither the *Clark* majority nor dissenting opinions mention this similarity. While *Roberts* was distinguishable as having been overruled by the Massachusetts legislature, MASS. GEN. LAWS ch. 256, § 1 (1855), and having preceded the Civil War, Justice Cole declined to discuss the *Roberts* case at all.

52. See *Roberts*, 59 Mass. at 209–10.

53. See *id.* at 205, 208.

54. *Clark*, 24 Iowa at 275.

55. *Id.*

56. *Id.* at 276.

57. *Id.*

58. *Id.*



Although this key sentence refers to the education statute, Cole characterized the education statute as “hav[ing] declared, pursuant to a constitutional requirement, that *all the youths* of the State shall be admitted to the common schools.”<sup>59</sup> In rejecting the school board’s separate-but-equal argument, the court recognized the “policy of the government to organize into one *harmonious* people, with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation and happiness of *mankind*.”<sup>60</sup> Were it to uphold the power of the school board to segregate students on the basis of race, the court’s ruling would “sanction a plain violation of the spirit of our laws,” and it predicted that racial segregation “would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of the races.”<sup>61</sup> We know from our nation’s experience following *Plessy v. Ferguson*<sup>62</sup> that, tragically, Justice Cole’s dire forecast was to come true for much of the nation.

Justice George Wright agreed the Iowa constitution and laws provided for the education of all youths by a system of common schools without distinction of color. Wright would “have no hesitation in holding, that, if the scholar was so far advanced that she could not receive proper instruction in the colored school, and such instruction was not furnished there, she could demand admission to the school from which she was excluded.”<sup>63</sup> However, he dissented because he would have found the school board’s racial segregation was within its discretion and consistent with the equal-application principle: “There is no absolute legal right in a colored child to attend a white school rather than one made up of children of African descent; just as there is no such right in a white child to attend a colored school.”<sup>64</sup>

*Clark* was a courageous and visionary decision that articulated a powerful vision of an inclusive U.S. society. It reflected a dynamic “living document” approach to constitutional interpretation that Chief Justice Cady, writing a century and a half later, confirmed continues to guide the court today:

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59. *Id.* at 274 (first emphasis added).

60. *Id.* at 276.

61. *Id.*

62. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

63. *Clark*, 24 Iowa at 278 (Wright, J., dissenting).

64. *Id.* at 279.

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[This approach] maintains the constitution was designed as a foundation for a society to grow within its established belief system in a manner consistent with the increasing knowledge and understanding of the world. In this way, constitutional interpretation reflects the reality of our understanding today—not merely the scope of its meaning limited by our understanding of the world at the time the constitution was written. This approach examines how the powerful and iconic general constitutional principles, such as equality, should be applied today to preserve their importance in our lives today in light of the evolving circumstances, understanding, and knowledge of our day.<sup>65</sup>

The originalist “view of constitutional interpretation is that the text of a constitution should be interpreted as it was originally understood at the time it was drafted and ratified.”<sup>66</sup> An originalist would look at the 1857 constitutional discussions and the rejected amendments to article IX and quite possibly may have upheld the school board’s segregation policy as permissible. Originalists would point out that while the proposed constitutional restriction of schooling to whites was rejected, the 1857 Constitution contains no provision requiring integrated schools and that some proponents of the article IX education “of all the youths” amendment had represented that segregated schools was a legislative option. Indeed, the very next year the legislature enacted a statute that required segregated schools, and while all education laws enacted in 1858 were invalidated in the *City of Dubuque* ruling, the court’s rationale did not address the constitutionality of segregation.<sup>67</sup> Since the legislature did not thereafter exercise its legislative option one way or the other—school segregation was neither required, authorized, or prohibited by subsequent legislation—an originalist might have concluded this legislative silence effectively delegated discretion as to segregation to the local school boards.

The court in *Clark* chose the living-constitution approach, which allowed the justices’ decision to be informed by the better appreciation of the human potential of African Americans after observing their extraordinary heroism and performance in the Union Army during the Civil War.<sup>68</sup> This did not restrict the meaning of equality to views expressed in 1857 which necessarily were uninformed by—and could not possibly have predicted—the performance of the African American soldiers during the Civil War. A century and a half later Chief Justice Cady explained that the

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65. Cady, *A Pioneer’s Constitution*, *supra* note 34, at 1142 (footnotes omitted).

66. *Id.*

67. *See* Dist. Twp. of Dubuque v. City of Dubuque, 7 Iowa 262, 266 (1858).

68. *See* Cady, *A Pioneer’s Constitution*, *supra* note 34, at 1139–40.

constitutional-interpretation approach fashioned in *Clark* continues to guide the court today:

[T]he Iowa Supreme Court has strived to view the constitutional meaning of equality through the lens of what is understood today. . . . Our court has been a pioneer because we take the time, as we must, to venture into an examination of our constitutional beliefs free from the view of the past, but only to better see if our past understanding has been eclipsed by the truth of today.<sup>69</sup>

## 2. Principle of Constitutional Avoidance

Justice Cole concluded the legislative history demonstrated that children of color were entitled to “equal common school privileges” and this legislation denied local school boards any discretion to segregate their schools. Cole stated that his reading of legislative history was influenced by the foundational “principle of equality for all” and the education article in the Iowa constitution.<sup>70</sup> However, as discussed above, there was more ambiguity regarding the legislative history than Justice Cole’s opinion let on. Although not cited by the court, there was also a longstanding principle of constitutional avoidance recognized by both the United States Supreme Court and the Iowa Supreme Court that strongly supported Cole’s statutory construction.<sup>71</sup> Whenever there is a serious doubt about the constitutionality of one reading of a statute but another reasonable interpretation of the statute would avoid the constitutional question, the constitutional-avoidance principle counsels the court to construe the statute so as to avoid the constitutional question.<sup>72</sup>

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69. Mark S. Cady, *The Vanguard of Equality: The Iowa Supreme Court’s Journey to Stay Ahead of the Curve on an Arc Bending Towards Justice*, 76 ALBANY L. REV. 1991, 2000 (2012–2013) [hereinafter Cady, *The Vanguard of Equality*]; see also Cady, *A Pioneer’s Constitution*, *supra* note 34, at 1147 (“[T]he constitutional views expressed by the Iowa Supreme Court in recognizing rights since 1857 have been the views derived from the better understanding of the world achieved by society over time, and have been properly found by judges only after the understanding has been subjected to the scrutiny of a courtroom designed to allow the truth to be revealed.”).

70. See *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 269 (1868).

71. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 707 (2012) (joint dissent); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *State v. Ramos*, 149 N.W.2d 862, 865 (Iowa 1967).

72. See, e.g., *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 563 (majority opinion) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

### 3. Key Take Aways from the Clark Ruling

Justice Cole's opinion recognized the school board's separate-but-equal policy for what it was—an invidious racial classification that disguised its inequality with its equal-application argument. The fallacy in the board's argument also sought to switch the court's focus from equality to adequacy, as the school district contended its constitutional obligation was satisfied by its provision of an elementary school for the African American students.<sup>73</sup> The court was not deceived. It recognized the policy was a racial classification that subordinated African Americans and that such subordination ran counter to the nation's goal of a national community, one harmonious people.<sup>74</sup> The court carefully avoided using the words *white supremacy* so as not to be accusatory. Instead it engaged in artful persuasion as to the wrongfulness of the racial classification: if it were constitutional to segregate blacks, it would necessarily be constitutional to segregate white ethnic groups, such as Germans and Irish, based on ethnicity or on religious grounds.<sup>75</sup>

Justice Edward Mansfield's reflection piece, *Clark and Citizenship*, explains that “two themes—equality and citizenship—drove the outcome of the case.”<sup>76</sup> Justice Mansfield praises the continuing vitality of Cole's citizenship insight and observes: “We should not disregard the importance of citizenship as a constitutional principle today.”<sup>77</sup>

Although events later in 1868 were to strongly support the civil rights cause, those developments did not influence the court as it decided *Clark* on April 14, 1868—three months *prior to* the ratification of the Fourteenth Amendment to the U.S. Constitution and seven months *prior to* the November election, in which Ulysses S. Grant was elected President and Iowa voters passed the amendments to the Iowa constitution deleting racial designations and granting African Americans the right to vote.<sup>78</sup> However, the Iowa legislature had given final approval to the black suffrage state

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73. See *Clark*, 24 Iowa at 279 (Wright, J., dissenting) (“[If Clark] was allowed to attend a school in the proper district, with suitable instruction furnished to others, then I know of no principle upon which she can complain.”).

74. See *id.* at 276 (majority opinion).

75. See *id.*

76. Edward Mansfield, *Clark and Citizenship*, in *Clark v. Board of School Directors: Reflections After 150 Years*, 67 DRAKE L. REV. 169, at 247, 247 (2019).

77. *Id.*

78. PETTYS, *supra* note 37, at 40–41.

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constitutional amendment on March 31 and ratified the Fourteenth Amendment a few days later.<sup>79</sup>

The Iowa Republican Party was strongly behind the black suffrage amendment, and Cole himself in 1865, in his individual capacity, was one of the first leaders to take a strong public stance in support of granting blacks the right to vote.<sup>80</sup> Undeniably, the claim of African American soldiers to full citizenship rights resonated not only in the voting-amendment campaign but also in the school desegregation case. Notably, all four justices had been staunch supporters of the Union cause in the Civil War.<sup>81</sup> The legislature's approval of the Iowa constitutional amendment granting blacks the right to vote was a strong indicia of political support, but the public vote had not yet been taken when the court decided *Clark*. The fear of whites that their schools would be inundated was less of a factor in Iowa because “[t]he small number of black children meant that the consequence of integration were greatly lessened for whites. . . . [I]n Muscatine, for example, integration would bring only a few dozen black children into schools with more than 2300 whites.”<sup>82</sup>

The significance of the fact that the Iowa Supreme Court in *Clark* was the first court in the nation to strike down public-school segregation cannot be overstated—it took great courage to be the trailblazer when school segregation was the practice in the majority of jurisdictions, including the District of Columbia. That the *Clark* ruling was vindicated by the U.S. Supreme Court 86 years later in its federal constitutional ruling in *Brown* is an indisputable barometer of the Iowa Court's leadership. But, the fact the Iowa Supreme Court held its ground for 58 years until *Plessy* was finally overruled—never acquiescing or capitulating to the separate-but-equal segregation precedents of *Plessy* and the vast majority of state courts—marks it as exceptional. That *Clark* was based, in significant part, on state constitutional grounds, made it revolutionary and transformational. *Clark* made the Iowa Supreme Court the national leader, the path breaker, on racial equality—the great issue of that era—and Iowa did not retrogress on its commitment to integrated education, even as the nation's commitment flagged with the ending of Reconstruction and eventually was crushed with *Plessy* and the federal government's retrenchment on civil rights.

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79. *Id.* at 40.

80. *See* Walker, *supra* note 28, at 229–30.

81. Brodnax, Sr., *supra* note 18, at 231.

82. *Id.* at 229.

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### III. HISTORICAL CIVIL RIGHTS DECISIONS OF THE IOWA COURT IN CONTEXT

The real meaning of a court's leadership and courage requires testing over time. Was *Clark* a one-off or an outlier? The Iowa Supreme Court had four other civil rights decisions that furthered the quest for racial and gender equality in the nineteenth century, and review of these cases makes clear that *Clark* was not an outlier or a one-off in the Iowa Supreme Court's jurisprudence. *Clark* was the trailblazer, the first decision to construe the Iowa constitution's equality clauses, and it was the most far reaching of the five great civil rights decisions by the court during this era—but it did not stand alone. In addition to *Clark* there was the antebellum *In re Ralph* decision<sup>83</sup> and three post-Civil War *Clark* era decisions: *In re Arabella Mansfield*,<sup>84</sup> *Coger v. Northwestern Union Packet Co.*,<sup>85</sup> and *Smith v. Directors of Independent School District of Keokuk*.<sup>86</sup>

#### A. 1838–1884: The Iowa Court's Golden Era

It is fitting to begin with the very first decision of the Iowa Supreme Court, the 1839 decision in *In re Ralph*. Although *In re Ralph* preceded the *Clark* era, it is fairly included amongst the court's great equality decisions for its symbolism and result—a clear commitment to abolition and freedom from the outset of the Iowa Territory. The *In re Ralph* decision arose during the era of slavery and the Fugitive Slave Act and preceded Iowa statehood and the Civil War. *In re Ralph* was propitiously announced on July 4, 1839.<sup>87</sup> While its effect was limited, it struck a strong symbolic blow for freedom.

Ralph was a slave who, with his master Montgomery's permission, had come from Missouri to work in the lead mines in Iowa and whose earnings were to purchase his freedom.<sup>88</sup> After four years had passed, his master

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83. *In re Ralph*, Morris 1 (Iowa 1839).

84. Although a copy of this opinion is not available, a discussion of the case is found in Aleta Wallach, *Arabella Babb Mansfield (1846–1911)*, WOMENS RTS. L. REP., Apr. 1974, at 3, 3.

85. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (1873).

86. *Smith v. Dirs. of Indep. Sch. Dist. of Keokuk*, 40 Iowa 518 (1875). Arguably, *Dove v. Independent School District of Keokuk*, 41 Iowa 689 (1875), constituted a fifth post-Civil War decision. However, since *Smith* and *Dove* were decided in the same year, involved the same school district, and stand for the same principle of constitutional law, I treat the two cases as one.

87. See Cady, *A Pioneer's Constitution*, *supra* note 34, at 1136.

88. DYKSTRA, *supra* note 25, at 8–10.

claimed Ralph had not made the required \$550 payment and had bounty hunters seize him.<sup>89</sup> The Iowa Supreme Court upheld a writ of habeas corpus freeing Ralph, holding that he was not a fugitive slave because his master agreed to his work in Iowa and that Ralph was entitled to his freedom because he had spent four years' time in the free territory of Iowa.<sup>90</sup>

The Iowa court was a territorial court in 1839 and therefore applied federal law. The court found that slavery had been barred by Congress in the Northwest Territory, and applying cutting-edge principles of equal protection law (as the Fourteenth Amendment was still 29 years away), the court came down on the side of freedom:

Property, in the slave, cannot exist without the existence of slavery; the prohibition of the latter annihilates the former, and, this being destroyed, he becomes free. . . . [W]hen [the claimant] applies to our tribunals for the purpose of controlling, as property, that which our laws have declared shall not be property, it is incumbent on them to refuse their co-operation. When, in seeking to accomplish his object, he illegally restrains human being of his liberty, it is proper that the laws, which should extend equal protection to men of all colors and conditions, should exert their remedial interposition.<sup>91</sup>

The court's holding was consistent with the English *Somerset v. Stewart* case, which held slavery was so odious in terms of natural law that a slave who lived in a free territory for a meaningful length of time acquired his freedom.<sup>92</sup> Unlike *Clark*, *In re Ralph* was not path breaking in terms of the law as the *Somerset v. Stewart* case principle was recognized by many state courts, including Iowa's neighboring slave state of Missouri.<sup>93</sup>

The *In re Ralph* decision was in direct contrast to the tragic *Dred Scott v. Sandford* decision of the United States Supreme Court, 18 years later in

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89. *Id.*

90. *In re Ralph*, Morris 1, 7 (Iowa 1839).

91. *Id.*

92. *Somerset v. Stewart* (1772) 98 Eng. Rep. 499; Lofft 1.

93. In 1852, in the first round of the *Dred Scott* litigation, the Missouri Supreme Court overturned its prior precedent and held that a slave who had spent four years in free territory did not lose his slave status. *Scott v. Emerson*, 15 Mo. 576, 584–87 (1852). The court was forthright in explaining that its decision to overrule precedent was influenced by the changing political climate regarding slavery: “Times are not now as they were when the former decisions on this subject were made.” *Id.* at 586.

1857.<sup>94</sup> The *Dred Scott* decision held that African Americans, even those who had been freed, could never become United States citizens and therefore could not bring suit in federal courts.<sup>95</sup> The Court struck down the federal statute that barred slavery in the Northwest Territory as unconstitutional.<sup>96</sup> As a result, the Court refused to grant Dred Scott his freedom even though he had spent four years' time in the free states of Illinois and Minnesota.<sup>97</sup> The Court's outrageous denial of citizenship ruling was eventually repudiated by Section 2 of the Fourteenth Amendment granting birthright citizenship.

Justice Cole participated in all four of the post-Civil War decisions.<sup>98</sup> *Clark*, decided in 1868, was the first of the decisions to be made after Iowa's statehood and after the Civil War, and it was the first decision of the court construing the new equality clauses of the 1857 Constitution.

The second of the court's post-Civil War civil rights decisions, involving the admission of Arabella Mansfield to the practice of law, was decided one year after *Clark* in 1869. After graduating from Iowa Wesleyan University, Arabella Babb Mansfield apprenticed in the Ambler Law Office and then passed the Iowa bar examination with high honors.<sup>99</sup> The Iowa Code § 1610 provided that "any white male person" was eligible to become a lawyer. Nonetheless, Mansfield's application for admission to the bar was approved by District Court Judge Francis Springer. Rather than construing the statute to exclude those not specifically listed as eligible for admission to the practice of law (women and persons of color), Judge Springer construed the statute to be no bar to the admission of a woman, reasoning "the affirmative declaration that male persons may be admitted is not a denial of the right of females."<sup>100</sup> The Iowa Supreme Court let Judge Springer's decision stand, and in 1870, the Iowa legislature ratified Judge Springer's unconventional

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94. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

95. *See id.* at 452–54.

96. *See id.* at 455 (Wayne, J., concurring).

97. *See id.* at 452–54 (majority opinion).

98. *Chester C. Cole (1864–1876)*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/for-the-public/iowa-courts-history/past-justices/chester-c-cole/> (last visited Feb. 6, 2019).

99. Wallach, *supra* note 84, at 3.

100. *Id.* In contrast, three years later, the U.S. Supreme Court upheld the Illinois Supreme Court's decision to deny Myra Bradwell a law license on the ground that women were not eligible to become lawyers. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872). The Court found this gender discrimination did not violate the Privileges and Immunities Clause or the Equal Protection Clause of the Fourteenth Amendment. *Id.*



statutory construction by striking the words *white male* from the statute governing licenses to practice law.<sup>101</sup>

The third of the court's post-war civil rights decisions, *Coger v. Northwestern Union Packet Co.*, was decided in 1873.<sup>102</sup> *Coger* warrants close examination because of its extensive reliance on the *Clark* decision, including its confirmation of the Iowa constitution's equality clause as the grounding for the *Clark* decision and its refusal, like *Clark*, to accept a minimalist vision of constitutional equality. It is important to note there was no Iowa statute that barred racial discrimination by a common carrier or in public accommodations generally.<sup>103</sup>

Emma Coger, a school teacher of mixed race<sup>104</sup> in Quincy, Illinois, was returning on a Mississippi River steamboat from a visit to Keokuk. Though she had a ticket to the first-class dining table, she was forcibly removed by the captain based on a company regulation that restricted first-class dining to whites.<sup>105</sup> Coger filed suit in the Iowa district court, alleging the tort of assault and battery, and won a jury verdict for \$250 as damages.<sup>106</sup>

The company argued that it was not excluding the plaintiff from transportation on its boat nor from receiving a meal, but only from the first-class dining area.<sup>107</sup> The Iowa Supreme Court held the steamboat company's practice was discriminatory, and its unconstitutionality was governed by the *Clark* holding "that the directors of a public school could not forbid a colored child to attend a school of white children simply on the ground of negro parentage, although the directors provided competent instruction for her at a school composed exclusively of colored children."<sup>108</sup>

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101. Act of Mar. 8, 1870, 1870 Iowa Acts 21; see PETTYS, *supra* note 37, at 42 n.206.

102. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 145 (1873).

