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A PLACE FOR WALTER CLARK IN THE AMERICAN JUDICIAL TRADITION

WILLIS P. WHICHARD†

Walter Clark, Chief Justice of the North Carolina Supreme Court from 1903 to 1924, is a preeminent figure in North Carolina jurisprudence. A forerunner in many ways, Clark was an early advocate for such causes as women's suffrage and child labor laws. In this Article Judge Whichard reviews the evidence on Clark's judicial and personal life, and evaluates earlier biographical treatment of Clark. Although Clark died over sixty years ago, there still is no consensus on the merits of his contributions. Clark's stature as one of the most influential judges in the history of the State and the Nation, however, is undeniable.

A hemlock shades an inconspicuous grave in Raleigh's Oakwood Cemetery. The marker reads:

WALTER CLARK
CHIEF JUSTICE
BORN 19 AUGUST 1846
DIED 19 MAY 1924

† Associate Judge, North Carolina Court of Appeals. A.B. 1962, J.D. 1965, University of North Carolina at Chapel Hill; LL.M. 1984, University of Virginia.

The author is indebted to Walter F. Pratt, Associate Professor of Law at Duke University, for suggesting Walter Clark as a subject; to E. Elizabeth Lefler, Tracy K. Lischer, Susan F. Owens, Daniel F. Read, and P. Michelle Rippon, for their support and assistance during this endeavor; to G. Edward White, Professor of Law at the University of Virginia, for helpful suggestions and advice. He also is indebted to his subject, Walter Clark, for proving unfailingly interesting company during several months of research and writing.

1. The graves of several other notable jurists and statesmen also are located in Oakwood Cemetery; for the most part, these graves are considerably more ornate than Clark's grave. A few steps away from Clark's marker, a large monument decorates the grave of Josephus Daniels—editor, confidant of President Woodrow Wilson, Secretary of the Navy, Ambassador to Mexico, and honorary pallbearer for Clark. The News and Observer (Raleigh, North Carolina), May 21, 1924, at 1, col.2, at 14, col.2; see also A. BROOKS, WALTER CLARK: FIGHTING JUDGE 53 (1944) (discussing the friendship between Clark and Daniels); 1 THE PAPERS OF WALTER CLARK 190, 224-25 (A. Brooks & H. Lefler eds. 1948). Tall, ornate stones mark the graves of Governors Jonathan Worth (1865-68) and Daniel G. Fowle (1884-91). Governors Aycock (1901-05), Bragg (1855-59), Holden (1865, 1868-70), and Swain (1832-35) also lie here.

Two other chief justices of the Supreme Court of North Carolina are buried in Oakwood Cemetery: John L. Taylor, the first chief justice (1819-29), and Richmond M. Pearson (1859-78), who led the court in the Civil War and Reconstruction eras. Pearson's monument contains extensive writing, including the words, "his epitaph is written by his own hand in the North Carolina Reports." Walter Clark said of Pearson: "He was the equal of Ruffin, if not his superior, as a common law lawyer. He had probably more originality, and, as far as he went, was as accurate . . . ." 1 THE PAPERS OF WALTER CLARK, supra, at 549. "Few will deny Ruffin's rank as our greatest judge. None will deny Pearson's claim to the second place, except those who claim for him the first." Id., quoted in J. Hutchens, The Chief-Justiceship and the Public Career of Richmond M. Pearson, 1861-1871, at 138 (1960) (unpublished master's thesis, University of North
Although the message is simple and the grave obscure, the person described was neither of these. He was, instead, a judicial harbinger, who was controversial in life and has remained so posthumously.

G. Edward White, in his book *The American Judicial Tradition*, profiles certain American judges, chosen on the basis of historical interest, and availability of information. Only judges no longer serving on the bench were considered. Although Clark is not included, he satisfies White's criteria. First, his juridical service ended over sixty years ago. Second, his life is of historical interest in that it "reflect[s] the governing social and intellectual assumptions of [a period] in American history . . . ." Last, although history is only "the recorded part of the remembered part of the observed part of what happened," and regrettable gaps exist in the record of Clark's life, there is adequate information from which to draw Clark's profile. The premise of this Article is that Clark merits the consideration that White has accorded to other American judges; its purpose is to supplement *The American Judicial Tradition* with a profile of Walter Clark.

I. Lineage

Biographers commonly seek clues to the character and personality of their subjects in the disposition and influence of their ancestors. Clark's ancestors, however, provide no ready explanation of his character and personality. The

Carolina at Chapel Hill) (available in the North Carolina Supreme Court Library, Raleigh, North Carolina).

Unless otherwise indicated, dates during which people served in their respective offices have been taken from *North Carolina Dep't of Secretary of State, North Carolina Government 1585-1974: A Narrative and Statistical History* (J. Chaney ed. 1975) [hereinafter cited as *North Carolina Government*].

2. Clark wanted only a simple marker. A year before his death, Clark and his son walked through the cemetery and noted the elaborate monuments. He told his son, "When my days are over, I wish a simple marker placed over my grave. Whatever services I may have rendered to my countrymen during life will be cherished by them when I am gone. This is the only monument I care for." A. Brooks, supra note 1, at 253.


4. *Id*. at 2-3.

5. White notes that "[a] work that presents a broad sweep of history through profiles of individuals necessarily presents problems of inclusion and exclusion." *Id*. at 2.


7. Address by Dr. George V. Taylor, Professor of History at the University of North Carolina at Chapel Hill, to the University community (Feb. 8, 1960).

8. Although Clark saved a substantial amount of his papers, there are large, unexplained gaps. The papers are sparse, for example, for the periods 1879-92 and 1921-24.

The North Carolina State Archives, located in the State Library Building in Raleigh, North Carolina, contains numerous boxes of Clark's correspondence. There also are many collections that contain letters from Clark to others. Further, some of Clark's papers are at the libraries of the University of North Carolina at Chapel Hill and Duke University. The author found very few significant materials in Clark's papers not included in 1 *The Papers of Walter Clark*, supra note 1, and 2 *The Papers of Walter Clark* (A. Brooks & H. Lefler eds. 1950).

9. See, e.g., R. Caro, *The Years of Lyndon Johnson: The Path to Power* 3 (1982). Caro concluded that "to understand Lyndon Johnson it is necessary to understand the Bunton strain [(i.e., Johnson's maternal line)], and to understand what happened to it when it was mixed with the Johnson strain . . . ." *Id*.

10. The information on Clark's ancestors in the text is from A. Brooks, supra note 1, at 23-
evidence reveals nothing in his family background that presaged juridical greatness. On the other hand, none of his more immediate ancestors require apology.

Clark's great-grandfather, Colin Clark, came to the United States from Scotland in the mid-eighteenth century. He married Janet McKenzie, a clergyman's daughter, and they named their oldest son David.11 David demonstrated an unusual capacity for business, and accumulated an estate quite large for his time. At age thirty-four he married Louise Norfleet, whose father gave her a hundred slaves and several thousand acres of land along the Roanoke River in eastern North Carolina. David's frugality and business judgment augmented the merged family fortunes so that he became one of the most wealthy and successful planters in North Carolina.

The union of David Clark and Louise Norfleet produced eleven children, the eighth of whom they named David Clark II. He married Anna Maria Thorne, who was educated in New York and whose grandfather was a distinguished New York physician. Their first child, born August 19, 1846, was named Walter McKenzie Clark.

II. CHILDHOOD

In addition to ancestral clues to character and personality, biographers commonly seek to discover events that may have influenced their subjects during youth.12 Although it would be hyperbole to conclude that one must understand Clark's ancestral strains to comprehend Clark himself, it is fair to infer that those strains profoundly influenced his childhood and his adult life. Clark's ancestors, for their time at least, were educated, talented, and economically successful. Their economic and educational wealth led to a childhood for Clark that was financially secure and could be devoted substantially to learning. While most eastern North Carolina children during the mid-nineteenth century tilled fields, Clark read books.13 When he was eleven years old, one of his teachers wrote to his father: "He is very studious and, what is rather remarkable in a boy of his age, seems to be so from the love of study. If I had

26. The author also has consulted an extensive genealogical chart and other Clark family materials supplied by Walter Clark, great-grandnephew of Chief Justice Clark.

11. "David" and "Walter" are common names in the Clark family. Three bearers of the names presently work in the North Carolina legal community. David Clark, grandson of the chief justice, is a Lincolnton attorney engaged primarily in nonlegal activities. A second David Clark, a grandnephew, is a practicing attorney in Greensboro. Walter Clark, a great-grandnephew, is an ocean and coastal law specialist with the University of North Carolina Sea Grant College Program at North Carolina State University in Raleigh.

12. See, e.g., J. COOPER, JR., WALTER HINES PAGE: THE SOUTHERNER AS AMERICAN 1855-1918, at 3-4 (1977). Cooper believed that a youthful Walter Hines Page was influenced profoundly by having seen coffins of deceased Civil War soldiers unloaded from trains. Id.

13. See Note, Walter Clark, 2 N.C.L. REV. 225, 226 (1924) (indicating that Clark's father had a large private library). Clark apparently used his father's library extensively. He is said to have shown an early interest in reading as a child. I THE PAPERS OF WALTER CLARK, supra note 1, at 3. By the time he entered military school at age fourteen, he evinced "a strong and active mind" and "had already learned how to study and . . . to make books his companions." A. BROOKS, supra note 1, at 1. While at military school he "frequently asked that books be sent him," presumably from his father's library. I THE PAPERS OF WALTER CLARK, supra note 1, at 5.
a school of such boys, most of the troublesome part of the business would be avoided." 14 Two years later Clark made the highest possible grade in every subject except speaking. These grades were prophetic; Clark never became a great platform orator. 15

Clark was a vigorous and longtime advocate of equal legal rights for women. Perhaps it is overly simplistic to attribute that focus to the influence of his mother; evidence, however, strongly supports such an attribution. Correspondence between the youthful Clark and his mother reveals a close relationship. 16 She appears to have been a knowledgeable woman who strongly encouraged learning, and a deeply religious person who inculcated zeal in her progeny.

At age twelve Clark wrote to his mother: "I read three chapters in my Bible regularly every day and five or ten every Sunday like you requested me to do; I go to Sunday School and Church . . . ." 17 When he was fourteen his mother wrote:

There is one thing I wish to admonish you on & that is the subject of prayer & reading your bible, never neglect getting on your knees, in humble submission, to your Maker, before you retire to rest, (never mind who is in the room) & read your bible every day, let others scoff if they will, but never, do you swerve from your duty to your God, remember, to him we owe our all, & on him are dependent for everything—You must try and set a good example for others & not be led off by wild & wicked boys—You know the promises in the bible to those who heed the instructions of their Parents . . . . 18

That same letter encouraged Clark to "go regularly to the Methodist church" and to hear a certain minister. 19 Perhaps the tenacity with which Clark pursued the causes he advocated as an adult is attributable to the religious zeal implanted in him by his mother.

Other letters from Clark to his mother disclose early interest in juridical matters. At age fourteen he wrote: "Tell Pa the "Life & Times" of Judge Iredell' in cloth costs $5.00 in sheep $6.00. Is he willing for me to get it at that price; The one I allude to is by Griffith J. McRee who married Judge Iredell's

14. A. Brooks, supra note 1, at 31.
15. I THE PAPERS OF WALTER CLARK, supra note 1, at 4; see also Winston, Book Review, 22 N.C.L. REV. 181 (1944). Winston states:

[Clark] became . . . a pungent, cryptic, powerful writer, though no speaker. The grand passion of the orator, the rolling periods, the deep, soul-stirring voice, that matchless something called "action" by Demosthenes, all these accessories Clark lacked. In private conversation he was soft spoken, affable and natural; but on his feet he was exactly the opposite: affected, unnatural, his shoulders squared, his voice militaristic, imperative, though not loud. As a public speaker he labored and seemed to bite his words.

Id. at 184. For information on Winston, see infra note 89 and text accompanying notes 89-100.
16. See generally I THE PAPERS OF WALTER CLARK, supra note 1, for the numerous letters exchanged between Clark and his mother that support this conclusion.
17. Id. at 8-9.
18. Id. at 29-30.
19. Id.
grand-daughter, is he the one Pa spoke of."\textsuperscript{20} Ten days later he wrote: "I sent a $10 bill to Pomeroy and he sent me 'Life and Correspondence of Judge Iredell' neatly bound in 2 vol cloth—and 'Plutarch's Lives' in 4 vol calf—together with $1.25 over, you know I have a long time wished to get the latter books . . . ."\textsuperscript{21}

James Iredell was the first and one of only two North Carolinians to serve on the United States Supreme Court.\textsuperscript{22} Clark's early interest in Iredell is particularly significant given that Clark himself subsequently was considered for appointment to the Court. In 1914 the North Carolina congressional delegation urged President Woodrow Wilson to appoint Clark; instead Wilson appointed John H. Clarke of Ohio. Harlan Fiske Stone, while Chief Justice of the Supreme Court, recalled that at that time he was Dean of the Columbia Law School, and that members of his faculty had observed that the President had appointed the wrong Clark.\textsuperscript{23}

III. MILITARY SERVICE, HIGHER EDUCATION, PRACTICE OF LAW

At age fifteen Clark entered the Confederate Army.\textsuperscript{24} Despite his youth, he immediately became second lieutenant and drill master. He ultimately reached the rank of major and fought in many battles, one of which—Antietam—involved another future jurist of considerable note, Oliver Wendell Holmes, Jr.

In February 1863 Clark resigned his commission to complete his education. In the spring he entered the University of North Carolina, from which he graduated in one year with the first honors in his class.\textsuperscript{25}

Little is known about Clark's legal education. On August 20, 1863, he wrote to his father from Chapel Hill and noted that he had commenced reading law under Judge William H. Battle, then Professor of Law at the University of North Carolina:

Next June (if I should continue here that long) if I pass well upon what I recite to [Judge Battle] I will be entitled to a County Court License tho' I would not be entitled to plead until I am 21. I have no idea whatever of being a lawyer but as you wished me to have a complete education I thought that would benefit me some in after life at least as much as the Greek which I have bestowed so much time on & which I am studying to make up.\textsuperscript{26}

Apparently Blackstone was a staple of legal education at that time, for the same letter states: "If there is a 'Blackstone's Commentaries' in the neighbor-

\textsuperscript{20.} \textit{Id.} at 27.
\textsuperscript{21.} \textit{Id.} at 32.
\textsuperscript{22.} \textit{North Carolina Government, supra} note 1, at 751, 756. Iredell served on the Supreme Court from 1790 to 1799. The other was Alfred Moore (1799-1804). \textit{Id.}
\textsuperscript{23.} \textit{A. Brooks, supra} note 1, at 190-91.
\textsuperscript{24.} \textit{See id.} at 3-22. \textit{See generally} 1 \textit{The Papers of Walter Clark, supra} note 1, at 49-141 (discussing Clark's military career).
\textsuperscript{25.} \textit{A. Brooks, supra} note 1, at 14-15.
\textsuperscript{26.} 1 \textit{The Papers of Walter Clark, supra} note 1, at 109.
hood please send it to me . . . as the one I am using is Judge Battle's."\(^{27}\)

After completing his studies under Judge Battle and serving in the Confederate Army for the duration of the Civil War, Clark still was not twenty-one years old. Because he was ineligible to practice law in the county courts, he decided to go to New York City to pursue further legal studies. Finding no law school open there, he began the study of law at the offices of Weeks and Foster, 58 Wall Street. He later went to the Columbian Law School in Washington, D.C., and completed its law course in a few months.\(^{28}\)

There also is relatively little information known about Clark's career as a practicing attorney. It was rather remarkable, however, for one who "ha[d] no idea whatever of being a lawyer."\(^{29}\) Clark's diaries record his "first argument in a Law Case" as "senior counsel for the plaintiff in the Moot Court" on December 5, 1866.\(^{30}\) They also record his receipt of a county court license in Raleigh on January 14, 1867, and the refusal on the same date, because of his age, to "let [him] stand" for his superior court license.\(^{31}\)

Exactly one year later Clark received his superior court license and began appearing in that court in his native Halifax County.\(^{32}\) He also appeared several times before the Supreme Court of North Carolina, on which he subsequently served for thirty-five years. During one term Clark argued two cases of his own and three for other lawyers. Older practitioners often employed him to argue their cases before the supreme court.\(^{33}\)

Clark moved from his native Halifax County to the capital city of Raleigh in late 1873.\(^{34}\) He did so partly because he was employed as director and general counsel for North Carolina of the Raleigh and Gaston and the Raleigh and Augusta railroads.\(^{35}\) His fiancee, Susan Washington Graham—daughter of William A. Graham, formerly Governor, United States Senator, Secretary of the Navy,\(^{36}\) and Whig Candidate for Vice President\(^{37}\)—also preferred Raleigh as a home.\(^{38}\)

From that time until his appointment as a judge of the superior court in April 1885, Clark conducted an exacting law practice. He represented some wealthy corporate interests, including the railroads\(^{39}\) and tobacconists Wash-

\(^{27}\) Id. at 110.


\(^{29}\) See supra text accompanying note 26.

\(^{30}\) Id. at 150.

\(^{31}\) Id. at 151-53.

\(^{32}\) A. Brooks, supra note 1, at 46.

\(^{33}\) Id. at 49; 1 The Papers of Walter Clark, supra note 1, at 189.

\(^{34}\) Id. at 49; 1 The Papers of Walter Clark, supra note 1, at 189.

\(^{35}\) Id. at 199.

\(^{36}\) A. Brooks, supra note 1, at 49.

\(^{37}\) Id. at 49.
Justice Walter Clark

For his practice Clark had the first, or one of the first, typewriters owned in Raleigh. He also owned the most complete legal library of any practicing lawyer in the state. After Clark became a superior court judge, other judges holding court in Raleigh frequently requested that Clark leave a key with the clerk of court so that they might use his library.

During these years Clark wrote and annotated Clark's Code of Civil Procedure, which practicing lawyers in North Carolina long thereafter found essential, and which the supreme court often cited with approval. He also published Everybody's Book, Some Points in Law of Interest and Use to North Carolina Farmers, Merchants, and Business Men Generally. He compiled and distributed an index to cases that were implicitly, but not explicitly, overruled by the supreme court. His papers include a January 9, 1877 letter from David M. Furches, a superior court judge (1875-79), who later became an associate justice of the North Carolina Supreme Court (1895-1901) and Clark's predecessor as chief justice (1901-03), thanking Clark for a copy and criticizing the court for its "mistake" of not stating that it was overruling an old case when it effectively was doing so.

Clark's correspondence through these years reveals active interest and involvement in North Carolina politics. He himself was supported by political leaders in elections for state Attorney General (1880) and Governor (1886), but he declined nomination for both positions.

IV. Trial Judge

Relatively little is known about Clark's years as a superior court judge. Governor A.M. Scales appointed Clark to fill a vacancy on that bench in April 1885. He then was elected to this position in November 1886, and held it until his appointment to the supreme court in 1889.