103. See generally *id.*

104. Coger was a quadroon, and her lawyers, in their zealous efforts to uphold the verdict, even argued that since "white blood predominates in her veins, she is, in law, to be regarded as belonging to the white race, and is not, therefore, subject to rules or restrictions that may be imposed upon negroes." *Id.* at 153. The court refused to be drawn into deciding the case along blood lines, pointing out such reasoning was "obsolete" and no longer persuasive authority "anywhere within the jurisdiction of the federal constitution, and most certainly not in Iowa." *Id.* (emphasis added).

105. *Id.* at 147–49.

106. *Id.* at 146–47.

107. See *id.* at 150–52.

108. *Id.* at 154 (citing *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 267 (1868)).

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Chief Justice Beck found the defendant's actions violated Coger's rights of contract and property—economic interests—and applied the broad equality language of *Clark* to this public transportation setting: “[T]he plaintiff was entitled to the same rights and privileges while upon defendant’s boat . . . which were possessed and exercised by white passengers.”<sup>109</sup> In the majestic words of *Clark*, the *Coger* court made clear the constitutional origins of these rights: “These rights and privileges rest upon the equality of all before the law, the very foundation principle of our government.”<sup>110</sup>

The court rejected the company's argument that dining was a “social right” and not protected by the constitution and laws and, in doing so, expressly reinforced the *Clark* vision of full citizenship equality.<sup>111</sup> The court rejected a minimalist vision of equality, a limited form of protection against discrimination that focuses on inadequacy rather than equality. *Coger* confirmed that the equality embraced in *Clark* was not crabbed or limited—it was not second-class citizenship.

The Iowa Supreme Court unanimously affirmed the verdict, concluding that the evidence supported the jury's finding that Coger had been removed from the dining table solely because of her color and holding Defendant steamboat company's action violated both Coger's Iowa constitutional right of equality and federal law.<sup>112</sup> The court held that its state constitutional holding was based upon *Clark*, which it independently found as sufficient basis for its holding, and was in no way reliant upon its federal law holdings:

[*Clark*] is planted on the broad and just ground of the equality of all men before the law, which is not limited by color, nationality, religion or condition in life. This principle of equality is announced and secured by the very first words of our State constitution which relate to the rights of the people in language most comprehensive, and incapable of misconstructions, namely: “All men are, by nature, free and equal.” Art. 1, § 1. Upon it we rest our conclusion in this case.<sup>113</sup>

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109. *Id.* at 150.

110. *Id.* at 153.

111. *Id.* at 157–58.

112. *Id.* at 160.

113. *Id.* at 154–55.

Justice Cole's melding of constitutional and statutory analysis in *Clark* left some doubt that the Iowa constitutional equality principle rooted in article I, section 1 was the principal ground of the *Clark* ruling, but those doubts were unequivocally removed by *Coger*.<sup>114</sup> Although *Coger* and *Clark* "cited Section 1, but not Section 6, for dispositive equality principles," Professor Pettys observes, "[I]t is Section 6—not section 1—that principally functions today as the Iowa Constitution's equal protection provision."<sup>115</sup> Professor Pettys further observes, "Section 1's more common role in the law of equality today is to articulate a premise on which Section 6's protections are built."<sup>116</sup>

Although *Coger* is principally cited for its full-citizenship racial-equality holding, its implicit gender-equality holding was path breaking too. Though treated matter of factly, the court obviously construed article I, section 1's male noun to include the female plaintiff, as did Judge Springer in the licensing of Arabella Mansfield (and, implicitly, as did the Iowa Supreme Court in allowing Springer's construction to stand).

The *Coger* ruling barring discrimination by a common carrier, like that of *Clark*, was a trailblazer. Professor Brodnax reports, "Nearly every other court around the country refused to use [*Coger*] as precedent and instead used the 'separate but equal' principle, ruling against black plaintiffs unless they had been provided with grossly inferior accommodations or barred entirely."<sup>117</sup> *Coger* was far ahead of the United States Supreme Court, which a decade later, in the ironically named *Civil Rights Cases* of 1883, struck down the 1875 Federal Civil Rights Act that barred discrimination in public accommodations.<sup>118</sup> The Court's reasoning that Congress had exceeded its enforcement power under the Thirteenth and Fourteenth Amendments<sup>119</sup> can only be described as contorted and grudging. Justice John Marshall Harlan wrote the first of his great dissents and contended that the freedom and equality purposes of the Civil War Amendments authorized Congress

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114. *Id.* Some disagreement exists among members of the current court and scholars as to the source of the equality right that underlays *Clark* and the court's contemporary equality jurisprudence. The cited language from *Coger* makes clear that although Justice Cole also relied upon article IX, section 12, the principal constitutional authority for *Clark* was firmly rooted in article I, section 1 of the Iowa constitution.

115. PETTYS, *supra* note 37, at 66.

116. *Id.* at 67.

117. Brodnax, Sr., *supra* note 18, at 307.

118. *Id.* at 309.

119. *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

to protect against racial discrimination—as a badge or incident of slavery, at least as to those businesses with a public function or license.<sup>120</sup> He expressed outrage at the majority’s snide comment that it was time that African Americans were no longer “the special favorite of the laws.”<sup>121</sup> In rebuttal Harlan pointed out Congress sought only to protect African Americans so they could enjoy the benefits of citizenship. It was not until 1964, in the *Heart of Atlanta Hotel* case, that the Court got it right, upholding the public accommodations component of the Civil Rights Act of 1964 on the ground that the Commerce Clause provided Congress with the necessary legislative authority.<sup>122</sup>

In this era Keokuk had the largest African American population in Iowa, and two Keokuk school desegregation cases in 1875, essentially companion cases, constitute the fourth of the *Clark* post-Civil War era decisions.<sup>123</sup> In both *Smith v. Directors of Independent School District of Keokuk* and *Dove v. Independent School District of Keokuk*, the school district argued that the African American students denied admission—to the elementary school in *Smith* and to the high school in *Dove*—were denied because there were no empty seats.<sup>124</sup> In each case the trial court found the African American student was refused because of his race, and that if he had been white, he would have been permitted to attend.<sup>125</sup> The circuit court’s mandamus orders requiring admission to the schools were unanimously affirmed.<sup>126</sup>

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120. *Id.* at 26–28 (Harlan, J., dissenting).

121. *See id.* at 61. The Iowa legislature was quick to respond to the *Civil Rights Cases*. With a remarkable unanimous vote in both the house and the senate, the Iowa Civil Rights Act (ICRA) was enacted in 1884 and prohibited discrimination in public accommodations. *See generally* Richard, Lord Acton & Patricia Nassif Acton, *A Legal History of African-Americans*, in *OUTSIDE IN: AFRICAN-AMERICAN HISTORY IN IOWA 1838–2000*, at 60, 74–75 (Bill Silag ed., 2001). The ICRA made a violation a misdemeanor punishable by up to one year in jail, a fine not more than \$500, or both. *Id.* at 74. Because punishment exceeded 30-days imprisonment, the Iowa constitution required indictment by a grand jury and trial in the district court. *Id.* The enforcement of civil rights through criminal law proved largely ineffective due to the necessity of a grand jury, proof beyond a reasonable doubt, and strict construction of the law’s coverage. *Id.* at 75–78.

122. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964).

123. *See, e.g.,* Alice Hoyt Veen, *Iowa’s African-American Heritage*, PRAIRIE ROOTS RES. (Feb. 2, 2014), <https://www.prairierootsresearch.com/black-history-month/>.

124. *Dove v. Indep. Sch. Dist. of Keokuk*, 41 Iowa 689, 691 (1875); *Smith v. Dirs. of Indep. Sch. Dist. of Keokuk*, 40 Iowa 518, 519 (1875).

125. *Dove*, 41 Iowa at 691; *Smith*, 40 Iowa at 519.

126. *Dove*, 41 Iowa at 693; *Smith*, 40 Iowa at 520.

Justice Cole wrote the opinion in *Smith*, the first of the Keokuk cases, and held the case was governed by the *Clark* holding “that a pupil may not be excluded from school because of his color, or required to attend a separate school for colored children.”<sup>127</sup> *Clark* was likewise found dispositive in *Dove*.

Historian David Brodnax, Sr. reports that the victories in *Smith* and *Dove* proved to have unintended negative consequences as integration resulted in closure of the black schools and termination of its teachers:<sup>128</sup>

[*Smith* and *Dove*] enabled [African American] children to attend better funded schools closer to home and removed the stigma of forced separation, but it also meant the destruction of independent black institutions, the loss of teachers who served as role models and a source of racial pride, and placing their children in an unfamiliar, potentially hostile environment.<sup>129</sup>

Tragically, no one apparently thought that the retaliatory dismissal of the African American teachers could have been challenged in court as unconstitutional per se or as an impermissible response to court-ordered desegregation.<sup>130</sup> Without such judicial protection, the African American community was understandably torn about this difficult choice and reticent about pursuing school desegregation: “Many black parents probably would have preferred integrated schools that hired black and fair-minded whites or black schools that had equal funding, but the first option would not be available for decades and the second one never existed at all.”<sup>131</sup>

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127. *Smith*, 40 Iowa at 519.

128. See Brodnax, Sr., *supra* note 18, at 242–44.

129. *Id.* at 243–44.

130. See, e.g., *Haney v. Cty. Bd. of Educ.*, 410 F.2d 920 (8th Cir. 1969).

131. Brodnax, Sr., *supra* note 18, at 244. W.E.B. DuBois eloquently explained how integration in a hostile setting could be worse than segregation:

A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

W. E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

The *Smith* and *Dove* cases are not included among the Iowa Supreme Court's historic civil rights cases exhibit in the Iowa Judicial Branch Building, but I believe this is an oversight. *Smith* and *Dove* not only reaffirmed the *Clark* holding but extended it, making clear the Iowa constitution's equality principles applied not only to facial racial classification (such as the formal Muscatine School Board policy in *Clark*) but also to covert racial discrimination in the administration of government policy—where racial discrimination is proven to be the motivating reason for the school board's refusal to admit African Americans students, rather than the race-neutral reasons asserted by the school board. Both decisions demonstrated continued courageous leadership by the court, as 1875 was a time when enthusiasm for Reconstruction and the quest for racial equality was beginning to flag and President Grant's second term was winding down.

In addressing covert discrimination, the Iowa Supreme Court was a decade ahead of the United States Supreme Court. It was not until *Yick Wo v. Hopkins* that the latter held the Equal Protection Clause prohibits covert racial classifications by public entities.<sup>132</sup> In *Yick Wo* the Court found that the San Francisco ordinance requiring operators of frame laundries to obtain a license was neutral on its face but had been administered in a racially discriminatory fashion by public officials.<sup>133</sup> The Court held:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the constitution.<sup>134</sup>

In sum, *Mansfield*, *Coger*, and *Smith* and *Dove* stand as authoritative testament to *Clark*'s exceptionalism. *Clark* was not an outlier or a one-off in the Iowa Supreme Court's post-Civil War equality jurisprudence; it was the anchor of those rulings. The reality that *Clark*, *Mansfield*, *Coger*, and *Smith* and *Dove* were ultimately followed by the United States Supreme Court, with the latter's constitutional rulings in *Brown v. Board of Education* and *Heart of Atlanta Hotel* coming nearly a century after *Clark* and *Coger*, is powerful confirmation of the Iowa Supreme Court's exceptionalism.

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132. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

133. *Id.* at 373–74.

134. *Id.*

### B. *The National Context*

Determining whether *Clark* meets a third benchmark of exceptionalism requires comparison to the handling of this highly controversial civil rights issue by the highest courts in other states. Space permits only a brief synopsis here.

Constitutional challenges were brought in several of the northern States where statutes authorized racially segregated public schools. The highest courts in the progressive states of California,<sup>135</sup> Massachusetts,<sup>136</sup> and New York<sup>137</sup> upheld public school segregation against constitutional challenges, as did the highest courts in Indiana,<sup>138</sup> Nevada,<sup>139</sup> and Ohio.<sup>140</sup>

In addition to *Clark*, there were three state supreme courts that struck down school board-imposed segregation rules during the nineteenth century: Michigan, Illinois, and Kansas. However, none of the three rulings were based on a *constitutional* principle of equality—a critically distinguishing factor as we assess the exceptionalism of the *Clark* case.

The Michigan Supreme Court decision held only that a Michigan statute of general applicability that barred school segregation did in fact apply to Detroit, the largest school district in the state.<sup>141</sup> The Illinois Supreme Court held that operation of a segregated school for only four colored children when there was room for the colored children in the white school next door constituted a fraud on taxpayers and ordered admission of the colored children so only one school was needed.<sup>142</sup> The court expressly declined to decide whether racial segregation of public schools was per se unconstitutional.<sup>143</sup> The Kansas Supreme Court, expressly relying upon the Iowa Supreme Court's *Clark* decision,<sup>144</sup> struck down racial segregation of Ottawa's public schools as not authorized by the Kansas statutes governing schools of second-class cities; however, the court appeared to accept school

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135. *Ward v. Flood*, 48 Cal. 36, 37 (1874).

136. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 208–10 (1849).

137. *People ex rel. King v. Gallagher*, 93 N.Y. 438, 451 (1883).

138. *Cory v. Carter*, 48 Ind. 327, 356–57 (1874).

139. *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 348 (1872).

140. *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 202 (1871).

141. *People ex rel. Workman v. Detroit Bd. of Educ.*, 18 Mich. 400, 409–10 (1869).

142. *Chase v. Stephenson*, 71 Ill. 383, 385–86 (1874).

143. *Id.*

144. *Bd. of Educ. v. Tinnon*, 26 Kan. 1, 19–20 (1881).

segregation in first-class cities as lawful since the Kansas statutes expressly authorized segregation by those districts.<sup>145</sup>

*C. No Retrogression, Eventual Reinvigoration*

In *Varnum v. Brien*, the court proudly cited *Clark*, *Coger*, and *In re Ralph* as reflecting its civil rights leadership, but it acknowledged that in relating this history it did “not mean[] to imply this court has been at the forefront in recognizing civil rights in all areas and at all times. These cases do, however, reflect this court has, for the most part, been at the forefront in recognizing individuals’ civil rights.”<sup>146</sup> Examination of the Iowa Supreme Court’s civil rights body of work from 1884 to the current time—the good, the great, and the not so great—and the court’s twenty first century reinvigoration of its independent constitutional analysis is a larger discussion I reserve for another article. I will attempt a one paragraph summary here, which necessarily is incomplete.

Context is so important. The destructive national impact of *Plessy v. Ferguson* in 1896 cannot be underestimated. *Plessy* gave the green light to apartheid in the South and chilled or set back the evolution of civil rights everywhere else. As it relates to the Iowa Supreme Court, *Plessy* led to a long period of dormancy for the court’s independent constitutional analysis and to narrow constructions of the Iowa Civil Rights Act.<sup>147</sup> With one notable exception, the Iowa Supreme Court did not forge ahead on civil

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145. *Id.* at 18–19.

146. *Varnum v. Brien*, 763 N.W.2d 862, 877 (Iowa 2009).

147. *See, e.g.*, *Brown v. J.H. Bell Co.*, 123 N.W. 231, 236 (Iowa 1909) (acknowledging that the court’s decision in *Clark* was the minority view in light of *Plessy* and the rulings of other state courts). Here, the court applied a narrow construction of the Iowa Civil Rights Act, finding it did not apply to a case in which a food show vendor refused to serve a sample to a colored person. *Id.* at 236–37 (“Manifestly defendant was not conducting an inn, a restaurant, a chophouse, an eating house, lunch counter, or anything of that kind or description, and it would be a startling doctrine to announce that the civil rights act covers all gifts for advertising purposes.”).

Chief Justice Evans wrote a passionate dissent in which he contended the pure food show was a “quasi public exhibition” that should be governed by the Iowa Civil Rights Act. *Id.* at 237 (Evans, J., dissenting). (“[T]he case comes fairly within the letter of the statute, and clearly within its spirit. . . . It was framed in language broad and comprehensive. Its manifest purpose was and is to protect [people of color] against the further burden of public discrimination and humiliation. It does not attempt to deal with social rights, nor is there any question of social rights involved in this case, nor was the humiliation of the plaintiff a mere ‘social humiliation,’ as indicated in the majority opinion.”).



rights during the *Plessy* era.<sup>148</sup> Still, in difficult times, muddling through is far, far better than going backwards. The Iowa Supreme Court maintained the commitment it made in *Clark* throughout an entire century in which its view was in the distinct minority—from 1868 until 1964, when *Brown*'s overturning of *Plessy* was finally embraced by Congress and the President in the Civil Rights Act of 1964. This commitment continued, of course, throughout the most recent half century when the Iowa Supreme Court's view was in ascendancy. It took courage to stay the course on school desegregation. From the beginning, the Iowa Supreme Court stood virtually alone when most state supreme courts embraced separate-but-equal," but its vigil became much lonelier after the U.S. Supreme Court embraced racial segregation in *Plessy*. There was no retrogression in the Iowa Supreme Court's commitment to equal educational opportunity—the foundation so widely believed to provide the springboard to full equality. In the year 2000, the Iowa Supreme Court's independent constitutional analysis reemerged,<sup>149</sup> and over the past two decades, it has been revitalized—restoring the Court to a leadership role.

#### IV. CONCLUSION: SHINE ON!

There is no need to summarize the historical case for the civil rights exceptionalism of *Clark* and the cases of its era. Suffice it to say, it is convincing. The court's current independent constitutional analysis and its constitution-as-a-living-document mode of interpretation have their roots in *Clark* and assure *Clark*'s continuing relevance today. Using these important

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148. *State v. Katz*, 40 N.W.2d 41 (Iowa 1949), was a major symbolic civil rights ruling during the *Plessy* era and, when coupled with grass roots protests and civil litigation by Edna Griffin and others, brought about the integration of lunch counters in downtown Des Moines, five years before *Brown v. Board of Education*.

149. Although his view was written in dissent, then-Justice Louis Lavorato was the first Iowa justice to reject the "lock-step" approach to state constitutional interpretation in the post-Warren Court era and to argue for independent analysis of Iowa constitutional claims:

We push aside our constitutional responsibilities when we merely look to the [U.S.] Supreme Court for answers in examining the state constitution. It is beyond belief that we should unquestioningly toe the line in every area in which the Court has spoken since *Marbury v. Madison*. Of what import is our state constitution then?

*State v. James*, 393 N.W.2d 465, 468 (Iowa 1986). The Iowa Supreme Court unanimously embraced independent state constitutional analysis in the year 2000. *State v. Cline*, 617 N.W.2d 277, 284–85 (Iowa 2000).

intellectual tools, the court continues to develop important precedents in the areas of equality and criminal procedure in the twenty-first century.

Drum roll, please! A big bravo-bravissimo for Alexander Clark, Chester Cole, and for *Clark*! Some might characterize *Clark* as a flower blooming in the judicial desert of its time. I prefer to see it as the bright radical star in the night time sky, whose brilliance was too distant to perceive until Chief Justice Earl Warren forged the unanimous opinion in *Brown*. May *Clark*'s courage and leadership continue to shine on and guide the Iowa Supreme Court—nay, all courts and all Americans—as the United States continues to strive for an inclusive society where justice and equality are enjoyed by all.