Clark's appointment to the superior court was well received. Thomas M. Holt, later Lieutenant Governor (1889-91) and Governor (1891-93), wrote to

40. 1 The Papers of Walter Clark, supra note 1, at 194-95, 197-98. Clark represented the Dukes in the collection of their accounts. Id.
41. A. Brooks, supra note 1, at 50 (stating that Clark purchased "the first typewriter that was ever owned in Raleigh); 1 The Papers of Walter Clark, supra note 1, at 190 (stating that Clark had "one of the first typewriters, if not the first in the city").
42. A. Brooks, supra note 1, at 50.
43. Id. See, e.g., Letter from T.M. Argo, a Raleigh, North Carolina attorney, to Walter Clark (Feb. 26, 1886) (relaying such a request from Judge Henry Groves Connor of Wilson, N.C.), reprinted in 1 The Papers of Walter Clark, supra note 1, at 226.
44. A. Brooks, supra note 1, at 51.
45. 1 The Papers of Walter Clark, supra note 1, at 189.
46. Id. at 193-94.
47. See generally id. at 189-236.
48. Id. at 190, 209.
49. A. Brooks, supra note 1, at 71-73; 1 The Papers of Walter Clark, supra note 1, at 228, 231, 233-34, 240-41.
50. 1 The Papers of Walter Clark, supra note 1, at 190.
51. Id. at 220.
Clark at the time:

You were my first choice and I earnestly hoped all the time that the Governor would have wisdom enough to appoint you. I feel that one more honest & impartial Judge has been added to the list, one who knows the law, and knowing it, will administer it, without fear, or favor. I am glad to see the papers endorsing your appointment.52

Judge Henry Groves Connor, who later served with Clark on the supreme court, wrote: "No man ever had the endorsement of the profession more unanimously than yourself and . . . no man was ever more entitled to it."53

The cases appealed from Clark's trial court that are reported in the North Carolina Reports reveal little of note about him. The supreme court affirmed54 or found no error55 in one hundred twenty-one cases56 and dismissed the appeal in six cases.57 It reversed,58 found error,59 granted a new trial,60 or arrested judgment61 in fifty-six cases, remanded five cases,62 modified two cases,63 and disposed of four cases in other miscellaneous ways.64

Clark once instructed the grand jury of Wake County that it was unlawful to maintain a gambling house, and that it was their duty to indict all who broke this law. In response, the grand jury indicted the operator of a gambling house near the hostelry where visiting statesmen, legislators, and attorneys appearing before the supreme court commonly gathered. Accepting a guilty plea to one count of the indictment, Clark imposed a substantial fine and a brief prison sentence. The state's press praised him for his action,65 and former Governor W. W. Holden wrote him, saying:

52. Id. at 224.
53. Id.
55. See, e.g., State v. Woods, 104 N.C. 898, 10 S.E. 555 (1889); State v. Terry, 93 N.C. 585 (1885).
56. These cases, and those referred to in the next sentence in the text, appear in volumes 93-107 of the North Carolina Reports.
57. Porter v. Western N.C.R.R., 106 N.C. 478, 11 S.E. 515 (1890); State v. McColly, 103 N.C. 352, 9 S.E. 412 (1889); State v. Tow, 103 N.C. 350, 9 S.E. 411 (1889); State v. Goings, 100 N.C. 504, 6 S.E. 88 (1888); State v. Hazell, 95 N.C. 623 (1886); White v. Utley, 94 N.C. 511 (1886).
58. See, e.g., Armfield v. Colvert, 103 N.C. 147, 9 S.E. 461 (1889); Wilson v. Hughes, 94 N.C. 182 (1886).
59. See, e.g., Everett v. Raby, 104 N.C. 479, 10 S.E. 526 (1889); Lilly v. West, 97 N.C. 276, 1 S.E. 834 (1887).
60. See, e.g., State v. Calley, 104 N.C. 858, 10 S.E. 455 (1889); Young v. Herman, 97 N.C. 280, 1 S.E. 792 (1887).
61. See State v. Hazell, 100 N.C. 471, 6 S.E. 404 (1888).
63. Efland v. Efland, 96 N.C. 488, 1 S.E. 858 (1887); Jones v. Call, 96 N.C. 337, 2 S.E. 647 (1887).
64. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889) (no error in plaintiff's appeal; modified and affirmed in defendant's appeal); Williams v. McNair, 98 N.C. 332, 4 S.E. 131 (1887) (affirmed in plaintiff's appeal, reversed in defendant's appeal); Perry v. Adams, 96 N.C. 347, 2 S.E. 659 (1887) (appeal continued to secure transcript); Scott v. Bryan, 96 N.C. 289, 3 S.E. 235 (1887) (reference directed).
65. A. BROOKS, supra note 1, at 56-57.
Allow me to express my high gratification at your action as Judge in relation to the crime of gambling. The sentence pronounced is moderate and just. For months and months that foul gambling house has glared on the main street of our City, inviting young and old men to bankruptcy, desperation, and ruin, and I have wondered if there was no law to extinguish that baleful light. Thank God, you have done that work!  

Clark managed his courts with an efficiency unusual for his day. He insisted that court open on time. He also insisted that litigants, witnesses, jurors, and officers of the court be present and prepared. He was so adamant in these practices that a rumor circulated that he even had fined himself for not opening court on time. His papers, however, contain a self-serving memorandum denying the rumor, and stating that, in his four and one-half years as a trial judge, he never was absent a day or late a minute in opening court.

In November 1889 Governor Daniel G. Fowle appointed Clark associate justice of the North Carolina Supreme Court. He was elected in 1890 to an unexpired term of two years, and in 1894 to a full eight-year term. He became "universally regarded as the ablest man on the Court, and his critics charged that he dominated it." Despite his seniority over the other associate justices and the high regard for his ability, however, it was only after a difficult and bitter contest that he was nominated and elected chief justice in 1902. Clark was reelected in subsequent general elections, and served continuously until his death on May 19, 1924.

V. SUPREME COURT YEARS

Clark's supreme court years are detailed in a biography by Aubrey Lee Brooks titled Walter Clark: Fighting Judge. Brooks' treatment of Clark exemplifies Robert Gittings' theory that a "biographer must suffer, not dully but acutely, not only the wrongs but all the experiences, triumphant or disastrous, of the subject whose life he attempts to recreate." It also exemplifies Gittings' theory that "[a] biography is always apt to be more than an exploration of one's subject; it becomes, at every step, an exploration of oneself.

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66. 1 THE PAPERS OF WALTER CLARK, supra note 1, at 225.
67. A. BROOKS, supra note 1, at 55; 1 THE PAPERS OF WALTER CLARK, supra note 1, at 190.
68. A. BROOKS, supra note 1, at 55-56.
69. 1 THE PAPERS OF WALTER CLARK, supra note 1, at 239.
70. 2 THE PAPERS OF WALTER CLARK, supra note 8, at 3 (quoting A. BROOKS, supra note 1, at 129).
71. The order of listing of the associate justices in the North Carolina Reports demonstrates Clark's seniority. He was first listed as the senior associate justice in 120 N.C. iii (1897).
72. See A. BROOKS, supra note 1, at 129-41; 2 THE PAPERS OF WALTER CLARK, supra note 8, at 3-7. At that time, a convention of party delegates from the counties of the State nominated the chief justice. Id. at 4. The qualified voters chose between the parties' nominees in the general election.
73. NORTH CAROLINA GOVERNMENT, supra note 1, at 581 n.9.
74. See 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 235-36 (W. Powell ed. 1979).
75. A. BROOKS, supra note 1.
Many people have started writing biography, and found that this has led them to be effectively writing their own autobiography." 77

Brooks obviously identified with Clark, and some have speculated that he was writing the story of his own life rather than Clark’s. 78 It is necessary, therefore, to examine Brooks briefly to understand fully his representation of Clark.

The lives of Clark and Brooks were parallel in several respects. Although Clark was Brooks’ elder by a quarter of a century and Brooks lived more than a quarter of a century after Clark died, the two nevertheless shared a considerable span of history. More importantly, they had many of the same experiences.

Both Clark and Brooks were reared in rural North Carolina. Both completed the law course at the University of North Carolina and succeeded at the practice of law. 79 They were considered for appointment to the United States Supreme Court—Clark by President Woodrow Wilson, 80 and Brooks by Presidents Woodrow Wilson, Herbert Hoover, and Franklin D. Roosevelt 81—and both engaged in intellectual or scholarly pursuits and published numerous works. 82

Perhaps most important, Brooks and Clark shared a common political and intellectual heritage. They were Jeffersonian Democrats 83 who lived through, and were influenced by, the Progressive Era of American history. Both lost United States Senate races to the political machine of the conserva-

77. at 85.


79. Brooks, having practiced much longer, was far more successful than Clark. Clark apparently lived primarily on his judicial salary most of his adult life, and died with a modest estate. The inventory of his estate included real property valued at $54,000; of that amount, $34,000 was for land in Halifax County, at least some, and presumably all, of which he inherited. The value of his personal property at death was $16,011.93; after paying debts, taxes, and costs of administration, only $51.02 remained. Final Account of David Clark and Walter Clark, Jr., Executors of the Estate of Walter Clark Deceased, ESTATE FILE No. 4929 (June 27, 1925) (available in Office of Wake County Clerk of Superior Court, Raleigh, North Carolina.)

Brooks, on the other hand, established a scholarship fund in excess of $1,000,000 at the University of North Carolina, created a revolving trust fund for The University of North Carolina Press, and made substantial gifts to his church and the Boy Scouts. 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, supra note 74, at 236.

On December 19, 1910, Clark made the following observation: "Tho I can hardly look forward to remaining 12 years yet on the bench . . . , I hope I may be able to serve out 8 years acceptably, unless I am starved out by the salary they give us." Letter from Walter Clark to Armistead Burwell (Dec. 19, 1910) (available in Burwell Collection at University of North Carolina Library, Chapel Hill, North Carolina).

80. See supra notes 22-23 and accompanying text.

81. 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, supra note 74, at 236.

82. See A. BROOKS, supra note 1, at 257-65 (selected list of Clark’s writings); 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, supra note 74, at 236.

83. A. BROOKS, supra note 1, at 41, 79, 83 (discussing Clark’s adherence to Jefferson’s views); 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, supra note 74, at 235 (referring to Brooks as "an avowed Jeffersonian Democrat").
tive Furnifold Simmons; Clark lost in 1912 to Simmons himself, and Brooks lost in 1920 to the Simmons candidate, Lee S. Overman. Both fought powerful vested interests for much of their lives, particularly the railroads and the tobacco monopoly.

Clark and Brooks revered each other. Clark called Brooks "the foremost and most successful lawyer in North Carolina." Brooks' biography of Clark is sympathetic, indeed almost eulogistic. Dumas Malone stated that "a biography should orientate its subject in history, though it should certainly not contain a full story of the times. The man himself must be kept in the center of the stage." Although Brooks' biography of Clark reflects much of the background and spirit of their times, Clark is always indubitably at the center of the stage.

After publication of the Clark biography, Brooks and Robert M. Winston, a successful corporate attorney and superior court judge, exchanged remarks that were surprisingly vituperative, given that they were published in the normally staid North Carolina Law Review. Winston described aspects of Brooks' book as "far from accurate and objective." He noted that, from Brooks' perspective, "[i]n every contest Clark's enemies are not only wrong but wickedly so." He described some of Brooks' phraseology as "language of the fiery stump orator . . . and not of the historian." Winston depicted Clark as "radical of the radicals" and a "radical reformer," referred to Clark's "strange, radical notions," and derided Clark's competence in the substantive law.

In a subsequent issue of the Review, Brooks retorted:

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84. See A. Brooks, supra note 1, at 177-91.
85. See 1 Dictionary of North Carolina Biography, supra note 74, at 235.
86. See A. Brooks, supra note 1, at 85-101 (Clark); 1 Dictionary of North Carolina Biography, supra note 74, at 235 (Brooks).
87. 1 Dictionary of North Carolina Biography, supra note 74, at 235.
92. Id.
93. Id.
94. Id.
95. Id. at 183.
96. Id. at 182.
97. Id. at 184-85. Winston stated: "[p]erhaps had [Clark] paid a little more attention to Blackstone . . . he might have ranked with Ruffin and Pearson." Id. at 185.
98. Brooks, supra note 90.
It is well known among their intimates that Judge Winston and Judge Clark had a very poor opinion of each other. Now that Clark's lips have been sealed in death for more than twenty years, I, as his biographer, am interested in seeing that justice is done to his memory.

The reading public has a right to assume that anyone reviewing a book in a publication like yours is disinterested and certainly not unfriendly to the subject of the book. In this case the reverse is patently true. He proceeded to rebut many of Winston's assertions, and concluded that "Winston's feigned resentment against Clark is not because he was a fighting judge but because he fought on the wrong side, according to Winston."  

VI. MINORITIES, CHILDREN, AND WOMEN

A jurist who evokes such vehement controversy twenty years after his death presumably is a significant historical figure. Brooks posits that Clark was significant, in notable part, for his advocacy for minorities, children, and women. The sections that follow examine those advocacies and the validity of Brooks' thesis.

A. Minorities

Some evidence supports Brooks' thesis that Clark was a significant advocate for minorities. Much, however, contradicts that thesis.

Clark and Brooks had similar youthful relationships with black people, the largest minority group of their region. Brooks wrote of his own childhood that he enjoyed what he considered "the last word in human happiness—a gun, a dog, and a negro boy chum." He wrote of Clark's childhood:

His playmates ... were mostly Negro boys of his own age and older. One who has never shared such an experience cannot possibly understand the thrill and joy of a white boy privileged to play, hunt, and swim with Negro urchins who obeyed and adored him and called him "Master." Indeed these playmates possessed all the virtues of the Negro without many of the vices of the whites.

There is considerable evidence that Clark, throughout his life, related to and cared for people on an individual level who, in the parlance of his time, were "colored" or "negro." When he joined the Army of Northern Virginia as a young man, his father gave him a bodyguard, "a Negro boy named Neverson, only two years older than Walter, but intelligent and devoted to his

99. Id. at 353.
100. Id. at 355.
101. See A. Brooks, supra note 1, at 161-76.
102. 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, supra note 74, at 235.
103. A. Brooks, supra note 1, at 30-31.
104. Although Clark was a North Carolina resident, he joined the Army of Northern Virginia because the Army was comprised of troops from the Easternmost Confederate States.
young master."\(^{105}\) On November 26, 1861, Clark wrote to his mother from camp, "if I can get the appointment [as regiment adjutant], I will be home to get my horse and boy & other things."\(^{106}\) His letters home during the war refer frequently to Neverson and show genuine concern about his health and well-being.\(^{107}\) On November 9, 1862, Clark wrote to his father: "Neverson . . . waits on me first rate, he was a little green at first about camp . . . but now I couldn't have a better (or honester) boy to wait on me."\(^{108}\)

Clark's papers include some indication of cordial relations with black leaders in his later years. A July 1, 1916 letter to Clark from Rev. W. Richard Gullins, of St. Paul A.M.E. Church in Raleigh states: "We are profoundly grateful for the interest you have heretofore manifested in us and hope to ever prove worthy of your confidence."\(^{109}\) A December 18, 1916 letter to Clark from Milton K. Tyson of Burlington states that "[t]he colored Business men, throughout has [sic] planed [sic] to hold in Greensboro, July, 4, 5-6, 7, what will be known as the North Carolina Negro Business Men's Congress, and desire your presence to deliver an address on one of the above days."\(^{110}\)

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105. 1 The Papers of Walter Clark, supra note 1, at 50.
106. Id. at 62.
107. Id. at 50.
108. Id. at 92.

A July 25, 1918 letter to Clark from O.R. Pope of the Fayetteville State Colored Normal School states: "[W]e are writing to express to you our sense of high appreciation . . . for the recent valuable contribution which you so generously made to the history of our state and country by giving to the press and the world the significant chapter: 'Part of Negroes in Previous Wars,' found in a column of the Fayetteville Daily Observer, July 23rd, 1918." Letter from O.R. Pope to Walter Clark (July 25, 1918) (available in The Clark Papers, North Carolina State Archives, Raleigh, North Carolina). Clark responded to the director of the school:

I know of no more useful work than that in which the teachers and ministers of the colored people of this State are engaged in raising the standard of intelligence and of right living among that one third of our people, who, in spite of the handicaps due to circumstances over which they had no control, are steadily rising in well being and well doing and upon whose loyalty and industry, and patriotism so largely depends the prosperity of our great State.

2 The Papers of Walter Clark, supra note 8, at 376.

Clark and James E. Shepard, founder and first president of the North Carolina College for Negroes—now North Carolina Central University—corresponded periodically. On September 6, 1906, Shepard wrote to Clark: "I have just read your magnificent and scholarly article on the Constitution in the Independent. Altho a colored man I rejoice in the fact, that we have a man in North Carolina of such standing and attainments." Letter from Dr. James E. Shepard to Walter Clark (Sept. 6, 1906) (available in The Clark Papers, North Carolina State Archives, Raleigh, North Carolina). In 1919 Shepard wrote Clark a letter of appreciation for the services Clark had rendered to black people and for his consistent justice in dealing with them. A. Brooks, supra note 1, at 175. Clark replied:

I have been the employer of colored labor ever since I became of age. I know them well and I have never received anything but kindness at their hands. I have the kindest feeling for the race and have seen the difficulties which surround their efforts to rise to better things. In my judgment, the best remedy for the situation in which the colored people find themselves is that which your race has been observing; i.e., extend the education as far as possible to all your people, impress upon them sobriety, self-control under what at times may be aggravating circumstances, the acquirement of property by industry and thrift, and the attainment, by their personal conduct, of the respect of white people.
Clark's family plantation, which had many slaves during his youth, had numerous negro tenants throughout his life. Clark reputedly dealt with them in a kind and considerate manner. On Clark's last visit to the plantation a few months before his death, one of the tenants told Clark that he needed an overcoat for the winter; Clark responded by removing his own coat and giving it to the man.

A newspaper account of Clark's funeral states:

[O]f them all who followed behind moving with feeble step, slow almost as the tolling of the muffled bell in the belfry above was George Alston, devoted servant to the Chief Justice for half a century, and who bears honorably wounds received in battle, and still carries against his skull a bullet brought home from battle. The Chief Justice had no more devoted friend than his former slave and held for him a deep affection. He sat bowed with grief, with the members of the Court.

To conclude from this evidence that Clark was a prophetic precursor of the civil rights movement, however, would be inaccurate. The sparse remaining evidence suggests the contrary.

At age nineteen, in the immediate aftermath of the Civil War, Clark began to publish letters in newspapers. In the letters he criticized the baneful effects of slavery and urged the importation of free white labor into the South. He insisted that the South must rid itself "of the dead body of slavery, and with it dispose of the perplexing questions of negro suffrage and negro equality forever."

Clark wrote:

These things your people have been doing for many years. You have risen steadily in the scale as to those things which command respect, and a steadily increasing number of white men everywhere are appreciating the change. Avoid giving this a setback by the intemperate utterances, especially by the young men of your race who are impatient at what they deem continued injustice. Most often this matter is due to the language used by office-seekers, who appeal to and excite race prejudice for their personal ends. I am sure that the vast majority of the white people of North Carolina wish to do equal and exact justice to the colored race, and their number is increasing with the proofs which the colored people are giving that they are better educated and are attaining a higher standard of morality and right living.