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## ALEXANDER G. CLARK

*Robert G. Allbee\**

In October 1867, Alexander G. Clark filed a petition as next friend and father to 12-year-old Susan B. Clark after she was excluded from a grammar school solely because she “belongs to the ‘colored race.’”<sup>1</sup> The decision in *Clark v. Board of School Directors* resulted in the racial integration of public schools in Iowa—the first state in the nation to do so—86 years before the United States Supreme Court acted to do the same nationwide.<sup>2</sup>

In the story of this landmark litigation, Alexander Clark was more than Susan’s next friend and father. Alexander, a child of unremarkable circumstances, yet endowed with innate intelligence combined with boundless energy, ambition, ingenuity and sound judgment, attained a lifetime of remarkable achievements.<sup>3</sup> His achievements included success as a barber, astute and profitable real estate acquisitions, prominent leadership in the African Methodist Episcopal Church and colored Masonic Order, influence as a human-rights advocate and political activist, newspaper owner and publisher, a reputation as “the colored orator of the West,” and finally appointment as United States Minister to the nation of Liberia by President Benjamin Harrison.<sup>4</sup> Contemporaries described Alexander as gentlemanly, courteous, and affable, as well as an entertaining conversationalist.<sup>5</sup>

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\* Robert G. Allbee is a native Iowan, born in Muscatine on December 14, 1928. The descendent of a pioneer Muscatine County family, he attended a rural one-room school, Maple Grove in Fulton Township, through eighth grade. A 1955 graduate of Drake University Law School, the Author was a long-time partner and trial lawyer in a Des Moines law firm. He also served at three levels of the Iowa judiciary: District Judge, the first Chief Judge of the Iowa Court of Appeals, and Justice of the Iowa Supreme Court. Retired for many years and residing in Des Moines with his wife, Jennie, he is proud of the Iowa Supreme Court’s historic record and leadership in guaranteeing civil rights and equal protection under the law to all Iowa citizens.

1. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 267–68 (1868).

2. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1952); *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 277 (1868).

3. *See THE UNITED STATES BIOGRAPHICAL DICTIONARY AND PORTRAIT GALLERY OF EMINENT AND SELF MADE MEN: IOWA VOLUME 539 (1878) [hereinafter EMINENT AND SELF MADE MEN: IOWA].*

4. *Id.* at 536; WILLIAM J. SIMMONS, *MEN OF MARK: EMINENT, PROGRESSIVE AND RISING 1098–99 (1887)*; Stephen J. Frese, *From Emancipation to Equality: Alexander Clark’s Stand for Civil Rights*, 40 *HIST. TEACHER* 81, 86 (2006).

5. SIMMONS, *supra* note 4, at 1100.

An outline of noteworthy achievements from Alexander's illustrious life follows.

### I. ANCESTRY AND EARLY YEARS

Alexander G. Clark was born February 25, 1826, in Washington County, Pennsylvania.<sup>6</sup> His parents were John Clark and Rebecca Darnes.<sup>7</sup> Alexander's father, John Clark, was born the son of his mother's slave master, a man identified only as an Irishman.<sup>8</sup> The Irishman freed both mother and son after John's birth.<sup>9</sup> Rebecca, Alexander's mother, was the daughter of emancipated slaves, George and Leticie Darnes.<sup>10</sup>

As a young lad in Pennsylvania, it is known that Alexander attended school, the extent unknown.<sup>11</sup> At age 13, Alexander was sent to Cincinnati, Ohio, to live with his mother's brother, William Darnes, for training in barbering skills.<sup>12</sup> While living with his uncle, Alexander attended a grammar school for perhaps a year.<sup>13</sup>

When he was only 15, Alexander left Cincinnati to become a hand—some accounts say a bartender—aboard the steamer *George Washington*, transporting passengers and cargo on the Ohio and Mississippi Rivers.<sup>14</sup>

### II. MUSCATINE 1840S

In May 1842, Alexander landed in Bloomington (renamed Muscatine in 1849), a small town located along the Mississippi River in the Iowa Territory.<sup>15</sup> The Iowa Territory was not welcoming to "colored" folks.<sup>16</sup> "Black Codes" were impediments.<sup>17</sup> Territorial legislation mandated that "Negroes or Mulattos" present a certificate of freedom under seal of a judge

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6. *Alexander Clark, P.G.M.*, 2 *PHYLAXIS* 62, 62 (1975).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Frese, *supra* note 4, at 81.

15. *Id.*; *Muscatine History*, CITY OF MUSCATINE, <https://www.muscatineiowa.gov/341/Muscatine-History> (last visited Nov. 2, 2018).

16. Frese, *supra* note 4, at 81.

17. *Id.* at 82.

or justice and provide a \$500 bond to insure good behavior while within the territory.<sup>18</sup> Territorial legislation also denied blacks the right to vote, hold public office, attend public schools, testify in court against white defendants, and enter into an interracial marriage.<sup>19</sup> In addition to these statutory obstacles, blacks entering the territory were confronted, without doubt, by racial bias, slurs, and threats by white residents.<sup>20</sup>

Alexander opened a barber shop, and with his energy and personality, it became a thriving business.<sup>21</sup> With funds earned as a barber, he purchased timber land along the Mississippi River.<sup>22</sup> From the timber he harvested wood and sold it to fuel steamboats plying the river.<sup>23</sup> Profits from those sales were invested in acquiring additional real estate.<sup>24</sup> Muscatine County records reportedly reveal that in years ahead Alexander became one of the county's larger real-estate tax payers.<sup>25</sup>

### III. UNDERGROUND RAILROAD

An orator at Alexander's funeral proclaimed that Alexander was "one of the Underground Railroad engineers and conductors, whose field was the South, whose depot was the North, and whose freight was human souls."<sup>26</sup> There is more legend than evidence of Alexander's actions in Underground Railroad operations. The logical conclusion for lack of evidence, however, is that those actions necessarily were clandestine. Such activity was covert and intended to be undetected.

Nevertheless, one episode is famously known—an adventure too detailed to be fully described here. In summary, however, in the 1840s Alexander sheltered in his garret a young slave, Jim, who was sought by an

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18. *Id.*

19. *Id.*

20. *Id.* at 81.

21. *Id.* at 82.

22. *Id.*

23. *Id.*

24. See SIMMONS, *supra* note 4, at 1097.

25. *Biographical Notations Concerning Alexander G. Clark*, MUSCATINE-TOURS.COM, <http://www.muscatine-tours.com/alexanderclark/clarkbio.html> (last visited Feb. 8, 2019).

26. J.W. Laws, *Oration of the Life of Hon. Alexander Clark 3* (1891) (funeral pamphlet), <http://muscatine-tours.com/alexanderclark/eulogy.html>.

agent hired by Jim's St. Louis master.<sup>27</sup> Then followed Jim's escape, aided by Alexander, in a rowboat drifting down the Mississippi River in the dark of night and landing at a distant shore.<sup>28</sup> Subsequent events included the agents continued pursuit of Jim, his discovery, and his arrest by the agent.<sup>29</sup> Thereupon, Alexander filed an information charging the agent for an arrest without a warrant.<sup>30</sup> After a somewhat disorderly and contentious three-day trial, Jim was adjudged a free man by authority of *In re Ralph*, and the agent was fined \$20 and court costs for assault and battery.<sup>31</sup>

Alas, that decision did not end the episode. A few days later, the agent went to Dubuque and obtained a federal arrest warrant from the United States district judge.<sup>32</sup> The agent returned to Bloomington and rearrested Jim.<sup>33</sup> Local white lawyers, taking prompt action pursuant to writ of habeas corpus, successfully pleaded Jim's grounds for freedom before acting Chief Justice of the Iowa Supreme Court, Hon. S.C. Hastings, who conveniently resided in Bloomington.<sup>34</sup>

As a freeman, Jim remained in Bloomington, later joining the African Methodist Episcopal Church where he became known at an active "shouter."<sup>35</sup>

#### IV. MARRIAGE

Alexander married Catherine Griffin on October 9, 1848.<sup>36</sup> What is known of Catherine: She was of African and Indian descent.<sup>37</sup> Born a slave in Virginia on January 4, 1829, at age three she was manumitted and taken to Ohio by the women who owned her mother—Paddick and Rachel

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27. J.P. Walton, *Unwritten History of Bloomington (Now Muscatine) in Early Days*, 1882 ANNALS IOWA 44, 48 (1882).

28. *Id.*

29. *Id.*

30. *Id.*

31. Transcript of Court at 6, *In re Jim*, decided Nov. 1845.

32. Walton, *supra* note 27, at 48.

33. *Id.* at 49.

34. *Id.*

35. *Id.*; *Muscatine Black History, Spirituality Interwoven with Liberty*, CHURCH LIVING WATER, <https://www.livingwatermuscatine.com/muscatine-black-history.html> (last visited Feb. 8, 2019).

36. EMINENT AND SELF MADE MEN: IOWA, *supra* note 3, at 540.

37. *Id.*

Cheadle.<sup>38</sup> Those women later moved to Marion, Iowa, with Catherine.<sup>39</sup> Sources report that at the time of her marriage Catherine was employed in Iowa City.<sup>40</sup> There is a lack of information regarding how Alexander and Catherine's relationship came about and resulted in marriage.

Alexander and Catherine had five children, two of which died during infancy.<sup>41</sup> Their three surviving children were Rebecca, Susan, and Alexander, Jr.<sup>42</sup> Also in 1849, Alexander purchased a home at Third and Chestnut Streets.<sup>43</sup> Years later, in June 1878, that home was destroyed in a fire caused by arson.<sup>44</sup> In less than a year after the fire, Alexander built a brick, two-story duplex overlooking the Mississippi River on the same site. The structure still exists and is occupied.<sup>45</sup>

#### V. FOUNDING OF A CHURCH

Alexander Clark was a founder of the African Methodist Episcopal Church in Muscatine in 1849.<sup>46</sup> He became a devout member of the church, remaining a faithful parishioner and generous financial contributor throughout the entirety of his many years in Muscatine.<sup>47</sup> He also preached and practiced abstinence from alcoholic beverages and occupied several church offices as trustee, steward, and Sunday school superintendent.<sup>48</sup>

Alexander also gained national stature in the church. In September 1881, he was 1 of 12 delegates nationally selected to attend an Ecumenical Conference of Methodists in London, England.<sup>49</sup> The conference was recognized as the largest and most scholarly Christian conference ever convened with delegates from around the world.<sup>50</sup>

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38. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

39. *Id.*

40. *Id.*

41. EMINENT AND SELF MADE MEN: IOWA, *supra* note 3, at 540.

42. *Id.*

43. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

44. *Id.*

45. *Id.*; *see also* *Alexander Clark*, MUSCATINE-TOURS.COM, [www.alexanderclark.org](http://www.alexanderclark.org) (last visited Feb. 8, 2019) (describing the history of Clark and the Clark House).

46. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

47. *Id.*

48. *Id.*; EMINENT AND SELF MADE MEN: IOWA, *supra* note 3, at 540.

49. *Alexander Clark, P.G.M.*, *supra* note 6, at 62.

50. *Id.*

After the conference, Alexander toured Switzerland and France.<sup>51</sup> He later wrote, ironically, that his travel experience was “free from that criminal prejudice caste that I and all my race meet when traveling in our boasted land of liberty.”<sup>52</sup>

#### VI. CIVIL WAR SERVICE

In 1863, after the Emancipation Proclamation, at age 37, Alexander enlisted in the 1st Iowa Colored Voluntary Infantry and actively aided in recruiting more than 1,100 troops in Iowa and Missouri.<sup>53</sup> The military unit was later designated the 60th Regiment Infantry, United States Colored Troops.<sup>54</sup> Alexander was selected sergeant-major; subsequently, a pre-existing left-ankle defect caused Alexander to be disqualified for infantry service.<sup>55</sup> Although no longer in the military, his active recruiting efforts continued.<sup>56</sup>

#### VII. CLARK V. BOARD OF SCHOOL DIRECTORS

Alexander Clark firmly believed education was essential for elevation of the colored race.<sup>57</sup> He was concerned that the black students’ grade school, which his 12-year-old daughter Susan attended, failed to prepare and qualify students for high school; the black students’ school lacked supplies, and well-paid competent teachers were available only to white children in the Muscatine public schools.<sup>58</sup> Therefore, in September 1867, Clark endeavored to enroll Susan at the nearby public school.<sup>59</sup> The school board refused her admission.<sup>60</sup>

On October 3, 1867, lawyers representing Alexander and Susan Clark filed a petition in Muscatine County District Court, seeking a writ of mandamus requiring that the school board admit Susan to public school.<sup>61</sup>

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51. *Id.*

52. Frese, *supra* note 4, at 96.

53. *Id.* at 83.

54. *Id.*

55. SIMMONS, *supra* note 4, at 1097–98.

56. *Id.* at 98.

57. Frese, *supra* note 4, at 82.

58. *Id.* at 84–85.

59. *Id.*

60. *Id.*

61. *Id.* at 85.



The petition consisted of six handwritten pages; the final paragraph was handwritten by Alexander, wherein he declared he was Susan's father and natural guardian, thus stating his authority to act on her behalf.<sup>62</sup> In due course, the district court issued the writ demanded; the school board appealed to the Supreme Court of Iowa.<sup>63</sup> The rest is history.<sup>64</sup> The majority opinion of that decision was authored by Justice Chester Cicero Cole, remembered today as a founder of the Drake University Law School.<sup>65</sup>

One senses that Clark's timing in initiating this litigation was strategic. Being an activist and astute follower of constitutional developments, he would have been quite aware that the Iowa constitution adopted in 1857 commanded that boards of education provide for the education of "all youths of the State," whereas the supplanted constitution of 1846 provided that schools be open and free to all white youths between certain ages.<sup>66</sup>

Two anecdotes of related interest follow: Susan in 1871 was the first black student to graduate from Muscatine High School.<sup>67</sup> At graduation ceremonies, she delivered the commencement address: "Nothing But Leaves."<sup>68</sup>

Of interest to the bar and bench of today, the district judge issuing the writ of mandamus in the *Clark* case was J. Scott Richman.<sup>69</sup> Alexander Clark's counsel of record were Richman & Carskadden and Henry O'Conner.<sup>70</sup> DeWitt C. Richman of the firm of record was a younger brother of the judge.<sup>71</sup> The two Richmans practiced together prior to Scott Richman

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62. Frese, *supra* note 4, at 96; see generally Plaintiff Petition, *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266 (1868).

63. *Id.*

64. See *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 277 (1868).

65. See *id.*; *About*, DRAKE U., <https://www.drake.edu/law/about/> (last visited Nov. 2, 2018).

66. Frese, *supra* note 4, at 84–85.

67. *Id.* at 85.

68. LESLIE A. SCHWALM, EMANCIPATION'S DIASPORA: RACE AND RECONSTRUCTION IN THE UPPER MIDWEST 201 (2009).

69. Letter from J. Scott Richman, Muscatine, Iowa, to Judge [unidentified] (Jan. 21, 1868), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1011&context=amtrials>.

70. See *Clark*, 24 Iowa at 268.

71. 1 HISTORY OF MUSCATINE COUNTY IOWA: FROM THE EARLIEST SETTLEMENTS TO THE PRESENT TIME 373 (Irving B. Richman ed., 1911).

being elected district judge in 1863.<sup>72</sup> Co-counsel Henry O’Conner presented the oral argument at the supreme court submission. A local county history records that O’Conner was known for his “gifts of oratory and warmth of heart.”<sup>73</sup>

#### VIII. IOWA LAW SCHOOL

Alexander Clark’s son, Alexander, Jr., having graduated from Muscatine High School two years after Susan, was the first African American to gain admission to University of Iowa’s Law Department, from which he graduated in 1879; likewise, the first black person to do so.<sup>74</sup>

Reportedly, a white lawyer had once suggested to Alexander, Sr. that he should study law.<sup>75</sup> Being financially secure as a result of profitable real-estate investments, in 1883, at age 56, Alexander enrolled and graduated from the Iowa law department in June 1884.<sup>76</sup> By all accounts, he was popular among his younger classmates who were impressed by his oratorical skills. Alexander’s graduating academic ranking was 8th in a class of 80 students.<sup>77</sup>

This Author once read an interesting report that Judge Wright, who was involved in the founding and development of the law department, was a speaker at the graduation ceremonies of Alexander’s law class. That person would have been the former Justice Wright, the lone dissenter in *Clark v. Board of School Directors*.

#### IX. NEWSPAPER OWNER AND EDITOR

Alexander purchased a black-owned weekly newspaper in 1882—*The Chicago Conservator*.<sup>78</sup> He associated his son, Alexander, Jr., with the publishing enterprise.<sup>79</sup> The newspaper did not do well, and after completing

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72. *Id.*

73. *Id.* at 375.

74. Frese, *supra* note 4, at 85.

75. Tom Snee, *Alum Preserves House, Legacy of UI Civil Rights Pioneer*, U. IOWA (Oct. 25, 2010), <https://fyi.uiowa.edu/10/25/alexander-clark/>.

76. Frese, *supra* note 4, at 85 n.45.

77. Chris Steinbach, *Honoring Alexander Clark, a Man Who Should Not Be Lost in History*, MUSCATINE J., Feb. 25, 2012, at 7A.

78. Frese, *supra* note 4, at 11.

79. *Alexander Clark, P.G.M.*, *supra* note 6, at 65.

law school in 1884, Alexander assumed control.<sup>80</sup> As editor, Alexander forcefully condemned racial discrimination and exclusionary laws, as well as espousing Republican causes.<sup>81</sup> It was said he wielded “a fearless pen . . . dipped in acid.”<sup>82</sup> The newspaper’s circulation increased and success was achieved.<sup>83</sup> After two and one-half years of managing and functioning as principal writer and editor, Alexander sold the newspaper because it demanded too much of him.<sup>84</sup>

#### X. RACIAL EQUALITY

Beginning early in his life, Alexander crusaded for racial equality in his public words and deeds, commencing with the Underground Railroad and evolving into national statesmanship.<sup>85</sup> Without attempting to enumerate all the letters and petitions he authored, the numberless meetings, assemblies and conventions he attended in state and national venues, or the countless speeches and orations given in support of causes to which he was devoted, only a select few will be cited as examples.

Alexander’s first national experience was an 1853 convention in Rochester, New York; it was an assemblage in opposition to slavery existing in a nation allegedly founded on the principle that all men are created equal.<sup>86</sup> Perhaps inspired by that convention, in 1855, Alexander, a young man of age 31, initiated a petition endorsed by both blacks and whites, seeking repeal of exclusionary laws prohibiting the immigration of free blacks into Iowa.<sup>87</sup> Though unsuccessful, he was not deterred.<sup>88</sup>

In 1857, Alexander was 1 of 33 delegates attending a Convention of Colored Men held in Muscatine.<sup>89</sup> The convention produced resolutions demanding full citizenship and contributed to equal rights becoming a primary issue in the year’s state constitutional convention.<sup>90</sup> Such a provision

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80. *Id.*

81. Frese, *supra* note 4, at 86.

82. *Id.*

83. *Alexander Clark, P.G.M., supra* note 6, at 65.

84. *Id.*

85. *See* Laws, *supra* note 26, at 5.

86. Frese, *supra* note 4, at 82.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

for equal rights was placed in a referendum and ratified by Iowa voters; however, black suffrage was rejected.<sup>91</sup>

When the Civil War ended, Alexander zealously renewed his civil rights agenda. In October 1865, as many as 700 colored Civil War veterans met in Davenport.<sup>92</sup> Alexander, elected president of the convention, proclaimed the colored veterans were entitled to the political rights of which they were deprived.<sup>93</sup> He declared, "He who is worthy to be trusted with a musket can and ought to be trusted with the ballot."<sup>94</sup> The convention appealed to the legislature to strike the word *white* from the constitutional requirement to vote.<sup>95</sup>

In February 1868, at the Iowa State Colored Convention in Des Moines, Alexander was elected secretary and spokesman.<sup>96</sup> The previous appeal to strike *white* as a requirement for voting was renewed.<sup>97</sup> Finally, the issue was placed before voters in an 1868 amendment. It passed almost two years before the Fifteenth amendment to the United States Constitution was ratified.<sup>98</sup>

Alexander was also an Iowa delegate in the 1869 National Convention of Colored Men in Washington, D.C.<sup>99</sup> At the convention he was appointed chairman and spokesman for a committee petitioning Congress to grant colored soldiers' and sailors' pensions equal to those received by white Civil War veterans.<sup>100</sup> His presentations impressed those to whom he spoke. In addition, he also was a member of a committee formed from that convention to call upon President Grant and the Vice President and to convey the congratulations of colored people on their election.<sup>101</sup>

What is reported here is by no account the entirety of Alexander's quest for equal human rights for people of color. Cited are only several

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91. *Id.*

92. *Id.* at 83.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 84.