Id. at 175-76; see also 2 The Papers of Walter Clark, supra note 8, at 391-92.

In a case involving the flogging of a convict, Clark wrote:

It is probable . . . that the man . . . brutally treated by an agent of the State of North Carolina while in its custody and under its protection was a negro; but that is no defense. It matters not what color an African sun has printed upon him. He was a human being and entitled to the elementary rights of a man.


111. A. Brooks, supra note 1, at 28.
112. Id. at 253.
113. Id.
114. Id. at 253-54.
115. The News and Observer (Raleigh, North Carolina), May 21, 1924, at 1, col. 2, at 14, col. 2.
116. 1 The Papers of Walter Clark, supra note 1, at 145.
117. Id. at 156-57. The full text of the letter appears in 1 The Papers of Walter Clark, supra note 1, at 156-59.
The negro cannot live among us in the present state of things. The proclamation of his freedom was the death knell of his race. . . .

. . . .

. . . The negro has fulfilled his mission. He must now pass from the stage. . . .

North Carolina will not, cannot [, leave her future to the guardianship of the freed-negro.

. . . The Negro cannot remain here forever in his present anomalous condition. The future of the State cannot be made to depend upon the willingness to work of a race for whom hitherto, we have considered that now proscribed instrument, the lash, as peculiarly appropriate. The white laborer must come, but the interests of the State demand that he shall come now. . . .

. . . .

. . . Fill your villages, your towns and your workshops with a hard working, intelligent population, unembittered by distinction of race, and you place the prosperity of this State beyond the reach of envy or the votes of a Black Republican Congress.

Clark's judicial opinions dealing with minorities also suggest that he shared, or at least uncritically accepted, the prevailing sentiments of his time. There is no evidence that he was particularly sensitive to racially discriminatory practices. In *State v. Wolf* 19 the North Carolina Supreme Court held that an act providing a special school district for Cherokee Indians was not unconstitutional class legislation. Clark's opinion acknowledged, without question or criticism, the general law that "'Indians are the domestic subjects of the particular European or American State in which they happen to be.'" He stated that "'[t]he white and colored races compose the bulk of the people of [North Carolina],," and acknowledged, again without question or criticism, the constitutional provision for racially segregated public schools.

"The act is not discriminative," he said, "because it applies alike to all Indians in that school district. It could not apply to other races, which go to their own race schools."122

In a subsequent 1907 decision, *Frazier v. Eastern Band of Cherokee Indians*, Clark appended a "Note" on the history of the Indians in North Carolina. He stated, "'[I]t may not be amiss to note here the uniform kindly treatment by this State of the Cherokees in her borders." This note emphasizes Clark's paternalistic interest in treating members of this minority well, but demonstrates that he was not sensitive to discrimination against them.

118. *Id.* at 156-57, 162.
119. 145 N.C. 440, 59 S.E. 40 (1907).
120. *Id.* at 444, 59 S.E. at 42 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)).
121. *Id.* at 444-45, 59 S.E. at 42.
122. *Id.* at 445, 59 S.E. at 42.
123. 146 N.C. 477, 59 S.E. 1005 (1907).
124. *Id.* at 480, 59 S.E. at 1007.
In *Ferrall v. Ferrall*\(^{125}\) a husband sought a divorce, alleging that when he married he did not know that his wife "was and is of negro descent within the third generation."\(^{126}\) The jury found that the wife was not of negro descent, and that the husband had abandoned her. Although the trial court set aside the verdict because of erroneous instructions regarding the meaning of "real negro," the supreme court reversed and ordered judgment entered on the verdict.\(^{127}\)

Clark's concurring opinion in *Ferrall* may be viewed simply as a defense of a wronged woman\(^{128}\) or potentially wronged children.\(^{129}\) It also reflects, however, his implicit acceptance of the common view of the negro race at that time. Clark deplored the husband's consignment of his wife "to the association of the colored race which he so affects to despise."\(^{130}\) He stated that the husband's action "would brand [his children] for all time, by the judgment of a court, as negroes—a fate which their white skin will make doubly humiliating to them,"\(^{131}\) and noted that "of all men he should have welcomed the verdict that decided his wife and children are white."\(^{132}\)

In *State v. Darnell*\(^{133}\) the court reviewed a municipal ordinance which stated that if the houses on the two streets adjacent to a particular street were occupied by a greater number of whites than blacks, then a black person could not occupy any house on that particular street. Similarly, white people could not occupy houses on streets where more houses were occupied by blacks than whites. Clark's opinion held that the ordinance was outside the municipality's authority to enact ordinances for the general welfare. Clark noted that if this ordinance were permissible, aldermen could require Democrats to live on one street, Republicans on another, or Protestants on one street and Catholics on another.\(^{134}\)

The decision was not premised on preventing racial discrimination, but on "the fundamental right of every one to acquire and dispose of property by sale."\(^{135}\) Clark, referring to the natural law, stated that this right of sale was "not conferred by the Constitution, but exists of natural right."\(^{136}\) He uncritically accepted racially discriminatory legislation, stating: "There is no question that legislation can control social rights by forbidding intermarriage of the

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125. 153 N.C. 174, 69 S.E. 60 (1910).
126. Id. at 174, 69 S.E. at 60.
127. Id. at 179, 69 S.E. at 62.
128. See infra notes 206-66 and accompanying text.
129. See infra notes 147-205 and accompanying text.
131. Id.
132. Id. Clark noted that "[the eloquent counsel for the [husband] depicted the infamy of social degradation from the slightest infusion of negro blood." Id. He concluded that "[the husband] deems it perdition for himself to associate with those possessing the slightest suspicion of negro blood, but strains every effort to consign the wife of his bosom and the innocent children of his loins to poverty and to the infamy that he depicts." Id. at 181, 69 S.E. at 63.
133. 166 N.C. 300, 81 S.E. 338 (1914).
134. Id. at 302, 81 S.E. at 339.
135. Id. at 304-05, 81 S.E. at 340.
136. Id. at 304, 81 S.E. at 340.
In *Johnson v. Board of Education* Clark, without opinion, concurred only in the holding that a local board of education could exclude from white schools a child with less than one-sixteenth negro blood. The opinion vehemently supports segregation, suggesting that any mixing of the races whatsoever would destroy proper school regulation and discipline and would culminate in disruption of the school system.

Since Clark did not file a concurring opinion, the basis of his disagreement with the court's rationale is unclear. He later cited *Johnson* uncritically, however, in a case that upheld, against evidentiary arguments, a finding that plaintiff's children were of unmixed white blood and thus entitled to attend a white school.

In a 1919 address to the law class at the University of North Carolina, Clark rejected four suggested solutions—amalgamation, extermination, emigration, or servitude—to "the effect of the negro element in our midst." He displayed insensitivity by arguing that the country was dependent on black labor. He concluded that "[i]n truth, there is no 'negro problem.'" In the same address Clark also argued for women's suffrage on the ground that "[t]here are 53,000 more white women in North Carolina than all the negro men and negro women put together, and the admission of the women to the ballot box will be the only certain guarantee of white supremacy." He stated:

We have to face a condition, and not a theory, and our surest protection is to increase the white vote by doubling the white majority. We have in this State about 70 white men to every 30 negroes—a white majority of 40. When women are admitted to suffrage we shall double these figures and will have 140 white voters for every 60 colored—a white majority of 80, just double.

He had written previously, during his 1902 campaign for chief justice, that "the proper order of things . . . demand[s] Anglo-Saxon supremacy."

This evidence conflicts with Brooks' apotheosized treatment of Clark's views on, and relation to, minorities. The chief justice was not a forerunner of the civil rights movement. Clark, however, should not be criticized unduly for

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137. *Id.* Clark did not cite Plessy v. Ferguson, 163 U.S. 537, 551 (1896), decided 18 years earlier, which upheld "separate but equal" racial accommodations on railroad coaches.

138. 166 N.C. 468, 82 S.E. 832 (1914).

139. *Id.* at 473, 82 S.E. at 834.


142. *Id.* at 7.

143. *Id.* at 8.


145. H. PAGE, SOME CAMPAIGN LETTERS 58 (1902).
his views; sentiments and practices now deplored as racist and discriminatory were the entrenched consensus of his time. "The felt necessities of the time" demanded them. The fact that Clark supported, or at least accepted, those views, does not necessarily condemn him.

B. Children

Brooks also posits that Clark was an important advocate for children, primarily because of Clark's concern for infants injured in the workplace or by the torts of their parents. Clark contributed significantly to the abolition of common-law doctrines unfavorable to children in these areas and to the adoption of legal policies protecting them.

In an early decision involving infants in the workplace, Sims v. Lindsey, a steam laundry mangle mashed a thirteen-year-old plaintiff's hand in its rollers, necessitating amputation of her fingers. Plaintiff, however, testified that she was working at the machine with knowledge that the machine was dangerous and had no guard. The trial court held that she was contributorily negligent and sustained defendant's demurrer.

A unanimous supreme court, in an opinion by Justice Clark, awarded a new trial. The court concluded that, "[i]t is the employer, not the employee, who should be fixed with knowledge of defective appliances and held liable for [the young girl's] injuries resulting from their use." Otherwise, the opinion does not comment on the baneful effects of child labor.

Such commentary first appears in Ward v. Odell Manufacturing Co., in which an evenly divided court affirmed, without precedential value, an award to a twelve-year-old plaintiff who lost an eye while working for defendant. Clark's opinion demonstrates his characteristic bifurcation— theoretical deference to the legislature in public policy matters, combined with a tangible judicial activism generally associated with the realist school of jurisprudence. The following language is illustrative:

The humanity of the age has, in very many of the States, placed on the statute books laws forbidding the employment of children under 14 years of age in factories. So far as these statutes are based upon the inhumanity of shutting up these little prisoners 11½ to 12 hours a day . . . in the stifling atmosphere of such buildings, or depriving

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146. O. HOLMES, JR., THE COMMON LAW 1 (1881). Although it is idle to speculate on what his views would have been if he had lived at a later time, Clark's entire career suggests that he probably would have promoted equal opportunity and equal justice, regardless of race. A fair assessment of the record, however, suggests that he did not transcend his own time by promoting such causes then.

147. 122 N.C. 678, 30 S.E. 19 (1898).

148. Id. at 681, 30 S.E. at 20.

149. Id. at 682, 30 S.E. at 20.

150. 126 N.C. 946, 36 S.E. 194 (1900).

151. See G. WHITE, supra note 3, at 268 (discussing the realist school of jurisprudence); see also G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 116-32, 137-44 (1978) [hereinafter cited as G. WHITE II] (same); infra notes 363-400 and accompanying text (illustrating Clark's judicial activism).
them of opportunity for education, or using the competition of their cheap wages to reduce those of maturer age, these are arguments on matters of public policy which must be addressed solely to the legislative department. But there is an aspect in which the matter is for the courts; that is, whether it is negligence per se for a great factory to take children of such immature development of mind and body, and expose them for twelve hours per day to the dangers incident to a great building filled with machinery constantly whirring at a high speed. The children, without opportunity of education, without rest, their strength over-taxed, their perceptions blunted by fatigue, their intelligence dwarfed by their treadmill existence, are over LIABLE to accidents. Can it be said that such little creatures, exposed to such dangers against their wills, are guilty of contributory negligence,—the defense here set up? Does the law, justly interpreted, visit such liability upon little children? . . . The factory superintendent put these children to work, knowing their immaturity of mind and body; and when one of them, thus placed by him in places requiring constant watchfulness, is injured, every sentiment of justice forbids that the corporation should rely on the plea of contributory negligence.152

In a subsequent case in which Clark wrote the majority opinion, Fitzgerald v. Alma Furniture Co.,153 the court upheld an award to a nine-year-old employee whose hand was mashed in an industrial machine. Again, Clark’s language is significant.

It does not appear, and cannot be ascertained, how this injury occurred. The little sufferer, in his artless testimony, says he does not know . . . . If, as is probable, from his account, he thought to rest his tired little legs by leaning against the machine . . . , and, dropping asleep, he unconsciously flung his arm over the top to rest himself or to keep from falling, or if . . . , with the curiosity and lack of judgment nature makes incident to nine years of age, he climbed upon the machine “to see the wheels go round,” and touched them, this (there having been, as he testifies, no instruction or warning from the employer as to the danger) would . . . justify the finding of the jury.

The court below did not charge . . . that employing a child of nine years of age in such dangerous work especially without instruction, was per se negligence . . . . But as [this] is a subject of growing importance to lawyers, as well as in public interest generally, it may be well to cite, as indicative of the conclusion to which the maturer judgment of mankind is tending, the age below which legislative construction in other States ha[s] made it illegal, and therefore negligence per se and irrebuttable, to employ any child in a factory. . . .

With this consensus of opinion in nearly the entire civilized world it might be that it would not have been error if the judge had held that it was negligence per se to put a child of the tender age of nine years to work on a dangerous machine which he had never seen

153. 131 N.C. 636, 42 S.E. 946 (1902).
before, without any instructions or warning, and to leave him there by himself without stopping the machine. But, however that may be, it certainly was not error to leave the question of negligence to the jury . . . .\(^\text{154}\)

North Carolina enacted legislation in 1903 that prohibited the employment in factories of children under the age of twelve and limited the work week of employees under age eighteen.\(^\text{155}\) Clark, having supported child labor laws long before his state adopted them, strictly construed the new laws against the employer.\(^\text{156}\) In his 1912 campaign for the United States Senate he demanded their strict enforcement.\(^\text{157}\) Further, when the limited child labor law was inadequate, Clark continued his effort to protect these children.

In *Pettit v. Atlantic Coast Line Railroad*\(^\text{158}\) the court, over Clark's dissent, upheld the nonsuit of a wrongful death action by the administrator of the estate of a twelve-year-old railroad messenger boy. The only evidence was that the youth was last seen riding defendant's box car; later he was found lying on defendant's track with one leg severed from his body. The court held that this evidence was insufficient to go to the jury on the question of defendant's negligence.\(^\text{159}\)

Clark protested vigorously. He noted that the boy "had not taken off knee pants"\(^\text{160}\) and that "[a] more deadly and perilous place [for him] could not be imagined."\(^\text{161}\)

The little child being found dead with his leg cut off in such a network of tracks, among constantly shifting trains, creates as strong a presumption that his leg was cut off by one of these trains as when a soldier is found dead on a battlefield with a bullet through his head, that he was killed by the enemy.\(^\text{162}\)

According to Clark, the court's opinion

- defeat[s] recovery for the death of the little sufferer who by the avarice of the defendant was sent to his death by exposure to an accumulation of perils greater to him in his unguarded and unwarned innocence than that which met the charging column of brave men on Cemetery Ridge. Many soldiers survived four years of war. This

\(^{154}\) *Id.* at 641-44, 42 S.E. at 948.


\(^{156}\) A. Whitener, *supra* note 155, at 141.


\(^{158}\) 156 N.C. 119, 72 S.E. 195 (1911).

\(^{159}\) *Id.* at 129, 72 S.E. at 199.

\(^{160}\) *Id.* at 133, 72 S.E. at 200.

\(^{161}\) *Id.* at 134, 72 S.E. at 200.

\(^{162}\) *Id.* at 135, 72 S.E. at 201.
child was slain on the fourth day of his employment.\textsuperscript{163} He went on to contend that the “munificent sum of $12.50 per month” paid to the youth was “the price of innocent blood.” Once again Clark invoked the natural law, appealing to “principles of right and justice” and to a belief that “[o]ur law is humane.”\textsuperscript{164}

In \textit{Evans v. Dare Lumber Co.},\textsuperscript{165} Clark wrote for a unanimous court, reversing the nonsuit of an action by a ten-year-old boy who had lost an arm attempting to straighten a board on “live rollers” while working at a lumber mill.\textsuperscript{166} Clark referred to his opinions in \textit{Ward}\textsuperscript{167} and \textit{Fitzgerald},\textsuperscript{168} in which the court first dealt with the “question of it being negligence \textit{per se} to work children of tender years in factories.”\textsuperscript{169} He stated:

There was negligence on the part of the defendant in allowing this boy 10 years of age to work in the factory; in allowing him to work in a dangerous place, and in allowing the live rollers to be operated without being boxed. The defendant's superintendent saw the boy there and made no objection to his working.\textsuperscript{170}

In \textit{Hauser v. Forsyth Furniture Co.},\textsuperscript{171} an action in which a thirteen-year-old had been denied damages from his employer for physical injuries, the court awarded a new trial for failure to charge the jury on the presumption that the minor plaintiff was not guilty of contributory negligence. Concurring in the result, Clark wrote that since the employer's offense was a crime, contributory negligence could not be a defense.\textsuperscript{172} He castigated “the influences of the common law under which women and children had no rights which the stronger were compelled to respect” and “‘judge-made’ law, formulated in a rude and barbarous age.”\textsuperscript{173} Clark noted that “it could hardly be expected that the common law, which so largely was created by unmarried priests (the judges of England), should have woven into it an adequate consideration of the rights of women and children.”\textsuperscript{174} He concluded:

The statutes of to-day [sic] are the formulated legal expression of the will of the people of this day and generation, and they must be construed in that light, and not according to the views of the priests and other judges . . . whose decisions created the “common law”

\begin{thebibliography}{9}
\bibitem{163} \textit{Id.} at 136, 72 S.E. at 201.
\bibitem{164} \textit{Id.} at 137, 72 S.E. at 201-02.
\bibitem{165} 174 N.C. 31, 93 S.E. 430 (1917).
\bibitem{166} \textit{Id.} at 34, 93 S.E. at 431 (stating that a statute, passed in 1903 and amended in 1907, had made employment of a child under age 12 a misdemeanor).
\bibitem{167} Ward v. Odell Mfg. Co., 126 N.C. 946, 36 S.E. 194 (1900); see \textit{supra} notes 150-52 and accompanying text.
\bibitem{168} Fitzgerald v. Alma Furniture Co., 131 N.C. 636, 42 S.E. 946 (1902); see \textit{supra} notes 153-54 and accompanying text.
\bibitem{169} \textit{Evans}, 174 N.C. at 34, 93 S.E. at 431.
\bibitem{170} \textit{Id.} at 33, 93 S.E. at 431.
\bibitem{171} 174 N.C. 463, 93 S.E. 961 (1917).
\bibitem{172} \textit{Id.} at 466, 93 S.E. at 962.
\bibitem{173} \textit{Id.} at 467, 93 S.E. at 962.
\bibitem{174} \textit{Id.}
\end{thebibliography}
under which women, children, and laborers were alike submerged.