97. *Id.*

98. *Id.*

99. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

100. SIMMONS, *supra* note 4, at 1098.

101. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

significant examples of his actions; all of which demanded courage, ingenuity, and relentless persistence. He was, in a word, indomitable.

#### XI. POLITICS

It was said Alexander was a Republican “both from gratitude and principle.”<sup>102</sup> His civil and equal rights ideology substantially coalesced with rights and policies advocated by the Republican Party of his era.<sup>103</sup> Alexander’s political activity included attending several state and national Republican conventions, for example:

- He served as one of the vice-presidents for the Iowa Republican Convention in 1869;<sup>104</sup>
- In 1870, he was a delegate at the Iowa Republican Convention and a member of the resolutions committee, where his eloquence enhanced his developing reputation as “the colored orator of the West;”<sup>105</sup>
- He was a delegate-at-large at the Republican National Convention in Philadelphia in 1872;<sup>106</sup>
- In 1876, he was an alternate Iowa delegate to the National Republican Convention held in Cincinnati;<sup>107</sup> and
- He also represented the colored people of Iowa at the 1876 Centennial Exposition in Philadelphia.<sup>108</sup>

More than attending conventions, Alexander was known to “travel far and wide,” both North and South, “stumping” for Republican candidates and equal rights for colored people.<sup>109</sup> His unfailing dedication to those causes became nationally known, and his fame as an effective orator expanded.<sup>110</sup> One source, reporting in lavish praise of Alexander as a political orator, said he had “the rare merit of stopping when he was

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102. EMINENT AND SELF MADE MEN: IOWA, *supra* note 3, at 540.

103. *See* Laws, *supra* note 26, at 6.

104. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Laws, *supra* note 26, at 6.

110. *Id.*

through.”<sup>111</sup> Meanwhile in 1873, President Grant appointed Alexander consul to Aux Cayes, Haiti, an office he, however, declined because the salary of \$1,500 per year was “not sufficiently remunerative.”<sup>112</sup> It is interesting to find that years later, in 1889, famed civil rights champion, Frederick Douglass, accepted the consul position in Haiti once declined by Alexander.<sup>113</sup>

## XII. UNITED STATES MINISTER TO LIBERIA

By handwritten letter, dated September 2, 1890, President Benjamin Harrison appointed Alexander United States Minister to the nation of Liberia.<sup>114</sup> (That original document is today held in the Muscatine Art Center.) Alexander’s appointment was the highest office ever awarded by a President to a black person.<sup>115</sup> The city of Muscatine honored him with a celebration on September 16.<sup>116</sup> On October 8, Alexander sailed from New York via London for Monrovia, Liberia.<sup>117</sup> His arrival date is uncertain; however, he assumed office as United States Minister at the U.S. legation in Monrovia on November 25, 1890.<sup>118</sup>

Alexander died May 31, 1891, perhaps from a cause vaguely described during his last illness as “African Fever.”<sup>119</sup> Sadly, he died alone in a distant nation, an ocean and half a continent away from home and family. No official cause of death seems to be known. Months after his death, Alexander’s remains were returned to Muscatine.<sup>120</sup> Following religious, military, and Masonic ceremonies and being praised in lengthy oratory, on February 16, 1892, he was interred in Greenwood Cemetery.<sup>121</sup>

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111. *Alexander Clark, P.G.M.*, *supra* note 6, at 62.

112. SIMMONS, *supra* note 4, at 1099.

113. *Frederick Douglass*, NAT’L PARK SERV., <https://www.nps.gov/museum/exhibits/douglass/visionary.html> (last visited Feb. 8, 2019).

114. Frese, *supra* note 4, at 86.

115. *Id.*

116. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* See generally, *Laws*, *supra* note 26.

## XIII. THE CLARK FAMILY

Catherine Griffin Clark died in Muscatine on September 4, 1879.<sup>122</sup> Her death may have been hastened by the deleterious effect of smoke inhalation in the June 1878 conflagration of the Clark home.<sup>123</sup> It was written of Catherine that she was in every way a “suited companion” for Alexander and of “highly esteemed Christian character.”<sup>124</sup> Her funeral services drew a notably large congregation.<sup>125</sup> Catherine was interred in Muscatine’s Greenwood Cemetery next to her children, John and Ellen, who died in infancy.<sup>126</sup>

Susan Clark married the Reverend Richard E. Holley, an African Methodist Episcopalian minister.<sup>127</sup> They resided in several locations, including Muscatine, Iowa; Davenport, Iowa; Cedar Rapids, Iowa; and Champagne, Illinois.<sup>128</sup> Susan died June 4, 1925, and was buried in Greenwood Cemetery.<sup>129</sup>

Rebecca, the oldest of the family, was born September 15, 1849.<sup>130</sup> She married George Appleton on October 15, 1872.<sup>131</sup> George was a barber and worked with Alexander until he retired.<sup>132</sup> After Alexander’s death, Rebecca and George moved to Sigourney.<sup>133</sup> George died in 1897, and Rebecca died August 24, 1906.<sup>134</sup> They also were buried in Greenwood Cemetery.<sup>135</sup>

Alexander, Jr. remained a while in Iowa City after graduation from law school.<sup>136</sup> From there he went to Chicago where for several years he was

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122. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

123. *Id.*

124. *EMINENT AND SELF MADE MEN: IOWA*, *supra* note 3, at 540.

125. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

associated with the *Chicago Conservator*.<sup>137</sup> Alexander, Jr., however, moved on to Oskaloosa where he practiced law most of his life.<sup>138</sup> He and his wife, Addie, are both buried in Oskaloosa.<sup>139</sup>

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137. *Alexander Clark, P.G.M.*, *supra* note 6, at 65.

138. *Biographical Notations Concerning Alexander G. Clark*, *supra* note 25.

139. *Id.*



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## REMEMBERING THE DEDICATION OF COLE HALL AND THE MAN FOR WHOM IT WAS NAMED

*David S. Walker\**

Within the university, we know others have gone before us who have built what we have today and to whom we owe a debt of gratitude. But inevitably with the passage of time, generations pass, and we very likely may know little about the lives and aspirations of those who built for us, perhaps little more than the name of this or that building.

In this Article regarding the Rededication of Cole Hall, I would like to recall for you the excitement and commitment to the rule of law on that day nearly 114 years ago, November 15, 1904, when Cole Hall was originally dedicated. I want to share with you some of Chester Cole's life and why it was fitting that this building, Cole Hall, was named for him.

As reported in the *Drake Delphic*, the dedication exercises "marked the culmination of an enterprise fraught [sic] with the greatest importance and benefit possible to the University."<sup>1</sup> That enterprise was the establishment of a college of law in Des Moines and within Drake University. Almost 40 years earlier, in 1865, together with his friend and fellow Iowa Supreme Court Justice at the time, George Wright, Cole cofounded the Iowa College of Law.<sup>2</sup> Three years later, in 1868, they were persuaded to move the school to Iowa City to be the law department of the University of Iowa.<sup>3</sup> When the contract he had signed expired in 1875, however, Judge Cole returned to central Iowa to resume the Iowa

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\* Dwight D. Opperman Distinguished Professor of Law, Emeritus, and Former Dean, Drake University Law School. This Article formed the basis for remarks the Author delivered at the Rededication of Cole Hall on September 25, 2018. The Author expresses his gratitude to Drake Law School's excellent reference librarians, Professors David Hanson, Rebecca Lutkenhaus, Karen Wallace, and the late Sue Lerdal, for their assistance over the years in his study of Judge Chester Cole.

1. *Dedication of New Law Building*, DRAKE DELPHIC, Nov. 18, 1904, at 1.

2. 1 CHARLES BLANCHARD, HISTORY OF DRAKE UNIVERSITY: BUILDING FOR THE CENTURIES 95 (1931).

3. *See id.*

College of Law,<sup>4</sup> first as the law department of Simpson College,<sup>5</sup> and in 1881, at the invitation and behest of Francis Marion Drake, at Drake University.<sup>6</sup>

Cole Hall, the *Register and Leader* reported, was the “first building in Iowa devoted exclusively to legal education,”<sup>7</sup> “or in the west;”<sup>8</sup> and with two floors 50 feet by 100 feet,<sup>9</sup> it was described not only as a “handsome”<sup>10</sup> but also as an “elegant, commodious, [and] modern equipped” building.<sup>11</sup>

The day of the Dedication of Cole Hall was a day of celebration. Drake University President Hill M. Bell celebrated the occasion by expressing his gratitude for “this ‘one more’ step toward the union of all departments.”<sup>12</sup> Chester Cole agreed, and today he would not only be most pleased with the growth and influence of the law school but happy as well that Cole Hall had become the University’s Admission and Financial Aid Offices. Judge Cole admired and commented on lawyers who had pursued a liberal education,<sup>13</sup>

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4. See Note, *The Iowa College of Law*, 9 WESTERN JURIST 451, 451–53 (1875).

5. See *The Iowa College of Law*, DAILY ST. REG., Sept. 19, 1875, at 4 (describing the first day of class after return to Des Moines as part of Simpson Centenary College); *The Iowa College of Law, Des Moines, Iowa, Being The Law Department of Simpson Centenary College*, DAILY ST. REG., Aug. 21, 1875, at 3.

6. EDWARD H. STILES, RECOLLECTIONS AND SKETCHES OF NOTABLE LAWYERS AND PUBLIC MEN OF EARLY IOWA: BELONGING TO THE FIRST AND SECOND GENERATIONS, WITH ANECDOTES AND INCIDENTS ILLUSTRATIVE OF THE TIMES 478–79 (1916).

7. *Dedicate Drake’s New Law Building*, REG. & LEADER, Nov. 16, 1904, at 1.

8. *Dedication of New Law Building*, *supra* note 1, at 1.

9. The *American Law School Review* (1904) published a short announcement as Cole Hall was under construction:

A new building is now in course of erection for Drake University College of Law. The structure is of brick and stone, 50 feet wide by about 100 feet long. It will be two stories in height above a very high basement. There will be nine large recitation rooms, ten office rooms, a library, an assembly room, cloak rooms, and all the accessories necessary in a modern college building. The building will cost, when completed, from \$25,000 to \$30,000.

*Notes and Personals*, 1 AM. L. SCH. REV. 238, 240 (1904).

10. *Dedicate Drake’s New Law Building*, *supra* note 7, at 1.

11. *Dedication of New Law Building*, *supra* note 1, at 1.

12. *Id.*

13. See, e.g., 1 CHESTER C. COLE & E. C. EBERSOLE, THE COURTS AND LEGAL PROFESSION OF IOWA 91 (regarding W.W. Williamson), 94 (regarding Samuel A. Rice), 119 (regarding Geo. W. McCrary) (1907).

and he remembered the well-rounded, college-preparatory education he had received at The Oxford Academy in Oxford, New York.<sup>14</sup> At age 88, he recalled with pleasure not only his legal education at Harvard Law School but also lectures and classes he had attended given by “the leading literary authors of that day, and distinguished men,” men like Ralph Waldo Emerson, historian William H. Prescott, Dr. John W. Webster of the Harvard Medical School, abolitionist Wendell Phillips, and future Senator Charles Sumner.<sup>15</sup>

All would have been grateful to Francis Marion Drake—the distinguished Civil War veteran, lawyer, successful businessman, former Governor, and of course, Drake University’s great benefactor. As mentioned, it was General, later Governor, Drake who in 1881 persuaded Chester Cole to become part of Drake University in Des Moines by relocating the Iowa College of Law that Cole then headed at Simpson in Indianola; Francis Marion Drake was the primary donor making possible the construction of Cole Hall.<sup>16</sup>

There was great excitement. Hundreds attended the afternoon and, indeed, all-day ceremonies; Cole Hall was “decorated with the royal purple of the law college, the blue and white of the university and each law class room was trimmed in the class colors.”<sup>17</sup> Class leaders from all three law classes participated, and Drake’s auditorium was filled to capacity in the evening.<sup>18</sup> The Chief Justice of the Iowa Supreme Court, Horace Deemer, delivered the principal, dedicatory address, and he dedicated Cole Hall in words that still are timely and relevant. He explained that within Cole Hall

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14. See Chester C. Cole, *Speech on Taking the Chair*, in THE OXFORD ACADEMY CENTENNIAL: A RECORD OF THE PROCEEDINGS AND EXERCISES HAD IN HONOR OF THE ONE HUNDREDTH ANNIVERSARY OF THAT INSTITUTION, WITH NOTES BY THE EDITOR 21, 21–24 (O. H. Curtis ed., 1895) [hereinafter Cole, *Speech on Taking the Chair*]; Chester C. Cole, *Response*, in THE OXFORD ACADEMY CENTENNIAL: A RECORD OF THE PROCEEDINGS AND EXERCISES HAD IN HONOR OF THE ONE HUNDREDTH ANNIVERSARY OF THAT INSTITUTION, WITH NOTES BY THE EDITOR 90, 90–94 (O. H. Curtis ed., 1895) [hereinafter Cole, *Response*].

15. STILES, *supra* note 6, at 474.

16. See Letter from Francis Marion Drake to Hill M. Bell, President, Drake University (Nov. 13, 1903) (on file with Drake University Archives) (copy on file with Author); Letter from Francis Marion Drake to Hill M. Bell, President, Drake University (Nov. 5, 1903) (on file with Drake University Archives) (copy on file with Author); see also *Dedication of New Law Building*, *supra* note 1, at 1.

17. *Dedicate Drake’s New Law Building*, *supra* note 7, at 1.

18. *Id.*

“justice is to be taught which will be administered according to the principles of sacred right. . . . Justice which injures no one, but secures to all their just rights. Justice which preserves and perpetuates the general welfare. Justice standing on the vantage ground of truth.” Quoting Emerson’s observation that “justice is the application of [truth] to affairs,” Chief Justice Deemer dedicated Cole Hall to truth.<sup>19</sup>

Chester Cole was honored and grateful. He was the cofounder of the Iowa College of Law with fellow Iowa Supreme Court Justice George G. Wright, and Cole was, and still is, widely recognized as the father or the real founder of the Drake Law School, which he served as Dean from 1892 to 1907.<sup>20</sup> Judge Cole wanted to locate the school near or in the state capital. He wanted legal education not only to be a rigorous academic pursuit but also to be near and at home with the law’s great institutions—the courts, the legislature, and the bar. In the state capital, he wrote:

[T]he Legislature convenes and the laws of the state are enacted; there . . . courts are held . . . so during the entire school year, one of the courts, and much of the time two of them, are in actual, open session and engaged in the trial of important causes. The opportunity for observation and the gaining of valuable information, not otherwise attainable, is as complete and entire as possible.<sup>21</sup>

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19. *Id.*

20. 1 BLANCHARD, *supra* note 2, at 95. Judge Cole recalled Judge Wright’s proposing that he “join him in the establishing of a law school at Des Moines,” and he recounted the later transfer of the school “to become the Law Department of the State University,” as well as “his return to Des Moines after terminating my services to the State University” and “re-establishing” a law school at Des Moines. STILES, *supra* note 6, at 478–79; *see also* Patricia Nassif Acton & Richard, Lord Acton, *The Founding of the Iowa Law School and the Old Capitol Years: 1865–1910*, in *THE HISTORY OF THE IOWA LAW SCHOOL 1865–2010*, at 3, 3–25 (N.W. Hines ed., 2011).

21. *The Iowa College of Law*, *supra* note 4, at 452. Influenced by the legal education he had received at Harvard, Judge Cole, with his colleagues, integrated “attendance upon the courts,” as well as moot trials and moot courts into the school’s academic program:

Under this course of instruction in pleading and practice, experience in moot trials and observation in actual court proceedings, together with the comments and suggestions thereon, it is believed a more thorough acquaintance and practical knowledge of the preparations of pleadings and how to try a cause can be obtained than hitherto has been afforded in the same time to students of law in any school or office.

*Id.* at 455. The curriculum also included a Model Senate for students to practice

Judge Cole saw the completion and dedication of Cole Hall at Drake University in the state capital as the culmination of decades of work, and he expressed to all his deep gratitude. “My cup of joy is well nigh full,” he said.<sup>22</sup>

Who was Chester C. Cole?<sup>23</sup> He was no one born to privilege. His father farmed, and early in life he lost his father. He received “rudimentary instruction . . . largely . . . from a much senior and favorite sister.”<sup>24</sup> At the age of 13, he went to work for nearly five years as a clerk in a store and boarded with the family of his employer, whose home was adjacent to The Oxford Academy, a university preparatory school that he would later come to attend.<sup>25</sup> At the age of 70, in 1894, he accepted an invitation to return to Oxford and serve as president of the school’s Centennial Celebration; in his remarks he said, “I was born within the sound of our Academy bell . . . .”<sup>26</sup> You can almost feel the longing he must have had for formal education as he would hear the bell ring, perhaps even a calling, and you can get some

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Parliamentary Law, one of their academic courses. Cole certainly knew of legislative conflicts about slavery and race relations both at the federal and the state levels, and he well appreciated the service in the legislature that attorneys had the opportunity, and would be called upon, to play. At the dedication of Cole Hall 39 years after Appomattox, Professor (later Dean) E. B. Evans recognized the importance of the judicial and legislative service for which legal education needed to prepare young lawyers:

[He] spoke of the rights of man that had been established and secured upon the battle field and by law and, regarding the preservation of these rights, he said: “They will not be preserved on the battle field, but in the future civil life and progress of the nations of the earth the battles will be in the legislative halls and before judicial tribunals.”

*Dedicate Drake’s New Law Building, supra* note 7, at 1.

22. *Dedication of New Law Building, supra* note 1, at 1 (“Dean Cole . . . was fairly overflowing with joy and good will, and as he spoke of his satisfaction and delight because of the completion of this work for which he had sacrificed thirty years, and expressed his gratitude for the presence of these, his friends of the bar. The grand old man was overwhelmed with cheers from his hearers.”).

23. At “the urgent request” of his friend Hon. Edward H. Stiles, who “earnestly besought him to sit down and narrate to my own stenographer the general events of his life,” Judge Cole, just before turning 88, dictated his own account of his life. STILES, *supra* note 6, at 474–80. He also spoke autobiographically at the Centennial Anniversary of The Oxford Academy. *See Cole, Response, supra* note 14, at 91–92. A brief but valuable, apparently authorized, biographical essay on Judge Cole appears in A. T. ANDREAS, ILLUSTRATED ATLAS OF THE STATE OF IOWA 362–63 (1875).

24. Cole, *Response, supra* note 14, at 91.

25. *Id.*; STILES, *supra* note 6, at 474.

26. Cole, *Response, supra* note 14, at 91.

hint of the importance he attached to education<sup>27</sup> that he would later, in *Clark v. Board of School Directors*, recognize as the right of all children, regardless of race, equally to enjoy.<sup>28</sup> Sickness prevented him from attending Union College, for which Oxford had prepared him, and later, upon recovering, he read law for two years with an attorney in Oxford.<sup>29</sup> He then attended the Harvard Law School, where his professors and the education he received made a lasting impression on him.<sup>30</sup> He would later write about the lessons he learned and the experience he had at Harvard, and its model and culture would influence him in cofounding the Iowa College of Law and shaping the Drake Law School.<sup>31</sup>

Chester Cole would go on to become a truly distinguished lawyer in his time,<sup>32</sup> engaged in public life and in one of the great issues, if not the greatest, in U.S. history—race relations in the United States. He cofounded the Iowa

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27. *See id.* (“[Boarding in a home that] adjoined the Academy lot . . . I was often within the sound of the voice alike of the teacher and the taught. This proximity and its opportunities served to intensify the desire for that instruction and growth in knowledge which were, to me, only attainable within the walls and the full advantages of the Academy”). It takes little stretch of the imagination to believe that Cole must easily have been able to relate to 12-year-old Susan B. Clark *and* her father.