The world moves on to a higher plane, and the law must move with it to a juster and a clearer regard of the rights of those who have so long needed its protection and have asked in vain.\textsuperscript{175}

Finally, in \textit{Butner v. Brown Brothers Lumber Co.},\textsuperscript{176} the court reversed an award to an eleven-year-old who had lost an arm in a mill accident. With characteristic ardor, Clark dissented, concluding that "[t]his child, 11 years old at the time, must go through life with one arm gone. He gave his account how it happened. The jury said he told the truth; can we say the contrary?"\textsuperscript{177}

Clark's opinions on children's rights in the workplace were influential during his life and beyond. In another area relating to legal rights of children, he presaged Justice Traynor by attempting to eliminate the defense of parental immunity for torts committed against children.\textsuperscript{178} That effort, however, came to fruition only posthumously; a dissenting opinion that Clark wrote less than a year before his death clearly influenced legislative debate over this issue more than half a century later.

In \textit{Small v. Morrison}\textsuperscript{179} a nine-year-old child, injured in a collision while in an automobile driven by her father, brought suit against the father, his insurance carrier, and the driver of the second vehicle. The father and the carrier demurred, in part because plaintiff, an unemancipated minor, could not sue her parent and her right to proceed against the carrier depended on her right to sue her father.

The court, on the sole ground that plaintiff could not sue her father, upheld the sustaining of the demurrer. The majority opinion noted the paucity of cases on the subject, and concluded that the relative absence of authority demonstrated "not only the soundness of the position, but also that it is founded in natural justice and in keeping with the eternal fitness of things . . . ."\textsuperscript{180} It cited cases referring to (1) "[t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society";\textsuperscript{181} (2) "preserving harmony in . . . domestic relations";\textsuperscript{182} and (3) "the maintenance of harmonious and proper family relations . . . conducive to good citizenship . . . ."\textsuperscript{183} The ratio decidendi was "practical considerations of public policy, which discourage causes of action that tend to destroy parental authority and

\begin{footnotes}
\item[175] Id. at 468-69, 93 S.E. at 963.
\item[176] 180 N.C. 612, 105 S.E. 319 (1920).
\item[177] Id. at 619, 105 S.E. 322.
\item[178] See G. White, supra note 3, at 309 (Traynor "undermined the defense of immunity, whether charitable, sovereign, or family, in negligence actions.").
\item[179] 185 N.C. 577, 118 S.E. 12 (1923).
\item[180] Id. at 579, 118 S.E. at 13.
\item[181] Id. at 580, 118 S.E. at 13 (quoting 20 RULING CASE LAW § 36 (1918)).
\item[182] Id. at 581, 118 S.E. at 14 (quoting Roller v. Roller, 37 Wash. 242, 243, 79 P. 788, 788 (1905)).
\item[183] Id. (quoting Roller v. Roller, 37 Wash. 242, 244, 79 P. 788, 788 (1905)).
\end{footnotes}
to undermine the security of the home." Ignoring the father's liability insurance, the court observed that "[t]o permit a minor child to sue its father for a tortious wrong would be to allow the child to take from its parent which is already dedicated to its support and maintenance."

Clark alone dissented. He called the insurance carrier's defense—that the insured party was the parent of plaintiff—"the barest camouflage." The contract does not except injuries to any person, and the company is in no wise affected by the relationship of the party injured to the assured," he stated. The "action is in reality one . . . against the indemnity company (for the demurrer admits that the father is insolvent) and [the driver of the second vehicle]." Clark rejected the majority's assertion that their holding was based on the common law, noting that no statute or common-law decision adopted by the State required the result. He cited numerous North Carolina cases in which children had sued their parents, and traced all contrary foreign authority to an 1891 Mississippi case. Even those contrary decisions, he argued, would not apply "where the action is by the child as beneficiary of a policy for indemnity, . . . and the relationship is purely an incidental matter and irrelevant."

"By what authority," he asked, "can the courts now create such law, and by their own fiat shut the doors of justice in the faces of the helpless, who do most need protection?" He characterized the majority holding as "a most flagrant defect of justice," and concluded:

It is the essential function of the courts to administer justice, and while they will not overrule a statute, they should not hesitate to overrule a precedent to attain that end when it has not become a rule of property. For a stronger reason, the courts should never create a precedent (when there is, as here, neither statute nor precedent) upon a supposed public policy, and when, as in this case, it will deprive any one of just rights.

Both before and after the Small decision, Clark discussed the immunity issue with contemporary legal figures. While considering the case, he wrote to Justice Oliver Wendell Holmes: "As you are a recognized authority on the common law, can you dictate to your Secretary a reference to any English

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184. Id. at 584, 118 S.E. at 15.
185. Id. at 585, 118 S.E. at 15.
186. Id. at 589, 118 S.E. at 18 (Clark, C.J., dissenting).
187. Id. at 589-90, 118 S.E. at 18 (Clark, C.J., dissenting).
188. Id. at 590, 118 S.E. at 18 (Clark, C.J., dissenting).
190. Small, 185 N.C. at 592-93, 118 S.E. at 19-20 (Clark, C.J., dissenting).
191. Id. at 598, 118 S.E. at 22 (Clark, C.J., dissenting). The Mississippi case is Hewlett v. George, 68 Miss. 703, 7 So. 885 (1891).
192. Small, 185 N.C. at 601, 118 S.E. at 24 (Clark, C.J., dissenting).
193. Id. at 602, 118 S.E. at 24 (Clark, C.J., dissenting).
194. Id. at 603-04, 118 S.E. at 25 (Clark, C.J., dissenting).
There is no statute or decision in this State that such action cannot be brought[,] but the defendant relies upon the common law . . . .” Holmes replied:

There is no surer way of proving a man’s ignorance than by assuming that he knows. I cannot refer you to any English case. I can only say that I don’t believe that a suit by a child against its parent would be found in the old books. I venture to suggest that the family relations are so modified in our day that we are free to consider the question a principle of policy. I am truly sorry not to be of any help.196

After the court rendered its decision, Clark sent the opinions to Roscoe Pound, Dean of the Harvard Law School. Pound’s response supported Clark’s view:

You certainly are upon strong ground. After all, why should we require the legislature to do things of this sort that ought to be done, and that we used to do, through judicial decisions? . . . So long as your court was not bound by any authoritative precedent I think your attitude decidedly the right one.197

Clark also sent a copy to W.S. Holdsworth, Professor of Law at All Soul’s College, Oxford, England, and author of the then latest work on the “History of the English Law.”198 Holdsworth replied that the parent-child immunity doctrine had “never been asserted.”199 Thereafter, Clark forwarded copies of Holdsworth’s letter to others, and lamented his colleagues’ refusal to correct “the inadvertence, for such it was.”200 He also wrote to all superior court judges in North Carolina advising them of the responses to his inquiries.201

The “inadvertence” of the Small decision remained the law in North Carolina for over half a century.202 Fifty-two years later the General Assembly partially abrogated the doctrine in an act providing that “[t]he relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent.”203

In the 1975 legislative debate insurance company lobbyists opposing the proposed bill appeared before legislative committees and cited policy considerations articulated by the majority in Small—the repose of families and pres-

195. 2 THE PAPERS OF WALTER CLARK, supra note 8, at 461.
196. Id. at 462.
197. Id. at 465-66.
198. Id. at 473-74.
199. Id. at 474.
200. Id. at 473-76.
201. Id. at 471-72.
203. Act of June 19, 1975, ch. 685, 1975 N.C. Sess. Laws 911 (codified at N.C. GEN. STAT. § 1-539.21 (1983)). The Act was effective October 1, 1975, and applied to causes of action arising on and after that date. Id.
eration of domestic harmony. Legislators opposing the bill also read from the majority opinion during floor debate.

Supporters, in response, referred primarily to the arguments articulated in Clark's dissent. They argued that the suit actually was against the insurance carrier rather than the parent; that in an era of compulsory liability insurance there was little reason to continue immunity; and that allowing such suits often would avert financial hardship and thereby promote family harmony rather than destroy it.

Clark's views ultimately prevailed and became the law. The fact that his arguments were prominent in a debate over half a century after they were espoused demonstrates White's observation that "[l]ike ancient English forms of procedure, American judges can rule us from their graves."205

C. Women

Plenary evidence supports Brooks' thesis that Clark, both as a citizen and a jurist, was a long-time, vigorous advocate for the legal equality of women. Some of the reforms he championed were enacted in his lifetime; others have been realized posthumously.

Clark's career-long efforts for women were characterized by a bellicose quality that he first demonstrated in his youth. On one occasion Clark demanded an apology from someone who cast aspersions on his views. When no apology was forthcoming, he challenged the perpetrator to a duel; ultimately, however, the controversy was settled without resort to arms. Throughout his life Clark apparently retained this fiery characteristic; one who "remembered [him] very vividly" described him twenty years after his death as "a testy, temperish man."208

That quality was manifest most in Clark's efforts to obtain equal legal rights for women. "The Justice on the bench stood at all times for the rights of woman in the courts; and the citizen plead [sic] that woman be granted the franchise."209 His advocacy was referred to as "his efforts to gain for woman a larger and freer life."210

The passage of women's suffrage in North Carolina has a colorful history.

204. See supra text accompanying notes 181-85. The author, then a member of the North Carolina Senate, sponsored the legislation that partially abrogated the parent-child immunity doctrine. Statements herein not otherwise documented are based on his personal recollections.
205. G. White II, supra note 151, at 193.
206. Clark, however, displayed this quality far less dramatically than Stephen Field, one of the jurists profiled in The American Judicial Tradition. See G. White, supra, note 3, and text accompanying supra note 3. While an Associate Justice of the United States Supreme Court, Field was involved in an incident that led to the killing by his bodyguard of one of his former colleagues on the California Supreme Court, and to the actual arrest of the justice himself. See G. White, supra note 3, at 92-95.
207. A. Brooks, supra note 1, at 43-46; 1 THE PAPERS OF WALTER CLARK supra note 1, at 148.
209. The News and Observer (Raleigh, North Carolina), May 21, 1924, at 14, col. 2.
210. Id.
Senator James L. Hyatt of Yancey County introduced the first “act to provide for woman suffrage in North Carolina” in the 1897 General Assembly. The presiding officer referred the bill to the Committee on Insane Asylums.