28. *See Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 275–76 (1868).

29. STILES, *supra* note 6, at 474. He read with attorney Ranson Balcom, who went on to become presiding justice on the New York Supreme Court.

30. Judge Cole specifically recalled:

Simon Greenleaf, the author of ‘Greenleaf on Evidence,’ and of several other leading textbooks, and who had for many years been Reporter for the Supreme Court of Maine, his native State; also Judge William Kent, who was the son of the great Chancellor of New York, James Kent, than whom no greater jurist has ever lived in this country; also Professor [Joel] Parker.

*Id.*

31. *See Note, Legal Education—IV—Law Schools*, 8 WESTERN JURIST 455, 455–59 (1874). Judge Cole recalled “Prof. Greenleaf’s introductory lecture in 1847 to the senior law class, of which [he was] a member, in the Harvard Law School,” in which the Judge was “greatly pleased” but eventually came to disagree insofar as faculty responsibility for student accountability was concerned. *Id.*; *The Iowa College of Law*, *supra* note 4, at 451–56. Greenleaf thought student accountability was not the faculty’s concern, but Cole disagreed. *Legal Education—IV—Law Schools*, *supra*, at 457.

32. *See Great Lawyer Passes*, DES MOINES REG. & LEADER, Oct. 5, 1913, at 4. In this editorial published on Judge Cole’s death, the *Register and Leader* opined, “Death removed one of the ablest jurists of the west when it stilled the heart of Chester C. Cole of Des Moines yesterday morning. Probably the common judgment of his colleagues will be that among the minds trained in the law few, in this country, have been keener or more capable or better equipped than his . . .” *Id.*

College of Law, to which Drake Law School traces its origin, and for 10 years or more he served as editor of *The Western Jurist*, a scholarly publication that published articles on law and reported on leading opinions in Iowa and the nation.<sup>33</sup> In recognition of his contributions over four decades to teaching and legal education,<sup>34</sup> The Carnegie Foundation awarded him a pension in 1907.<sup>35</sup> In February of 1864 he was appointed to serve on the Iowa Supreme Court, and he would later be elected and reelected to it, serving for 12 years in all.<sup>36</sup> In 1868 he authored the landmark opinion of the Iowa Supreme Court that we now celebrate, *Clark v. Board of School Directors*, holding that racially segregated public education violated the “equality principles” expressed in article I of the Iowa constitution and was unconstitutional.<sup>37</sup>

Let me make just three observations about Judge Cole, as he seems universally to have been known. First, let me say that he *loved* being a lawyer and being part of the legal profession. That included, but was not limited to, his service as Justice, and at times Chief Justice, of the Iowa Supreme Court, especially on what came to be known as “the old court” that was so instrumental in developing the law of the new state of Iowa<sup>38</sup> “when there

33. See ANDREAS, *supra* note 23, at 363; STILES, *supra* note 6, at 478–79.

34. In its Annual Report published in 1914, the Carnegie Foundation for the Advancement of Teaching took note of Judge Cole’s passing with a brief biographical note. It concluded, “The Carnegie Foundation, in recognition of Judge Cole’s long and valuable service to legal education in Iowa, on January 5, 1907, granted him a retiring allowance. He died October 4, 1913.” CARNEGIE FOUND., NINTH ANNUAL REPORT OF THE PRESIDENT AND OF THE TREASURER 129 (1914).

35. *Judge Cole Given Carnegie Pension*, DES MOINES REG. & LEADER, Jan. 8, 1907 (Morning Edition), at 5 (“President Pritchard (sic), in his letter [to Judge Cole], explained that this allowance is generally not granted to teachers in professional schools, but Judge Cole, with one other, had been made an honorary exception.”). The Foundation President actually was Henry S. Pritchett, President of Massachusetts Institute of Technology. CARNEGIE FOUND., *supra* note 34, at 123.

36. See ANDREAS, *supra* note 23, at 363; STILES, *supra* note 6, at 476–78.

37. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 276–77 (1868); see *infra* text accompanying notes 70–76.

38. See 1 COLE & EBERSOLE, *supra* note 13, at 316. The “old court” was composed of justices sitting at the beginning of 1864, namely, Ralph P. Lowe, George G. Wright, John F. Dillon, and Chester C. Cole. E. H. Stiles, an attorney himself as well as author and historian, described these justices as a “rare judicial array that principally contributed in giving to the Supreme Court of Iowa the distinction throughout the entire country of being one of the very strongest in the land.” STILES, *supra* note 6, at 419. At the ceremonies dedicating the Iowa Supreme Court’s “new” courtroom on June 9, 1886, members of the Iowa Supreme Court, past and present, as well as the Governor and U.S. Supreme Court Justice Samuel Miller were present and invited to speak. Judge Cole

was little precedent to follow.”<sup>39</sup> He wrote 886 opinions for the court. However, he also loved the *practice* of law. In a statement about his life that he made at the age of 88, he recalled his introduction to the practice of law in western Kentucky, in both civil and criminal cases, including a harrowing experience with a defendant whom he was cross-examining who didn’t like the cross-examination and drew a knife on the young lawyer.<sup>40</sup> Decades later, at the age of 83 or 84, he was arguing an appeal he had taken for a client to the United States Supreme Court;<sup>41</sup> and in 1912, at the age of 88, he was the principal trial attorney in a five-day jury trial in Polk County.<sup>42</sup> In that case he represented a small business suing the giant Standard Oil Company on a claim we would describe today as one for predatory pricing looking to drive his client out of business. That was a retrial of a case in which the Iowa Supreme Court had reversed an earlier verdict the jury had returned for his client.<sup>43</sup> In the second trial, his client won \$7,000, the equivalent of more than \$180,000 today.<sup>44</sup> Judge Cole treasured being part of the legal profession. In 1907, he was the chief historian for and contributor to the two-volume publication of *The Courts and Legal Profession of Iowa*, a compilation of biographies of prominent lawyers and leading judges in Iowa—including

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related stories from the court’s past but “predicted for its future renewed honors and glory coming forth from amid such surroundings.” *Eloquent Words from Justice Miller, Judges Wright, Wilson, and Cole, T. S. Parvin, J. N. Baldwin, and Others*, IOWA ST. REG., June 9, 1886, at 6. An account of the ceremonies published in the *New York Times* includes the statement that Judge Cole “spoke of himself as the connecting link between the old and the new.” *Opening a New Court Room*, N.Y. TIMES, June 10, 1886, at 3. In that respect, the judge must not only have reminisced about the old court but was also thinking keenly of the students who were, and would be, educated at the law schools he had cofounded.

39. *Judge C. C. Cole, Aged Jurist, Dies*, DES MOINES REG. & LEADER, Oct. 4, 1913 (Morning Edition), at 1, 3.

40. STILES, *supra* note 6, at 475–76 (noting how Cole said he was “so much affrighted that I was not able to move or say a word, but before he reached me, he slackened and I saw fully that he had relented his purpose, and thereupon I recovered myself, and pointing my finger at him, I said to him: ‘You go back. You must answer that question. You can’t scare people here.’”). Not quite, of course. Judge Cole then added, “While I was in point of fact so scared that I could not move a muscle or say a word, this was not known to those present, and from the entire transaction, I acquired the reputation of a very brave man.” *Id.* at 476.

41. *Thomas v. Iowa*, 209 U.S. 258, 259 (1908).

42. *See Speech Marks End of Career in Law*, DES MOINES REG. & LEADER, Oct. 26, 1912, at 1, 3 (reporting on the trial and discussing Judge Cole’s long career in law).

43. *Dunshee v. Standard Oil Co.*, 132 N.W. 371, 376 (Iowa 1911).

44. *See Dunshee v. Standard Oil Co.*, 146 N.W. 830, 832 (Iowa 1914).



every justice of the Iowa Supreme Court—along with commentary on leading cases of the Iowa Supreme Court from the time Iowa was part of the Wisconsin Territory and had a Territorial Court to the early twentieth century. While reading it, one is constantly struck by the admiration and affection he expresses for the members of the bar and the work of the profession.

Second, Chester Cole was devoted to public service. In *The Courts and the Legal Profession of Iowa*, he repeatedly recognizes the public service of the members of the bar—their enlistment and service in the Union Army during the Civil War, their entry into politics and service in the Iowa house or senate, their contributions through legislation and judicial opinions, and their election and service as Governors and Senators or congressmen and prominent members of state and federal government.<sup>45</sup> Even while serving as Supreme Court Justice, the community looked to Judge Cole for leadership. In the fall of 1875, Des Moines learned that President Grant would be attending the Reunion of the Army of the Tennessee,<sup>46</sup> and Judge Cole served as Chairman of the Committee on Reception.<sup>47</sup> The Reunion was anticipated to be a major event, as more than 10,000 Union Army Veterans had attended the previous Reunion.<sup>48</sup> President Grant and family members stayed at Judge Cole's home, Colchester, and received guests there.<sup>49</sup> Especially noteworthy during President Grant's visit to Des Moines was his speech on Wednesday evening, in which he emphasized the importance of free public education for all and stressed the separation of church and state.<sup>50</sup> In addition to his service on the Iowa Supreme Court for

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45. See, e.g., 1 COLE & EBERSOLE, *supra* note 13, at 95–96 (Henry C. Caldwell), 96–97 (Samuel J. Kirkwood), 99–101 (George G. Wright), 168–69 (Ralph P. Lowe), 187–89 (James B. Weaver), 189–90 (William F. Stone), 324–35 (Leslie M. Shaw), 421–25 (Francis Marion Drake). Evidence of Judge Cole's view of public service as a calling, if not an obligation to serve, may be found in a comment he made about Samuel J. Kirkwood, who after serving as a prosecutor and member of the constitutional convention in Ohio, moved to Iowa, became a state senator, and then was elected and served as Iowa's Governor from 1861 to 1864. Kirkwood was familiar both with the practice of law and the making of laws. "Such talent," Judge Cole wrote, "could not be allowed to remain unemployed in public interests." *Id.* at 97.

46. *President Grant Coming*, DAILY ST. REG., Sept. 19, 1875, at 4.

47. *Id.*

48. *The Society of the Army of the Tennessee*, DAILY ST. REG., Sept. 26, 1875, at 4.

49. *Our Guests*, DAILY ST. REG., Sept. 29, 1875, at 1, 3.

50. *The President—How General Grant Spent His First Day in Des Moines*, DAILY ST. REG., Sept. 30, 1875, at 1, 4. For a description of President Grant's visit to Des Moines and time with Judge Cole, see RON CHERNOW, GRANT 811–12 (2017).

12 years, Chester Cole's service included active participation and leadership as President of the Iowa Soldier's Orphan's Home, for which he helped dramatically improve its financial position in keeping with a large rise in the number of orphan children assisted.<sup>51</sup>

A lawyer's practice and representation of clients itself represents public service in which to find meaning and take pride.<sup>52</sup> At the age 87, Chester Cole wrote to the Clerk of the Marion Circuit Court in Crittenden County, Kentucky, where he had begun practice 60 years earlier after leaving Harvard; he asked for a copy of the opinion in a case in the late 1850s in which he had represented an African American woman seeking to have her and her children declared free persons.<sup>53</sup> The defendant was one who claimed to be the owner of his client and her children. The trial court held for the defendant; however, with his partner, the young lawyer pursued a successful appeal on her behalf. The Kentucky Court of Appeals held that

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51. ANDREAS, *supra* note 23, at 363. The *Register and Leader* published a lengthy news article, in the nature of an obituary, when Cole died. *Judge C. C. Cole, Aged Jurist, Dies*, *supra* note 39, at 1, 4 (noting Judge Cole's public service: "Of the many general acts of charity and philanthropy in which Judge Cole took part many are fresh in the minds of the older residents of Des Moines. In 1872 he was prominent in the rehabilitation of the state library, making it the splendid omnigatherum it needed to be. As president of the board of trustees of the Soldiers' Orphans' home shortly after the war he aided in greatly extending and improving its aid. In social activities he was prominent. He was a member of Knights of Pythias and of the Masonic fraternity. In his church connections he was a Presbyterian and for many years an elder in the church.").

52. See Dean Roscoe Pound's famous and often quoted definition of what defines a profession, "pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood." ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* 354 (1953).

53. See Letter from Napier Adams, Clerk, Commonwealth of Kentucky Office of Clerk of Court of Appeals Frankfort, to Chester C. Cole, Former Justice, Iowa Supreme Court (Sept. 8, 1911) (copy on file with Author) (referencing Judge Cole's earlier letter and request at the Iowa State Historical Library). The records of the court of appeals, it turned out, had been destroyed by fire in 1864, but Judge Cole's request was referred to the Marion County Circuit Court, which located a copy of the whole of the opinion "filed with the papers in the case in the Circuit Clerk's office." Letter from C.S. Nunn, Circuit Court Clerk, Marion County, to Chester C. Cole, Former Justice, Iowa Supreme Court (Sept. 25, 1911) (on file with the Iowa State Historical Library) (copy on file with Author). Judge Cole evidently earned a good and lasting reputation during his years of practice in Kentucky. The Marion County Circuit Court Clerk in his letter to Judge Cole added, "Your name is frequently heard here, and always mentioned with favor and appreciation." *Id.*

she and her children were “adjudged to be free persons of color [and] they are declared to be entitled to all the rights appertaining to such persons.”<sup>54</sup> Obviously the cause, the result in the case, and his service resonated with him a half a century and more later. Judge Cole would be very, very proud to learn, as Public Service Scholar and 3L Brinet Rutherford has just announced, that Drake’s Public Service Scholars will hereafter be known as “Chester C. Cole Public Service Scholars.”

Third, and finally, I want to call attention to Chester Cole’s personal courage. Judge Cole was a Democrat. He was nominated in 1859 as a Democrat for the Iowa Supreme Court;<sup>55</sup> he was nominated and ran for Congress as a Democrat in 1860;<sup>56</sup> and in 1862 he spoke to Democrats at their convention as one of their own.<sup>57</sup> But as between *party* and *country*, he chose country, and he championed the Union. Because he *was* a Democrat, Cole was called upon immediately after the firing on Fort Sumter in April of 1861 to urge support for the Union, which he did at a public meeting in Sherman Hall;<sup>58</sup> thereafter, Republican Governor Samuel Kirkwood asked him to travel to myriad Iowa counties, especially the southern counties, and

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54. *Yeakey v. Yeakey* (Ky. Ct. App. Oct. 28, 1859) (on file with the Iowa State Historical Library) (copy on file with Author). Although this opinion does not appear to be published, J. M. Barnes, Clerk of the Crittenden County Circuit Court, made a handwritten copy of the opinion and mailed it to Judge Cole on September 27, 1911.

55. STILES, *supra* note 6, at 476–77. In 1857, Judge Cole moved his family from Kentucky to Iowa, settling in Des Moines, because of violence in Kentucky following the 1856 election and the future conflicts he could foresee.

56. *Id.* at 473, 477 (noting that, to his misfortune as a candidate, “it was the year of the [Republican] Lincoln boom and the determination of the American people to blot out slavery”).

57. *Id.*

58. *The Great Meeting at Sherman Hall*, IOWA ST. REG., Apr. 24, 1861, at 3. The meeting was held Saturday evening, April 20, 1861. *Id.* Judge Gray presided; various persons were designated Vice Presidents and Secretaries. *Id.* Judge Cole had been appointed to the Committee on Resolutions, for which he submitted the following resolution:

Therefore, Resolved, That we, as American citizens, regardless of our former political proclivities, and differences, pledge ourselves to make every effort in our power and to suffer any personal or pecuniary sacrifice which may be necessary to vindicate the integrity of the Union, the supremacy of the Constitution and the honor of our flag.

*Id.* (quoting committee resolutions submitted by Judge Cole). According to the article, “The resolutions elicited tremendous applause, and were unanimously adopted.” *Id.* Afterwards, “excellent speeches were made,” one of which Judge Cole delivered. *Id.*

speak out against the Rebellion and in support of the Union.<sup>59</sup> He endeavored tirelessly to persuade people, even his own party and especially “Copperhead Democrats,” to put country ahead of party and politics. “Fellow Citizens,” he wrote, “[w]e have not met to promote partisan views, nor to accomplish partisan purposes, but ignoring such considerations, we will consult together, only in the true spirit of patriotism, as to the duty we owe our Country in this, the hour of her imminent peril.”<sup>60</sup> That is, of course, a hope for which we pray today.

When President Lincoln issued the Emancipation Proclamation that became effective January 1, 1863, Judge Cole was one of a few of the prominent citizens of Des Moines who spoke at a filled-to-capacity Sherman Hall in support of the Proclamation and its importance.<sup>61</sup> That spring, at the request of Governor Kirkwood, he spoke in numerous Iowa counties, urging them to support the Union.<sup>62</sup> Later that year, Judge Cole publicly came out

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59. STILES, *supra* note 6, at 473, 477.

60. Chester C. Cole, *Untitled (Undated)* (unpublished handwritten manuscript) (on file with the Iowa State Historical Library in the folder of Judge C. C. Cole) (copy on file with Author). The manuscript appears to be a speech given to Wapello County Democrats and likely provided the pattern or substance for Judge Cole’s remarks to other gatherings. To his audience in Wapello County, while urging support of the President and the Union, he said:

It is, however, proper for me to say that I have been a Democrat of the strictest faith, [and] have a grateful recollection of the honors paid [and] devotion shown by the citizens of Wappello [sic] County, as the Congressional standard bearer of that party in the [word unclear] of 1860. And you will permit me also to state that I am today a firm believer in, [and] conscientious [sic] advocate of the principles of that party, that when this Rebellion shall be put down, the perpetuity of this government established, other problems solved that we have a country to govern, I shall again undertake to convince you of the wisdom of those principles [and] the necessity of their enforcement in the government of the country.

*Id.* A later reference in the manuscript to “a rebellious spirit against the mother Rebellion” in Georgia suggests a time in 1862 when opponents of secession in Georgia engaged in brutal conflict with neighbors and neighboring communities who supported it. *Id.* See generally JONATHAN DEAN SARRIS, *A SEPARATE CIVIL WAR: COMMUNITIES IN CONFLICT IN THE MOUNTAIN SOUTH* (2006).

61. *The Meeting Last Evening*, DAILY ST. REG., Jan. 6, 1863, at 2; *Ratification Meeting at Sherman Hall*, DAILY ST. REG., Jan. 4, 1863, at 2.

62. STILES, *supra* note 6, at 478. A folder for Judge Cole at the Iowa State Historical Library in Des Moines, Iowa, contains a handwritten outline of remarks dated “Keokuk, Saturday, March 28th, 1863,” as well as “Oxford, N.Y., June 27th, 1863.” The handwriting appears to be very much the same as in a book Judge Cole maintained while

in support of the Republican candidate for governor, and the former Democrat eventually changed his party affiliation to Republican.<sup>63</sup>

Even before the Civil War ended in April 1865, and especially after it formally ended, the issue of black suffrage was controversial. Democrats publicly and vehemently opposed it, and the issue was controversial even among Republicans.<sup>64</sup> Nevertheless, in August 1865, while he was an Iowa Supreme Court Justice, he wrote a lengthy letter to an old friend that was later published in the *Daily State Register*.<sup>65</sup> In it he came out strongly in

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he was a member of the Iowa Supreme Court, which the folder also contains. The outline is in the nature of what today we would call “talking points.” His outline begins, “[P]arty ties, no candidacy or platform now, all for Union;” continues, “Secession began the day after elections,” giving dates for each of the states of the Confederacy; next asserts, “The duty of every citizen without regard to party [to support the Government];” asks, “What is the Government?” and counters various arguments made against support for the President and the government’s policies. One of those arguments that he voiced: was “[b]ut this War is prosecuted to abolish slavery,” to which the Judge wrote, “No!” Thereafter he referenced President Lincoln’s Emancipation Proclamation and the President’s “Letter to Greeley,” the widely known editor of the *New York Tribune*, to whom President Lincoln famously wrote:

My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would do that.

See DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 470–71 (2005) (referencing Greeley’s August 20, 1862 editorial, “The Prayer of Twenty Millions,” which criticized Lincoln for not going far enough in the Emancipation Proclamation and quoting Lincoln’s letter of August 22nd in response). Lincoln’s letter was “widely published.” DAVID HERBERT DONALD, *LINCOLN* 369 (1995).

63. STILES, *supra* note 6, at 478.

64. LELAND L. SAGE, *A HISTORY OF IOWA 172–74* (1974); Hubert H. Wubben, *The Uncertain Trumpet: Iowa Republicans and Black Suffrage, 1860–1868*, 47 *ANNALS IOWA* 409, 415–417 (1984); Robert R. Dykstra, *The Issue Squarely Met: Toward an Explanation of Iowans’ Racial Attitudes, 1865–1868*, 47 *ANNALS IOWA* 430, 433–35 (1984) (responding to Wubben); Hubert H. Wubben, *Further Reflections on the Iowa Black Suffrage Victory*, 47 *ANNALS IOWA* 544, 544–45 (1984) (responding to Dykstra). For a thorough, scholarly, and excellent account of race relations in Iowa between the 1830s to 1868 and black suffrage secured by the amendment of the Iowa constitution in 1868, see ROBERT R. DYKSTRA, *BRIGHT RADICAL STAR: BLACK FREEDOM AND WHITE SUPREMACY ON THE HAWKEYE FRONTIER* (1993).

65. *Negro Suffrage—Letter from Judge Cole*, *DAILY ST. REG.*, Aug. 10, 1865, at 2.

support of black suffrage, giving four specific reasons.<sup>66</sup> At that time only a handful of states accorded voting rights to Blacks; Democrats, certainly President Andrew Johnson, vehemently opposed extending voting rights to African Americans.<sup>67</sup> A few others supported black suffrage, but Judge Cole may have been, as he believed, “the first man of influence in the state to put himself thus publicly on record in favor of this then unpopular measure, which he fearlessly defended, ably arguing that it was right and reasonable, and that justice to persons of color demanded it.”<sup>68</sup> Among other reasons Judge Cole gave in his letter, he cited “God’s law of equality,” which made it incumbent upon the citizenry to “complet[e] the fact, by making all men equal before the law, as they are before their Maker.”<sup>69</sup>

The same principle of equality guided him as he wrote for the majority of the court in *Clark v. Board of School Directors*, 86 years before the United States Supreme Court’s landmark opinion in *Brown v. Board of Education*.<sup>70</sup> Recognizing at the very beginning of his opinion “the principle of equal

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66. Judge Cole’s letter and reasons are discussed and credited in DYKSTRA, *supra* note 64, at 208–10.

67. See, e.g., CHERNOW, *supra* note 50, at 619–21; Amy Davidson Sorkin, *Summer Reading for the Trump Administration: Ron Chernow on the Midterm Elections of 1866*, NEW YORKER (July 5, 2018), <https://www.newyorker.com/news/daily-comment/summer-reading-for-the-trump-administration-ron-chernow-on-the-midterm-elections-of-1866>.

68. ANDREAS, *supra* note 23, at 363. Professor Dykstra accepts that assessment. DYKSTRA, *supra* note 64, at 208.

69. *Negro Suffrage—Letter from Judge Cole*, *supra* note 65, at 2. In language that previews his stirring conclusion in *Clark v. Board of School Directors* about *equal*, and not separate-but-equal, access to education, Judge Cole wrote:

[T]he *moral influence* of correct action in Iowa [on the issue of Black Suffrage] will be potent for good upon the National cause. The influence of Iowa is recognized and felt among our sister States and in the National Legislature, and as she has been *first* in furnishing men, and *they* among the bravest of the brave, to secure victory in the military contest, now so triumphantly closed, so let her be *first* in the great act of political progress, and *that* among the wisest of the Right, to secure compete victory in the struggle for equality which alone can crown our brilliant triumph in arms and make our Nation practically and really “the land of the Free and the home of the Brave.”

*Id.*

70. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

rights to all, upon which our government is founded,”<sup>71</sup> Justice Cole wrote for the court that the Muscatine School Board did not have the power or the discretion to exclude children from public education on the basis of race or nationality or to require children to attend a separate school “composed wholly of that nationality.”<sup>72</sup> Separate was not equal; in visionary and, still, stirring language, Justice Cole wrote, that whether African or German, Irish, French, English, or otherwise, such people:

[T]ogether constitute the *American* . . . which it is the tendency of our institutions and policy of the government to organize into one harmonious *people*, with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation, and happiness of *mankind*.<sup>73</sup>

Notably, Judge Cole wrote over the dissent of his longtime, intimate, and widely admired friend and educational partner, Justice George G. Wright.<sup>74</sup> Wright urged instead the adoption of a separate-but-equal approach, regrettably the doctrine the United States Supreme Court announced 28 years later in the discredited and overruled case of *Plessy v. Ferguson*.<sup>75</sup>

*Clark v. Board of Directors* exemplifies what Chief Justice Deemer described in dedicating Cole Hall as justice being administered “according to the principles of sacred right. Justice which forgets all friendships, knows

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71. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 269 (1868).

72. *Clark*, 24 Iowa at 276. The court would be called upon in two later cases to make clear that the court meant what it said. These two later cases were *Smith v. Directors of Independent School District of Keokuk*, 40 Iowa 518 (Iowa 1875) and *Dove v. Independent School District of Keokuk*, 41 Iowa 689 (Iowa 1875). Its opinion in *Clark* and rationale expressed in the opinion provided the dispositive foundation for extending the principle of equal rights under Iowa’s constitution to public accommodations in *Coger v. Northwestern Union Packet Co.*, 37 Iowa 145, 154–55 (1873). For a thoughtful discussion of Iowa’s constitution and the Iowa Supreme Court’s commitment to the principle of equality expressed in *Clark* and later cases, see generally Mark S. Cady, *A Pioneer’s Constitution: How Iowa’s Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 DRAKE L. REV. 1133 (2012).

73. *Clark*, 24 Iowa at 276.

74. Some evidence of the admiration and affection Judge Cole had for Judge Wright may be found in his recollections of Judge Wright in 1 COLE & EBERSOLE, *supra* note 13, at 99–101.

75. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled in* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

no party, and disregards all ties of blood. Justice which injures no one, but secures to *all* their just rights . . .”<sup>76</sup> One hundred and fourteen years later it is good to have an occasion to rededicate ourselves to those principles and to recall not only the Dedication of Cole Hall but also our celebrated founder and forefather for whom it was deservedly named, Chester C. Cole.

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76. *Dedicate Drake's New Law Building*, *supra* note 7, at 1 (emphasis added).



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## REFLECTION ON *CLARK V. BOARD OF SCHOOL DIRECTORS*, 150 YEARS LATER

*Mark S. Cady\**

There is a reason we take time to reflect, with wonder and gratification, on times when courts made decisions that truly moved us forward as a people. It comes from our collective sense of justice and how justice given to one is achieved by all. Justice is found within each of us, as it was within the founders of our constitution.<sup>1</sup> Our founders not only established justice as a goal of government, they created a judicial branch of government uniquely different than the other two branches—one that oversees and best assures that all people have the opportunity to turn to a system that upholds justice. This commitment to justice is exemplified in many important cases that have shaped the landscape of our society.

One of those cases in our history, which we celebrate today, is *Clark v. Board of School Directors* decided by the Iowa Supreme Court in 1868.<sup>2</sup> At a time when segregated schools were common in Iowa and across the nation, the Iowa Supreme Court held in *Clark* that community school boards in the state could no longer require Caucasian children to attend one school and African American children to attend a separate school.<sup>3</sup> Remarkably, with that decision, Iowa became the first state in the nation to reject segregated schools—86 years before the United States Supreme Court did so for all states.<sup>4</sup>

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\* Chief Justice of the Iowa Supreme Court. I would like to express my gratitude to my law clerk, Victoria Millet, for her helpful assistance in producing this piece. I would also like to thank the *Drake Law Review* for giving me the opportunity to reflect on this monumental decision that continues to guide our judicial values 150 years later.

1. Findings from a study on the role of fairness in complex societies support the idea that the evolution of complex societies, “especially as it has occurred over the last 10 millennia,” involved the spread of cultural norms that facilitated and upheld fairness “beyond local networks of durable kin and reciprocity-based relationships.” Joseph Henrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, 327 *SCIENCE* 1480, 1484 (2010).

2. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 277 (1868). *But see* *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 209–10 (1849) (rejecting integrated schools and upholding the doctrine of separate but equal only 18 years before *Clark*).

3. *Clark*, 24 Iowa at 277.

4. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Our nation advanced to become “a more perfect union” by the decision in *Brown v. Board of Education* in 1954, but Iowa set the nation on its course in *Clark*.<sup>5</sup> The *Clark* decision, however, did much more on that day 150 years ago. The remarkable gift of *Clark* is not just found in the justice given to 12-year-old Susan Clark in 1868 and to all schoolchildren since. It also gives an essential understanding to all people today of the process of justice and the need for courts to continue to follow that process today to give justice as it did in 1868.

The *Clark* decision was written in a way that revealed the genius of our constitutional form of government. It reflected on the early struggles of the legislative branch of government in this state to enact statutes to resolve the controversial issue of segregated schools, but was cognizant of those prevailing shared values expressed in our state’s constitution, including equality. It spoke of the authority of the executive branch to carry out law, but demonstrated how those actions were required to be consistent with our constitutional values.<sup>6</sup> It understood that while two branches of government are designed to speak for the people, the judicial branch was established to speak for the values found in our constitution.<sup>7</sup> It took the road less traveled to ensure justice was achieved for everyone. It understood that a group of people organized by a governing structure would change into something different if it was not true to the set of common values and principles that brought them together. It understood the true meaning of judicial independence and how that principle was essential to honor our state’s enduring commitment to give value to our liberties and maintain our rights.<sup>8</sup> It reflected on how the popular sentiment of the community was for segregated schools and how that belief was expressed by the governing bodies charged with executing the laws. It understood the damage that comes when our collective values do not prevail.<sup>9</sup>

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5. *See id.* at 495.

6. *See Clark*, 24 Iowa at 271–74.

7. *See id.* at 275–77.

8. “Our liberties we prize, and our rights we will maintain.” IOWA CODE § 1A.1 (2017).

9. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (affirming a military order that forcibly removed people of Japanese ancestry from their homes to reside in detention centers during World War II), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896) (upholding the constitutionality of racial segregation laws, becoming the precedent that supported the separate-but-equal doctrine for the next several decades), *overruled by Brown*, 347 U.S. at 483; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1857) (refusing to recognize the

But, the *Clark* decision exemplified one other essential component of the values declared in our constitution. It understood that truth is what makes us remain faithful to our values. So when faced with the doctrine of separate but equal, the court in *Clark* looked to the truth: the distinction between white and black children was arbitrary and unlawful. It rejected the doctrine of separate but equal, recognizing the truth that such a doctrine allows a society supposedly devoted to equality to be separated by classifications of people. The court wrote that authority of those who carry out the law is limited by “the line which fixes the *equality of right* in all the youths.”<sup>10</sup> The court further provided:

No discretion which disturbs that equality can be exercised . . . . Therefore, it is not competent for the board of directors to require the children of Irish parents to attend one school, and the children of German parents another; the children of [C]atholic parents to attend one school, and the children of [P]rotestant parents another. And if it should so happen, that there be one or more poorly clad or ragged children in the district, and public sentiment was opposed to the intermingling of such with the well dressed youths of the district, in the same school, it would not be competent for the board of directors, in their discretion, to pander to such false public sentiment, and require the poorly clothed children to attend a separate school.

. . . Now, it is very clear, that, if the board of directors are clothed with a discretion to exclude African children from our common schools, and require them to attend (if at all) a school composed wholly of children of that nationality, they would have the same power and right to exclude German children from our common schools, require them to attend (if at all) a school composed wholly of children of that nationality, and so of Irish, French, English and other nationalities, which together constitute the *American*, and which it is the tendency of our institutions and policy of the government to organize into one harmonious *people*, with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation and happiness of *mankind*.<sup>11</sup>

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descendants of slaves as U.S. citizens, a decision we understand today as abhorrent), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

10. *Clark*, 24 Iowa at 275 (emphasis added).

11. *Id.* at 275–76.

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Importantly, the *Clark* court did not turn a blind eye to the truth simply because Iowa's founders did not contemplate integrated schools when forming our constitution in 1857. The *Clark* court did not adopt the political doctrine of separate but equal, masked as a legal doctrine to hide from the truth. Instead, it used the truth, the hallmark of justice, knowing it would always secure our common values for "ourselves and our posterity."<sup>12</sup> The profound understanding expressed by the court in *Clark* needs to be understood and celebrated today. Our reflection on *Clark* today gives us this opportunity.

The last word written in the *Clark* decision was "Affirmed." It was written to affirm the decision of the district court, but it must also be understood as affirming our process of government. Our founders gave us a remarkable and powerful form of government for us to achieve the justice in all of us. It needs to be understood, supported, and valued so that it can continue to make us into that more perfect union. If we can celebrate *Clark* in a way that highlights the celebration of a process of fairness and equity, the time required to give justice for all will be shortened, and our institutions of government will shine for all.

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12. U.S. CONST. pmbl.

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## CLARK V. BOARD OF SCHOOL DIRECTORS

*Brent Appel\**

*Clark v. Board of School Directors*<sup>1</sup> is a bright, shining star in Iowa jurisprudence and the jurisprudence of the nation. I offer a few observations to put the case in the proper perspective. The overall theme is that the Iowa Supreme Court historically has charted a course independent of federal jurisprudence, and this demonstrated judicial independence has proven the great strength of Iowa law.

The Iowa trilogy of celebrated civil rights cases, of which *Clark* is a part, along with *In re Ralph*<sup>2</sup> and *Coger v. Northwestern Union Packet Co.*,<sup>3</sup> can only be understood as part of the jurisprudence of the West. For example, Charles Mason, the author of *In re Ralph*, came West notwithstanding his familiarity with sophisticated New York society as managing editor of William Cullen Bryant's *New York Evening Post*.<sup>4</sup> The young lawyers on the Iowa Supreme Court that decided *In re Ralph* were all under the age of 40.<sup>5</sup> They sought freedom and opportunity. The jurisprudence of the Western United States tended to be free of cultural baggage—the received wisdom of the established social order—and, particularly, the baggage of jurisprudential norms that tolerated, if not supported, the brutal reality of chattel slavery.<sup>6</sup>

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\* Justice of the Iowa Supreme Court, appointed in 2006.

1. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266 (1868).

2. *In re Ralph*, Morris 1 (Iowa 1839).

3. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (1873).

4. Mark W. Schwiebert, Charles Mason and the Civil War: The Story of a Jacksonian in the Mid-Nineteenth Century 1, 9–10 (1976) (unpublished M.A. thesis, Drake University) (on file with Drake University), <https://escholarshare.drake.edu/bitstream/handle/2092/851/dt1976mws.pdf?sequence=1&isAllowed=y>; see also 4 BENJAMIN F. GUE, HISTORY OF IOWA: FROM THE EARLIEST TIMES TO THE BEGINNING OF THE TWENTIETH CENTURY 183–84 (1903), <https://babel.hathitrust.org/cgi/pt?id=coo.31924052550427;view=1up;seq=363>.

5. 4 GUE, *supra* note 4, at 183, 287–90. Justice Thomas Wilson came to Iowa and was appointed to the territory's supreme court at the young age of 25 and would decide *In re Ralph* only months later. *Id.* Justice Joseph Williams was the eldest of the three at the age of 37 when he was appointed the year before the *In re Ralph* decision. *Id.*

6. See, e.g., Schwiebert, *supra* note 4, at 1, 9–10 (describing a young Mason as a man who bound from trade to trade and one who, as a Jacksonian Democrat, espoused egalitarian principles that broke from the establishment norms of the day and was critical of big business and banks of the time).

A robust notion of equality before the law was an important part of the jurisprudence of the West. Unlike the United States Constitution, the Northwest Ordinance famously contained an antislavery provision.<sup>7</sup> In *In re Ralph*, Chief Justice Mason, relying on notions of equal protection of the law found in the Northwest Ordinance, crafted a simple but consequential opinion declining to return an African American working the lead mines in Dubuque to captivity in Missouri.<sup>8</sup> Further, a few years later, the Iowa constitutional founders notably placed the notion of equality based on the Virginia Declaration of Rights (a state law provision whose verbiage was subsequently borrowed in large part by Jefferson in the federal Declaration of Independence) in the very first substantive Iowa constitutional provision, article I, section 1. Originally declaring that “all men are . . . free and independent” in the 1846 Iowa constitution, the language was upgraded in the 1857 Iowa constitution to state that “all men are . . . free and equal.”<sup>9</sup>

Such an equality provision was absent from the United States Constitution. Madison told LaFayette in a moment of candor that the inclusion of equality language similar to the Virginia Declaration of Rights “would have a spark on a mass of gunpowder” because of the slavery issue.<sup>10</sup> Yet, the Iowa founders found the concept of equality too important to be excluded from the Iowa constitution. And, unlike the federal Constitution, the Iowa constitution contained no provisions like the Fugitive Slave Clause and the Second Amendment (arguably designed, in part, to allow state militias to suppress slave revolts) to accommodate, if not directly support, the brutal institution of chattel slavery.<sup>11</sup> The inclusion of equality language in Iowa and other state constitutions proved to be a very powerful tool

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7. Henry K. Peterson, *The First Decision Rendered by the Supreme Court of Iowa*, 34 ANNALS IOWA 304, 305 (1958), <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=7490&context=annals-of-iowa>.

8. *In re Ralph*, Morris 1, 5–6 (Iowa 1839).

9. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 348–49 (Iowa 2015).

10. See DAVID O. STEWART, MADISON’S GIFT: FIVE PARTNERSHIPS THAT BUILD AMERICA 323 (2015).

11. See, e.g., Stephanie Mencimer, *Whitewashing the Second Amendment*, MOTHER JONES (Mar. 20, 2008), <https://www.motherjones.com/politics/2008/03/whitewashing-second-amendment>; see also Adam Winkler, *The Right to Bear Arms Has Mostly Been for White People*, WASH. POST (July 15, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/07/15/the-right-to-bear-arms-has-mostly-been-reserved-for-whites/?noredirect=on&utm\\_term=.da4d1e376c85](https://www.washingtonpost.com/posteverything/wp/2016/07/15/the-right-to-bear-arms-has-mostly-been-reserved-for-whites/?noredirect=on&utm_term=.da4d1e376c85).

for antislavery and civil rights lawyers seeking to undermine the institution of slavery and to advance the cause of civil rights in the Reconstruction Era.<sup>12</sup>

Another feature of the Iowa historical landscape is the high importance given to the provision of public education in Iowa state government. Both Iowa constitutions have specific provisions promoting public education, and Iowa governors of both political parties repeatedly urged the development of public school in Iowa as a high priority.<sup>13</sup> Not surprisingly, when Iowan political leaders formed a commission to make recommendations regarding the future of public education in Iowa, they recruited Horace Mann, the nationally prominent leader in public education, to lead the commission.<sup>14</sup> The historical landscape at that time provides a helpful context for the themes of the primacy of education and the importance of equality that merge powerfully in *Clark*.

When considering the decision in *Clark* and later in *Coger*, it is important to consider the justices serving on the Iowa Supreme Court at the time the decisions were rendered. By 1854, a political revolution swept over Iowa as antislavery interests rallied behind James W. Grimes's bid for governor, an electoral victory that upended the Iowa political landscape and

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12. See, e.g., Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 *DRAKE L. REV.* 1133, 1138–40 (2012) (noting that despite several antiblack measures, including the denial of suffrage for black Iowans, the 1857 constitution was as progressive and inclusive as any at the time).

13. WILLIAM SALTER, *THE LIFE OF JAMES W. GRIMES: GOVERNOR OF IOWA, 1854–1858; A SENATOR OF THE UNITED STATES, 1859–1869*, at 26, 56 (1876), [http://galenet.galegroup.com/servlet/Sabin?dd=0&locID=drakeu\\_main&d1=SABCP00339400&srctp=a&c=1&an=SABCP00339400&df=f&s1=education&d2=39&docNum=CY3801520709&h2=1&vrsn=1.0&af=RN&d6=39&d3=39&ste=10&stp=Author&d4=0.33&d5=d6&ae=CY101520671](http://galenet.galegroup.com/servlet/Sabin?dd=0&locID=drakeu_main&d1=SABCP00339400&srctp=a&c=1&an=SABCP00339400&df=f&s1=education&d2=39&docNum=CY3801520709&h2=1&vrsn=1.0&af=RN&d6=39&d3=39&ste=10&stp=Author&d4=0.33&d5=d6&ae=CY101520671) (providing that Governor Grimes advocated for public education at Education Convention in 1847 and in 1854 stated that “[government’s] greatest object is to elevate and ennoble the citizen . . . . To accomplish these high aims of government, the first requisite is ample provision for the education of the youth of the State.”). Ansel Briggs, speaking to the Special Session of the state’s first General Assembly, urged lawmakers, “Our Laws relative to Common Schools, in my judgment, call for your immediate and careful attention. The people of Iowa have ever manifested an earnest and commendable zeal in the spread of education, and especially in the establishment of an efficient and permanent system of Common Schools.” LEONARD FLETCHER PARKER, *HIGHER EDUCATION IN IOWA* 24 (1893) (citation omitted).

14. C. Ray Aurner, *Iowa a Debtor to Horace Mann*, 78 *J. EDUC.* 315, 316–17 (1913), <https://www.jstor.org/stable/pdf/42821076.pdf> (noting Horace Mann was tapped by Governor Grimes to help draft language for legislation that would go on to be the bedrock of public education in Iowa).

paved the way for the emerging Iowa Republican Party to take control of the state legislature.<sup>15</sup> While supreme court justices were selected by the legislature in the 1846 constitution, under the 1857 Iowa constitution, justices were elected by the voters.<sup>16</sup>

The Iowa Republican Party took the obligation of nominating qualified persons seriously, but not surprisingly, the devotion to evolving Republican Party principles was not a hindrance, and no doubt was a benefit, to those aspiring to the bench. It thus should come as no surprise that persons nominated by the Iowa Republican Party tended to have strong views about slavery and equality. Among the nominated and elected justices with such demonstrated commitments were Joseph Beck, the author of *Coger*. Beck's uncle was then the renowned Senator Thomas Morris of Ohio who, along with John Quincy Adams, proved to be one of the foremost opponents of slave power in Congress in the 1830's.<sup>17</sup> Harvard-educated Chester Cole had a profound hatred for slavery, stemming, at least in part, from his experiences in Kentucky prior to coming to Iowa.<sup>18</sup> And, as a young lawyer in Davenport in the 1850s, John Dillon—a rather stern figure in later life—actively assisted in the gathering of supplies and recruitment of volunteers to assist freedom forces in bleeding Kansas.<sup>19</sup> Dillon later married the daughter of Hiram Price, who served in Congress for two decades and was a staunch opponent of the extension of slavery.<sup>20</sup>

The growth of antislavery sentiment in Iowa was demonstrated at the Iowa Constitutional Convention of 1857. Echoing the advocacy of antislavery lawyers, like Ohio's Salmon Chase, the 1857 constitution extended the right to jury trials to fugitive slaves in a fashion contrary to the Fugitive Slave Act.<sup>21</sup> Further, the right to counsel was extended beyond

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15. SALTER, *supra* note 13, at 5–9.

16. IOWA CONST. art. V, § 3 (1857) (repealed 1962).

17. 4 GUE, *supra* note 4, at 16.

18. *See id.* at 56–57.

19. *See* Letter from John Dillon to William Penn Clark (June 17, 1856) (on file with the Iowa State Historical Library in the William Penn Clark correspondence file box 1, vol. 2, letter 71) (discussing Dillon's efforts to raise money and obtain blankets for a company of 12 to 15 men).

20. 4 GUE, *supra* note 4, at 73–74.

21. *See* IOWA CONST. art. I, § 9 (1857); *see also* H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1165 (2012) (noting throughout northern states, hundreds and thousands would meet to condemn the Fugitive Slave Act as, among other things, unconstitutional for its denial of a right to jury for fugitive slaves).



criminal prosecutions to include civil cases involving life or liberty of the accused, an effort plainly designed to apply to fugitive-slave proceedings in state court.<sup>22</sup> The bitter rejection of federal slavery jurisprudence was demonstrated only a few months after the 1857 constitutional convention when the United States Supreme Court handed down *Dred Scott*, which was soundly excoriated by the Iowa legislature, declaring that “*Dred Scott*, is not binding in law.”<sup>23</sup>

Although the passage of time has dimmed public memory, Iowa’s refusal to acquiesce in federal and state efforts to enforce the slave regime was cited as a cause of secession by South Carolina and Texas in their secession ordinances.<sup>24</sup> Particularly irritating to southern states was the refusal of Iowa Governor Samuel Kirkwood to expeditiously extradite Barclay Coppoc, a participant in John Brown’s fateful raid, at the behest of Virginia’s governor.<sup>25</sup> While it is sometimes claimed that the southern states leaving the union were doing so to enforce their state rights, the opposite is true. As Professor James Loewen and others have currently demonstrated and contemporaneous sources plainly confirm, the southern states left the Union because states like Iowa refused to acquiesce in the enforcement and maintenance of the slave regime, and the grip of slave interests on the levers of federal power were waning.<sup>26</sup> According to Confederate Vice President Alexander Stephens in his famous Cornerstone speech, the cornerstone of the new confederate government was that “the negro is not equal to the

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22. See IOWA CONST. art. I, § 10 (1857).

23. *State v. Short*, 851 N.W.2d 474, 484 (Iowa 2014) (citing the Iowa legislature’s resolution of 1858, stating the case was “not binding in law or conscience upon the government or people of the United States” and that it “degrade[d] the free states”).

24. See S.C. SECESSION CONVENTION, DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION; AND THE ORDINANCE OF SECESSION 7–9 (1860), <http://www.atlantahistorycenter.com/assets/documents/SCarolina-Secession-p1-13.pdf>; *Declaration of Causes: February 2, 1861, A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union*, TEX. ST. LIBR. & ARCHIVES COMMISSION, <https://www.tsl.texas.gov/ref/abouttx/secession/2feb1861.html> (last updated Aug. 25, 2011).

25. See, e.g., Roy Booker, *The Story of an Iowan with John Brown*, QUAD-CITY TIMES (Oct. 3, 2013), [https://qctimes.com/news/local/ask-the-times/the-story-of-an-iowan-with-john-brown/article\\_e61bf4a4-1663-5140-87f5-2a7b11583339.html](https://qctimes.com/news/local/ask-the-times/the-story-of-an-iowan-with-john-brown/article_e61bf4a4-1663-5140-87f5-2a7b11583339.html).

26. See, e.g., James W. Loewen, Opinion, *Five Myths About Why the South Seceded*, WASH. POST (Feb. 26, 2011), [https://www.washingtonpost.com/outlook/five-myths-about-why-the-south-seceded/2011/01/03/ABHr6jD\\_story.html?utm\\_term=.4eeaa2e32f31](https://www.washingtonpost.com/outlook/five-myths-about-why-the-south-seceded/2011/01/03/ABHr6jD_story.html?utm_term=.4eeaa2e32f31).

white man, that slavery—subordination to the superior race—is his natural and normal condition.”<sup>27</sup> The Civil War was not a battle over southern states’ rights; it was a battle over the continuation and maintenance of a race-based slave regime that sought to expand to the West.<sup>28</sup>

Another feature of the historical landscape that cannot be overlooked is the role of immigrants in the development of the Iowa legal culture. After the failed revolutions in Europe of 1848, thousands of immigrants fled the old countries for a new future across the Atlantic.<sup>29</sup> In particular, a large number of Germans settled in the river towns of Dubuque and Davenport as well as other towns in Southeast Iowa.<sup>30</sup> Of particular note, highly educated and sophisticated German revolutionary leaders, such as Theodor Olshausen and Hans Reimer Claussen, fled Schleswig-Holstein and settled in Davenport and its environs.<sup>31</sup> These political refugees of European political repression knew what it meant to be chased through narrow streets and into the countryside by forces of law and order.<sup>32</sup> These political refugees bitterly opposed slavery and its enforcement mechanism, the Fugitive Slave Act, and publicized their opposition in the German language newspaper, *Der Democrat*.<sup>33</sup> In addition to strong antislavery views, the Schleswig-Holsteiners were also strong advocates of public education.<sup>34</sup>

The German immigrants came to Iowa in large enough numbers to become politically significant. The Iowa Republican Party, burdened with a history of temperance not favored by German settlers, was anxious to gain a

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27. Alexander Stephens, *Sketch of the Corner-Stone Speech*, in HENRY CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 717–29 (1866), <https://iowaculture.gov/history/education/educator-resources/primary-source-sets/civil-war/cornerstone-speech-alexander>.

28. *See id.*

29. *See generally* Merle Curti, *The Impact of the Revolutions of 1848 on American Thought*, 93 PROC. AM. PHIL. SOC’Y 209–15 (1949).

30. Charles Wilson Emery, *The Iowa Germans in the Election of 1860*, 22 ANNALS IOWA 421, 427 (1940), <https://doi.org/10.17077/0003-4827.6108>.

31. *Id.* at 431.

32. *See id.* Both men were arrested and imprisoned for political actions in Denmark. *Id.*

33. *See id.* at 446–47.

34. *See id.* at 444–45 (detailing how another Schleswig-Holsteiner and Republican politician, Nicholas Rusch, was a fierce proponent of an integrated public education in Iowa schools).

fair share of the German American vote.<sup>35</sup> As a consequence, the Iowa Republicans nominated a German American, Nicholas J. Rusch, for Lt. Governor, who won the office in the election of 1860.<sup>36</sup> When former State Senator Hans Reimer Claussen, one of the most prominent Schleswig-Holstein transplants, retired from legal practice, an admiring note was penned by Davenport-native and former Iowa Supreme Court Justice John Dillon praising his “active sense of justice and right.”<sup>37</sup> Given the prominence of German Americans politically and their distinguished leadership, it is not surprising that in *Clark*, Justice Cole specifically noted that if the educational authorities could discriminate against negroes in education, they could also similarly discriminate against German Americans and other immigrants.<sup>38</sup>

The Iowa dedication to equality in its constitutional structure and case law did not escape contemporaneous notice outside Iowa. In the Kansas Constitutional Convention of 1859, as Professor Chris Green has noted, the privileges and immunities clause of the Iowa constitution was cited as the kind of text “they wished to preserve the equal rights of the people.”<sup>39</sup> The *Clark* case, with its emphasis on “equal privileges,” was cited in the halls of Congress by New Jersey Senator Frederick Frelingshuysen, an eminent lawyer and leading civil rights advocate.<sup>40</sup> More recently, Professor Green, a leading contemporary scholar, cites *Clark* as an example of where constitutional notions of “privileges and immunities” were not “strangled in the crib.”<sup>41</sup>

As is well-known, the federal judiciary took a fundamentally different path on questions of equality and civil rights in the Reconstruction Era. The Reconstruction Era United States Supreme Court faced a situation where

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35. *Id.* at 443.

36. *Id.* at 440, 444–45.

37. Richard, Lord Acton, *A Remarkable Immigrant: The Story of Hans Reimer Claussen*, PALIMPSEST, Summer 1994, at 87, 96.

38. See *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 275–85 (1868).

39. CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 33 (2015).

40. See 2 CONG. REC. 3454 (1874) (invoking the *Clark* decision by arguing “a public school who should exclude therefrom a German who by naturalization has become a citizen . . . because he was of German descent, would violate his privileges as a [U.S.] citizen . . . . And the same is true if one of African descent was excluded.”).

41. Christopher R. Green, *Originalism and the Sense–Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 614–16 (2006).

the federal government lacked the power to enforce civil rights in the South, whether constitutional or statutory, absent effective military enforcement, which attracted waning political support in the North.<sup>42</sup> Beginning in Mississippi and spreading throughout the South, gangs of terrorists engaged in murders and brutal acts of physical violence to deny the freedman newly found political rights in defiance of federal authorities.<sup>43</sup> By 1877, fears spread through the nation's capital about the possibility of a second civil war. Five members of the Supreme Court served on the Hays-Tilden Commission to recommend a resolution of the election controversy, thus placing them in the very center of a blistering national political debate.<sup>44</sup> The necessity of dealing with an obdurate, unreconstructed, and violence-infused white Southerners determined to maintain white supremacy, combined with the post-war desire for normalcy in the North, no doubt played a role in lessening the resolve of the United States Supreme Court to apply constitutional norms of equality.<sup>45</sup> The end result was the truly embarrassing performance of the United States Supreme Court in the *Slaughter-House Cases* (1872), *Civil Rights Cases* (1883), and *Plessy v. Ferguson* (1896).<sup>46</sup>

The Iowa context in the immediate post-war years, and hopefully even today, differed from the environment faced by the United States Supreme Court. In 1868, while federal authorities in the South struggled with Reconstruction, Iowa voters enacted a constitutional amendment conferring the right to vote on African Americans.<sup>47</sup> Although there was plenty of opposition, there was never a substantial question of the enforceability of the *Clark* and *Coger* decisions.<sup>48</sup>

At the end of the day, the trilogy of Iowa civil rights cases, of which *Clark* is an important part, should inspire us all. Although the Iowa Supreme

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42. See generally Adam Serwer, *The Supreme Court Is Headed Back to the 19th Century*, ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/redemption-court/566963/>.

43. See *id.*

44. Gilbert King, *The Ugliest, Most Contentious Presidential Election Ever*, SMITHSONIAN (Sept. 7, 2012), <https://www.smithsonianmag.com/history/the-ugliest-most-contentious-presidential-election-ever-28429530/>.

45. See *id.*

46. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Civil Rights Cases*, 109 U.S. 3 (1883) (never overruled); *Slaughter-House Cases*, 83 U.S. 36 (1872) (never overruled).

47. G. Galin Barrier, *The Negro Suffrage Issue in Iowa—1865—1868*, 39 ANNALS IOWA 241, 258–61 (1968), <https://doi.org/10.17077/0003-4827.7876>.

48. See *id.*

Court did not face resistance comparable to the federal courts in the southern states, racism remained rampant in northern states. Iowa was no exception.<sup>49</sup> A less controversial path was clearly available in each of these cases. Yet, the Iowa Supreme Court declined to conform its opinion to the lowest common denominator of political prejudice in favor of the constitutionally established legal principle of equality. As noted in *Clark*, “[P]ublic sentiment in their district is opposed to the intermingling of the white and colored children in the same school.”<sup>50</sup> Nonetheless, the *Clark* court emphasized that to allow separate schools would “be to sanction a plain violation of the spirit of our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races.”<sup>51</sup> The *Clark* case thus represents an enduring clarion call for unity in a diverse nation.

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49. See, e.g., Gabriel Victor Cools, *The Negro in Typical Communities of Iowa* 65 (1918) (unpublished dissertation, University of Iowa) (on file with University of Iowa) (“[I]t is to be inferred that the moral life of the Negro in Des Moines presents the greatest problem to the social group. A double standard of living appears to be the ideal toward which the majority of the people is unconsciously striving. Indeed virtue seems to be subordinated to licentiousness. The majority of the people, it would appear, have set up an ideal, which, if pursued, would transmit to the future generations an inheritance of immorality and degeneracy from which they would be slow in recovering.”).

50. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 268 (1868).

51. *Id.* at 276.



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## CLARK AND CITIZENSHIP

*Edward Mansfield\**

*Clark v. Board of School Directors* is a great decision with enduring lessons for the present day.<sup>1</sup> Two themes animate the majority opinion. One is equality. The court invokes “the principle of equal rights to all, upon which our government is founded.”<sup>2</sup> The second is citizenship. By citizenship I mean the right to be part of a single community. On this score, the court reminds us that we are “one harmonious *people*, with a common country.”<sup>3</sup>

The combination of these two themes—equality and citizenship—drove the outcome of the case. The court observed that the school board’s discretion was “limited by the line which fixes the *equality of right* in all the youths between the ages of five and twenty-one years.”<sup>4</sup> Yet the court also noted that allowing the board to maintain a separate, segregated school for African Americans “would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races.”<sup>5</sup> The critical constitutional provision on which the court relied is not some guarantee in the Iowa bill of rights but a section of the education article, which stated at the time, “The board of education shall provide for the education of all the youths of the State, through a system of common schools.”<sup>6</sup>

To us today, the principle of equality appears to be a fully sufficient and obvious basis for the court’s decision. It strikes us as nonsense that the grammar class the school board proposed to create for Susan Clark would be “equal” to the educational opportunities afforded white children.<sup>7</sup> As my former constitutional law professor, Charles Black, once wrote:

But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior

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\* Justice, Iowa Supreme Court; J.D., Yale University, 1982; B.A., Harvard University, 1978.

1. *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266 (1868).

2. *Id.* at 269.

3. *Id.* at 276.

4. *Id.* at 275.

5. *Id.* at 276.

6. *See id.* at 271, 274 (quoting IOWA CONST. art IX, § 12 (1857)).

7. *See id.* at 268.

station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.<sup>8</sup>

We also view segregation through the lens of *Brown v. Board of Education*, which held that the mere fact of segregation deprives minority children of equal educational opportunities.<sup>9</sup> In the *Brown* Court’s words, “Separate educational facilities are inherently unequal.”<sup>10</sup>

But 150 years ago, separate but equal didn’t seem so implausible. *Clark* was not a unanimous decision. In dissent, Justice Wright acknowledged “a mere offer to organize the [grammar] department” at the colored school would not meet the Muscatine school district’s obligation.<sup>11</sup> Yet he concluded, “There is no absolute legal right in a colored child to attend a white school rather than one made up of children of African descent; just as there is no such right in a white child to attend a colored school.”<sup>12</sup> As he put it, “The principle of equal rights to all does not demand that all the children of the district should be taught in the same building, nor by the same teacher . . . .”<sup>13</sup> He believed that “[t]he true inquiry is: Have all equal school privileges?”<sup>14</sup> And he found that this equality had been “preserved” and “in no sense disturbed, under the rule adopted by [the] board.”<sup>15</sup>

Justice Wright, in short, thought he had an answer to the majority’s view that segregated schools denied African Americans equal rights under the law. Yet, he did not answer, or even attempt to answer, the majority’s theory of citizenship: How can we be considered one nation, one state, one citizenry, as long as African Americans are forced into separate schools? Frederick Douglass put it this way in a famous 1852 speech: “In a composite nation like ours, as before the Law, there should be no rich[,] no poor, no high, no low, no white, no black, but common country, common citizenship,

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8. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 424 (1960).

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

10. *Id.*

11. *Clark*, 24 Iowa at 278 (Wright, J., dissenting).

12. *Id.* at 279.

13. *Id.* at 280.

14. *Id.*

15. *Id.* at 281.



equal rights, and a common destiny.”<sup>16</sup> Douglass, like the *Clark* majority, saw the importance of *both* equality *and* citizenship.<sup>17</sup>

We should not disregard the importance of citizenship as a constitutional principle today. The fabric of our nation consists of more than bits and pieces of individual rights, at times partially woven together in judicial opinions. There is also a right to belong, to be part of the community. In *Clark*, the Iowa Supreme Court cited to an express statement of that principle within the education article of the Iowa constitution.<sup>18</sup> Additionally, citizenship is inherent to our form of government. Elsewhere, Professor Black wrote that constitutional law should not be limited to textual interpretation; rather, inferences can additionally be drawn from constitutional structure.<sup>19</sup> Citizenship is one of those inferences.

Citizenship helps explain the right to travel, which at least underlies the next great Iowa civil rights decision to follow *Clark*: *Coger v. Northwestern Union Packet Co.*<sup>20</sup> Citizenship may also help us resolve some of the more difficult legal controversies of our times that are not neatly susceptible to a pure individual rights analysis. These include situations where a right only takes its full meaning in a group context or where one person’s right may appear to conflict with another’s.

Citizenship means we go to school together. That is one lesson of *Clark v. Board of School Directors*.

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16. See, e.g., *A Vision for American Citizenship*, NAT’L MUSEUM AM. HIST., <http://americanhistory.si.edu/democracy-exhibition/creating-citizens/defining-citizenship/vision-american> (last visited Feb. 2, 2019) (quoting Frederick Douglass).

17. See *id.*

18. *Clark*, 24 Iowa at 271, 274 (majority opinion).

19. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22–25 (1969).

20. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873) (finding that an African American boat passenger was entitled to the same rights and privileges possessed and exercised by white passengers).



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## RACIAL DISPARITY IN IOWA'S CRIMINAL JUSTICE SYSTEM 150 YEARS AFTER *CLARK*

*Alfredo Parrish\**

*Southern trees bear a strange fruit  
Blood on the leaves and blood at the root  
Black bodies swinging in the southern breeze  
Strange fruit hanging from the poplar trees<sup>1</sup>*

“Strange Fruit” was sung by Billie Holiday 71 years after the Iowa Supreme Court ruled in *Clark v. Board of School Directors* that a young African American could attend an all-white school in Muscatine, Iowa.<sup>2</sup> Dubbed at the time “a declaration of war . . . [and] the beginning of the civil rights movement,”<sup>3</sup> Billie Holiday’s epic resonates today as Iowa confronts gross racial disparity in sentencing by its courts.<sup>4</sup> That disparity represents an ugly blight in Iowa’s otherwise historical leadership among states in upholding equal rights for African Americans<sup>5</sup> and demands our immediate attention. It is a problem that, if we are to assuage Billie Holiday, requires the concerted efforts of all branches of government and a significant commitment of community resources.

Iowa’s history can be broken into four broad periods.<sup>6</sup> The first period, during which discrimination against Blacks was accepted, includes the

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1. BILLIE HOLIDAY, *STRANGE FRUIT* (Commodore Records 1939).

2. *Id.*; *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 274 (1868).

3. DAVID MAGOLICK, *STRANGE FRUIT: BILLIE HOLIDAY, CAFÉ SOCIETY, AND AN EARLY CRY FOR CIVIL RIGHTS* 17 (2000).

4. *See, e.g.*, Charly Haley, *Iowa Still near Top for Locking Up Blacks, Study Says*, *DES MOINES REG.* (June 15, 2016), <https://www.desmoinesregister.com/story/news/crime-and-courts/2016/06/15/iowa-still-near-top-locking-up-blacks-study-says/85936006/>.

5. *See, e.g.*, *Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (1873); *Clark*, 24 Iowa at 266; *In re Ralph, Morris* 1 (Iowa 1839).

6. *See* Richard, Lord Acton & Patricia Nassif Acton, *A Legal History of African-Americans*, in *OUTSIDE IN: AFRICAN-AMERICAN HISTORY IN IOWA 1838–2000*, at 60, 60 (Bill Silag ed., 2001).

founding of the territory and continues up to the Civil War.<sup>7</sup> In 1851, free Blacks were prohibited from coming into the state, yet during this period the Iowa Supreme Court allowed two former slaves to be granted freedom after petitioning the court.<sup>8</sup> The second period encompasses the beginning of the Civil War through 1880.<sup>9</sup> During this time, Iowa began the dismantling of discriminatory provisions in Iowa's constitution and statutes.<sup>10</sup> This influential period included the pivotal decision in *Clark* as well as *Coger v. Northwestern Union Packet Co.*, in which the Iowa Supreme Court affirmed that a Black woman was "entitled to the same rights and privileges while upon [the] defendant's [steamboat] . . . which were possessed and exercised by white passengers."<sup>11</sup> The third historical period encompassed 1884 to 1960.<sup>12</sup> This was the era of the enforcement of civil rights by enactment of criminal sanctions and civil damages.<sup>13</sup> An important case marking the period is *State v. Katz*,<sup>14</sup> which involved a drug store owner named Maurice Katz who refused to serve three African American customers in 1948.<sup>15</sup> The trial court's decision found Katz guilty of violating Iowa civil rights law and was upheld by the Iowa Supreme Court.<sup>16</sup> The aftermath of the *Katz* decision ushered in the fourth period of Iowa's history, beginning with the passage of the 1965 Civil Rights Act.<sup>17</sup> This act created the Iowa Civil Rights Commission, diverting many of Iowa's civil rights cases out of the realm of the court and into the realm of an administrative agency.<sup>18</sup> Each historic period has been marked by different challenges and decisions, but the singular focus throughout has been that "equal protection shall be secured to all regardless of color or nationality."<sup>19</sup>

Today, in what I envision as Iowa's fifth historical period, Iowa's standing as a leader in civil rights is threatened through its complacency in the face of unequivocal and rapidly mounting evidence of racial bias in the

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7. *Id.* at 61–69.

8. *See id.* at 67–68; *In re Ralph, Morris* at 7.

9. *See Acton & Acton, supra* note 6, at 69–72.

10. *See id.*

11. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873).

12. *See Acton & Acton, supra* note 6, at 74–78.

13. *See id.*

14. *Id.* at 76–78; *State v. Katz*, 40 N.W.2d 41, 41 (Iowa 1949).

15. *Katz*, 40 N.W.2d at 43.

16. *Id.* at 45.

17. *See Acton & Acton, supra* note 6, at 79.

18. *Id.* at 80.

19. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 158 (1873).

sentencing of its minority citizens. African Americans currently make up 25.8 percent of the prison population in Iowa<sup>20</sup> but represent only 3.8 percent of the general population.<sup>21</sup> At least 35 percent of individuals serving mandatory minimum sentences in Iowa are African American, and across crimes, African Americans serve longer sentences than whites for the same charges.<sup>22</sup> These disparate outcomes are rooted in conditions and biases that exist at every level of our criminal justice system.<sup>23</sup> African Americans walk a path uniquely wrought with peril, where one bad choice—forgiven in others—can spiral in ways non-minorities are much less likely to experience.<sup>24</sup> The racial disparities in sentencing that ultimately result from these “pipeline” hazards are in fact unjustified losses of liberty and should *alarm* our sense of justice as other such losses have throughout Iowa’s history.<sup>25</sup> Sentencing bias has myriad roots and reform must be broad, but Iowa’s courts must take the lead.

Implicit bias within the criminal justice system is one of the leading culprits of racial disparities.<sup>26</sup> It is bias resulting from “systems and institutions that produce racially disparate outcomes, regardless of the intentions of the people who work within them.”<sup>27</sup> The standard utilized by Iowa’s correctional system to classify defendants’ risks—the “Level of

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20. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

21. *QuickFacts Iowa*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ia> (last visited Jan. 22, 2019).

22. See Kathy A. Bolten, *Blacks Hit Hard by Iowa's Mandatory Sentences*, DES MOINES REG. (Apr. 4, 2016), <https://desmoinesregister.com/story/news/crim-and-courts/2016/04/03/mandatory-minimum-sentences-robbery/81832336>.

23. See *id.*

24. See, e.g., Jamil Smith, *Where Can We Be Black? From Starbucks to Coachella to the Pulitzers, White America Needs to Get Used to Having Us Here*, ROLLING STONE (Apr. 19, 2018), <https://www.rollingstone.com/politics/politics-features/where-can-we-be-black-629584/>.

25. See, e.g., Abiodun Raufu, *School-To-Prison Pipeline: Impact of School Discipline on African American Students*, J. EDUC. & SOC. POL’Y, Mar. 2017, at 47, 51.

26. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 152 (2010).

27. Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal-Justice System Is Racist. Here's the Proof*, WASH. POST (Sept. 18, 2018), [https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?noredirect=on&utm\\_term=.2c73a172c8d6](https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?noredirect=on&utm_term=.2c73a172c8d6).

Service Inventory-Revised” (LSI-R)<sup>28</sup>—is a significant contributing factor to disparate sentencing outcomes.<sup>29</sup> LSI-R considers the following factors to determine a defendant’s risks: whether the defendant had employment prior to incarceration, whether there was an official record of a violent crime, and whether the defendant associated with any other people who had been involved with crime prior to the current charge.<sup>30</sup> Using LSI-R, African Americans are classified as higher risk than whites due to criteria that discriminate against low socioeconomic status and race.<sup>31</sup> The LSI-R is one example of a system that leads to disparate outcomes for African Americans in Iowa based on criteria supported by implicit bias. Implicit bias in risk assessment should be identified and removed.

The Iowa Supreme Court has recognized the racial disparity present in Iowa’s criminal justice system.<sup>32</sup> Consistent with its history of extending rights to marginalized groups ahead of the United States Supreme Court,<sup>33</sup> the Iowa Supreme Court is preparing to confront racial disparity in sentencing with the same emboldened approach. In *State v. Plain*, Justice David Wiggins, in his concurring opinion, stated:

I feel compelled to write separately on the issue of implicit bias and racial disparity in Iowa.

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Due to the disgraceful disparity in the punishment and incarceration between blacks and whites, we should not wait for further research and study on the issue of implicit bias and racial disparity. The demand for justice to our black citizens does not allow for further stalling.<sup>34</sup>

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28. See IAN WATKINS, THE UTILITY OF LEVEL OF SERVICE INVENTORY-REVISED (LSI-R) ASSESSMENTS WITHIN NSW CORRECTIONAL ENVIRONMENTS 1 (2011).

29. See Kevin W. Whiteacre, *Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias*, 17 CRIM. JUST. POL’Y REV. 330, 338 (2006).

30. WATKINS, *supra* note 28, at 2.

31. See Whiteacre, *supra* note 29, at 331.

32. See, e.g., *Griffin v. Pate*, 884 N.W.2d 182, 203 (Iowa 2016).

33. See *Varnum v. Brien*, 763 N.W.2d 862, 883–84 (Iowa 2009) (holding same-sex couples are similarly situated as opposite-sex couples with respect to the subject and purposes of state’s marriage laws); *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873); *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 277 (1868); *In re Ralph, Morris* 1, 7 (Iowa 1839) (granting a former slave’s petition for freedom).

34. *State v. Plain*, 898 N.W.2d 801, 830 (Iowa 2017) (Wiggins, J., concurring specially).

During a recent argument before the Iowa Supreme Court in *State v. Brown*, a case involving a pretextual stop (another troubling issue contributing to racial disparity in Iowa), Chief Justice Mark Cady stated, “There seems to be a fear placed in the African-American community regarding policing tactics. Aren’t these concerns?”<sup>35</sup> The insights of Chief Justice Cady and Justice Wiggins show an acknowledgement by the Iowa Supreme Court of the problem of racial inequality in Iowa’s criminal justice system. The current court, consistent with its historical tradition, has demonstrated its independence in interpreting the Iowa constitution to provide more rights than the United States Supreme Court when interpreting constitutional provisions.<sup>36</sup>

As Iowa’s courts grapple with racial disparity in sentencing, which is difficult and complex, I want to share my views as a trial lawyer. I offer these suggestions having had the privilege of trying jury trials across Iowa and having argued numerous appellate cases as well. The following are my suggestions, in no particular order, to decrease the disparity in Iowa’s criminal justice system:

- increase quality standards and salaries for public defenders;
- revise, update, and improve risk assessments to reduce racial discrimination against defendants in the criminal justice system;
- establish a rule requiring consideration of the racial impact of all legislation;
- establish a rule requiring all judges to consider racial statistics in sentencing;
- require county attorneys to keep and forward statistics on charging decisions to the court and legislators;
- improve sensitivity training of judges, prosecutors, and all court personnel;
- require courts to review all cooperation agreements for racial disparity;
- establish an appeal procedure for probation revocation hearings;
- increase minority personnel in the court system;

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35. Margery A. Beck, *Iowa High Court Hears Arguments in Police Stop Case*, AP NEWS (Sept. 18, 2018), <https://www.apnews.com/eb9b9542eb1040e6befaa43765f4fc77>.

36. *See, e.g.*, *State v. Ingram*, 914 N.W.2d 794 (Iowa 2018); *Varnum*, 763 N.W.2d at 862; *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004).

- abolish mandatory minimum sentences;
- increase discretion in sentencing;
- establish more diversion programs for utilization by prosecutors (i.e., driving while barred is a poor person's crime);
- require the use of body cameras in all arrests and the use of audio recordings in all statements by suspects in felony cases;
- reduce court fines, allow a reasonable repayment schedule, and shorten time for restoration of civil rights after conviction;
- prohibit employers from using crimes that have been expunged as a basis to deny employment;
- increase the use of home detention;
- increase funding of community correction programs;
- require the consideration of racial impact with every sentence to determine if it will increase racial disparity;
- allow greater reduction in sentences of inmates who complete education while incarcerated;
- grant a tax deduction to businesses that hire people who have been convicted of crimes;
- establish mentoring programs for prospective minority lawyers to assist with passing the bar and gaining employment;
- set up programs to assist the families of inmates released on parole or probation;
- write a children's book about Iowa's rich heritage of equality;
- create more inner-city sports programs;
- coordinate Iowa's prison educational program with community colleges;
- consider increasing age limits of youth offender programs to 24;
- restore civil rights of inmates when their sentence is completed (even when fines and restitution remain);
- stop prosecuting minor marijuana crimes;
- prohibit pretextual traffic stops;



- allow courts to create a diversion sentence program to go along with the deferred sentence and/or deferred judgment; and
- expand shock sentencing to allow the courts to resentence in forcible felony cases.

Bryan Stevenson, in accepting the American Bar Association's highest award in 2018, outlined how the narrative of race in this county must change:

I think we're burdened by a history of racial inequality that is so difficult and so painful that it is creating kind of a smog . . . . We have to be willing to do things that are uncomfortable and inconvenient, because justice does not come when you only do the things that are comfortable and convenient . . . . We advance justice only when we are willing to do things that are uncomfortable.<sup>37</sup>

As Iowa confronts this blight of racial disparity in sentencing, its courts must do the uncomfortable by forging an independent path and, as in the past, go beyond those protections granted to Iowa's citizens by the United States Supreme Court. The ultimate solution to this complex issue can only be found by embracing the vestiges of *Clark*.

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37. Kevin Davis, *Bryan Stevenson Calls on Lawyers to Get Uncomfortable and Deepen Commitment to Justice*, ABA J. (Aug. 4, 2018), [www.abajournal.com/news/article/bryan\\_stevenson\\_calls\\_on\\_lawyers\\_to\\_get\\_uncomfortable\\_and\\_deepen\\_commitment](http://www.abajournal.com/news/article/bryan_stevenson_calls_on_lawyers_to_get_uncomfortable_and_deepen_commitment).



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## COURAGE IN ACTION

*Johnny C. Taylor, Jr. SHRM-SCP\**

The courage displayed by Alexander Clark, Justice Chester Cole, and the Iowa Supreme Court 150 years ago is not a relic of a bygone era, nor is it an idea or a concept. It is an action—one that is demanded of us today.

People think of courage in a number of ways: taking a stand, even when it's dangerous; knowing the full weight of the consequences and acting anyway; or facing your greatest fears. These ideas of courage are all accurate, but they still seem large and lofty and a little hard to get our arms around.

But specific acts of daily courage are what paved the way for *Clark v. Board of School Directors*, our nation's first ruling against desegregation, which happened just three years after the Civil War and 86 years before *Brown v. Board of Education*.

So, what does courage look like in action?

It looks like a father taking on his local school system over racial discrimination because he wanted a better education for his daughter. It looks like a state supreme court justice ruling against the popular and accepted ideas of the day because he knew they were unconstitutional and morally wrong. It looks like legislators in a Midwestern, overwhelmingly white state becoming a leading voice for school desegregation and the constitutional right of universal education—in a time when speaking out for racial equality could lead to violence and ruin.

Everyday courage looks much like what happened in Iowa for the *Clark* decision. And I believe today we need more everyday courage than ever. We need to inspire courage in action among our citizens, our leaders, our legislators, and our institutions.

Now more than ever, in today's divided, highly political and social climate, we need more people like Alexander Clark and Justice Cole: People who are willing to make the tough calls. People who are able to adopt a perspective that stretches beyond today's tweets and headlines. People who are willing to go against the grain of popular sentiment, even if there is a price to pay, and to lead with integrity.

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The HR profession faces these challenges every day. Name any of the toughest issues facing our world, and you will see them show up every day in the workplace—red-hot topics like sexual harassment, immigration, wage gaps/disparities, skills gaps, unconscious bias, and more. The workplace also remains one of the few arenas of life where we do not get to self-select our companions and cohorts, creating the perfect climate for misunderstanding and conflict.

Creating inclusive workplaces that make room for talent in every kind of package should be a priority for every employer. But this often means taking some risks and doing some gut-checks. We need more courage in every workplace, where social change often begins.

Just think about what it would mean if every employer had the courage to speak up for workplace immigration at a time when just the word *immigration* launches heated conversations. Or, just think about what it would mean if every employer had the boldness to rethink the dogma around requiring college degrees, so that letters after a name were not the single-most important determining factor to getting a job.

What would it mean to overcome fears around hiring people with criminal records—even the formerly incarcerated—so that these Americans were not “resentenced” by employers for the rest of their lives? Or what would it mean to hold accountable anyone and everyone who abuses their power and engages in any form of harassment—even letting those go who were deemed “too big to fail”?

Critically, what if every employer, hiring manager, HR professional, and other leader had the courage to see and value talent in all its forms?

It would pay off for work, workers, workplaces, and society.

Acts of everyday courage can be intimidating. But there are a few things we can do to foster the bold attitude of those leaders in Iowa 150 years ago. First, keep an eye on the future, and be cognizant of what today’s decisions mean for our children and grandchildren. Second, be ready to act against outdated public sentiment, for which our institutions should therefore step into the lead. Third, recognize and put aside our own unconscious biases to act with fairness and integrity. Finally, listen to and value the ideas of people with whom we do not share the same worldview.

I am the proud father of a daughter who is just a little younger than Susan Clark was when she was denied a place in her local school. I know how I would react if she was stopped from fulfilling her dreams because of ignorance or bigotry. I would try to do something about it. I would make

sure she had what she needed, one way or another. But after that, I am not so certain I would have the courage to fight for every other child, especially if doing so could affect my position, my reputation, and my future.

That is the kind of courage I am talking about—and the kind that is needed today. The kind that compels us to go beyond meeting our own immediate needs and reaching out, over and over, to improve conditions for others.

As employers, when we have the courage to do what it takes to make our own workplaces better, that is great. But when we do the work that makes *all* workplaces better, that is when we create a better world.

Fortunately, we have the example of those who have come before us, including those who we celebrate on the auspicious anniversary of *Clark*.