In 1920 a North Carolina Senate known to be divided evenly on the issue debated a bill to ratify the nineteenth amendment to the United States Constitution. The Lieutenant Governor (later Governor), O. Max Gardner, had announced to Clark in 1916 his support for women’s suffrage, and was expected to break the tie with a vote in favor of it. Before the vote was taken, however, an antisuffrage senator, Lindsay Warren (later Comptroller General of the United States), locked a prosuffrage senator in the restroom; in that imprisoned senator’s absence, the bill was defeated by a single vote. North Carolina ultimately ratified the amendment in 1971 when the significance was purely symbolic, by a unanimous vote in both the house and senate.

Clark identified four principal sources of opposition to the suffrage movement: “the liquor interest which knows that if the women vote there will be an efficient enforcement of the Prohibition law and that will mean a money loss to those who accumulate fortunes by making widows and orphans through the liquor traffic”; “some large employers of labor in industrial establishments who . . . know [suffrage] means the enforcement of the Child Labor Law, shorter hours for women and expenditures for sanitary provisions”; “political machines which have the men more or less rounded up [and] do not think . . . they can as effectively control women”; and “men of shady character who justly fear that if women vote, the chances for obtaining office will become . . . less for them.” In addition to logic and history, he used humor to state his case: “It has been said seriously that if women are allowed to vote they

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211. 1897 N.C. Senate J. 295.
212. Id.
213. J. MORRISON, GOVERNOR O. MAX GARDNER: A POWER IN NORTH CAROLINA AND NEW DEAL WASHINGTON 34 (1971). Gardner’s 1916 pronouncement of support to Clark evidences Clark’s identification as the principal suffrage advocate within the state’s leadership. In 1911 Clark delivered the first prepared address on the subject by any state leader. A. BROOKS, supra note 1, at 168; 2 THE PAPERS OF WALTER CLARK, supra note 8, at 365. His subsequent address in 1915, titled simply “Equal Suffrage” and delivered to the Equal Suffrage League, was printed and distributed by suffrage proponents with the caption “Read and hand to some intelligent friend, with request to read and pass on.” Address by Walter Clark to Equal Suffrage League, Greensboro, North Carolina (Feb. 22, 1915) (unpublished address available in the North Carolina State Library, Raleigh, North Carolina) [hereinafter cited as Greensboro Address]. He made other significant statements on the subject in: (1) a 1916 speech titled “Ballots for Both,” Address by Walter Clark to Equal Suffrage League, Greenville, North Carolina (Dec. 8, 1916) (unpublished address available in the North Carolina State Library, Raleigh, North Carolina) [hereinafter cited as Greenville Address]; (2) a 1919 newspaper article titled “Votes for Women: Why and Why Not?,” Wilmington Dispatch, Feb. 22, 1919 (reprint on file in the North Carolina State Library, Raleigh, North Carolina); and (3) a 1920 magazine article, Clark, Why North Carolina Should Ratify, EVERYWOMAN’S MAGAZINE July-Aug. 1920, at 7, reprinted in Box 54 GERTRUDE WEIL PAPERS (available in North Carolina State Archives, Raleigh, North Carolina) [hereinafter cited as Clark, EVERYWOMAN’S MAGAZINE].
214. J. MORRISON, supra note 213, at 34.
216. The house vote was 92-0. 1971 N.C. House J. 435-36.
217. The senate vote was 44-0. 1971 N.C Senate J. 370-71.
218. Clark, EVERYWOMAN’S MAGAZINE, supra note 213, at 7.
will vote for the handsomest man. I now understand why some politicians are opposed to women voting.”

Clark viewed equal suffrage as “the logical outgrowth of [the] great democratic movement to place the Government in the hands of the people,” and as “world wide in its scope and . . . [having] its foundation in the justice of the demand and . . . the need for the suffrage based on economic causes.” He also viewed it as “a logical development of the movement which has elevated women to the rights of human beings.”

No matter how bad a character a man has, if he can only keep out of the penitentiary and the insane asylum we permit him to vote and to take a share in the government, but we are afraid to trust our mothers, wives, and daughters to give us the aid of their intelligence and clear insight. We let the bartender and those who live upon the evils and vices of life have a vote, while you deny it to your mothers, your wives, your sisters, and your daughters.

In Clark’s 1919 address to the University of North Carolina law class, he noted “the certainty of the extension of the suffrage to women.” Although he thus regarded suffrage as inevitable, he nevertheless worked as though he were solely responsible for its adoption. Gertrude Weil, a leader for the suffrage movement in North Carolina, told Clark that he had made “the strongest and most complete argument for woman suffrage that [she had] seen.” She also called his writings on the subject “the best material available for use in North Carolina.”

Clark’s writings also influenced the movement in other states. A February 3, 1919 letter to Clark from Kate Cox of the Woman’s Franchise League of Indiana states:

Your opinion has been of the greatest value. Without it we feel it would have been almost impossible to have secured the favorable action given the bill in this legislature. When our president . . . asked Governor Goodrich to recommend presidential suffrage [presumably voting by women in presidential elections only] in his address to the legislature, he stated that he would do so provided she would secure from a lawyer well known in the state as an authority on constitutional law the statement that the bill was constitutional in Indiana. It seemed an impossible task, but with your material as the basis for her argument, the opinion was secured, and presidential suffrage was recommended in the Governor’s speech at the opening

220. Id. at 2.
221. Id. at 3.
222. Id. at 7.
223. Greenville Address, supra note 214, at 1.
224. Clark, supra note 141, at 7 (emphasis added).
225. 2 THE PAPERS OF WALTER CLARK, supra note 8, at 394.
226. Id. at 403.
Although North Carolina never ratified the amendment during Clark's lifetime, that failure cannot be attributed to any lack of vitality or thoroughness in Clark's own advocacy.

Clark was sixty-five when he became the first state leader to support suffrage. That position as a citizen, however, evolved naturally from his career-long effort as a jurist to liberate women from a common law that had categorized them with infants, idiots, lunatics, and convicts.

When Clark came to the bench, the state constitution had, "in accordance with the sentiment of a more enlightened age, abolished the common-law system under which the property of [a] married woman became the property of her husband on marriage."229 "The courts, however, had been still slower than the Legislature in grasping the fact of the emancipation of married women,"230 and "[n]otwithstanding this emancipation, married women still were held in medieval leading strings by [the] courts."231

Only a quarter of a century before Clark came to the supreme court, it refused to hold a husband criminally responsible for beating his wife. Chief Justice Pearson, generally regarded as one of the court's ablest jurists,232 stated:

A husband is responsible for the acts of his wife and he is required to govern his household, and for that purpose, the law permits him to use towards his wife such a degree of force, as is necessary to control an unruly temper, and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain.233

The court reached this result even though the husband and wife were living apart when the beating occurred. "The husband is still responsible for [the wife's] acts," Pearson said, "and the marriage relation and its incidents remain unaffected."234

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231. Id. at 618, 32 S.E. at 884.

232. See supra note 1.


234. Id. at 264. In a similar case shortly thereafter, the court found no error in a special verdict that a husband was "not guilty in law" for beating his wife, based on the trial judge's opinion "that the defendant had a right to whip his wife with a switch no longer than his thumb." State v. Rhodes, 61 N.C. (Phil. Law) 453, 454 (1868). The court stated that "family government is recognized by law as being complete in itself," and that it would "not interfere with or attempt to control it, in favor of either husband or wife, unless in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable." Id. at 456-57.
Although the court had "advanced from that barbarism" before Clark's service began, it still adhered to numerous other relics of the common law that negatively affected women. Clark worked vigorously to eliminate them; a common maxim of the day stated that if a woman were involved, one could be sure that Clark would champion her cause. In *State v. Grigg*, Clark's first opinion in a case involving a woman, the court upheld an instruction that, if a woman had had illicit intercourse prior to marriage with one who had since become her husband, and had remained virtuous since that occasion, she was an "innocent woman" and thus within the statute proscribing the slander of such women. Speaking for the court, Clark stated:

Every man, in the course of his life must have had instances brought to his knowledge of unfortunate females who have at some period of their lives been led from the path of virtue by the wiles of a seducer, who have afterwards reformed, and by a course of exemplary conduct established for themselves a character for chastity above all reproach. Shall it be said that these unfortunates are not allowed a *locus penitentiae*, and are to be subject forever to the vile tongue of the maligner and slanderer?

*Grigg* was the first case in Clark's consistent and tenacious campaign to free women, particularly married women, from the residual fetters of the common law. Although generally unsuccessful in persuading the court, Clark noted in *Wallin v. Rice* that the discriminations against married women that he had discussed in numerous dissenting opinions and one concurring opinion had been removed by statutes. The court, however, at times

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235. State v. Oliver, 70 N.C. 60, 61 (1873).
236. A. Whitener, *supra* note 155, at 137.
237. 104 N.C. 882, 10 S.E. 684 (1889).
238. *Id.* at 886, 10 S.E. at 685.
239. 170 N.C. 417, 418-20, 87 S.E. 239, 240 (1915) (Clark, C.J., dissenting).
242. He named those statutes in his concurring opinion in *Warren v. Dail*, 170 N.C. 406, 414-15, 87 S.E. 126, 130 (1915) (Clark, C.J., concurring), as follows:

Among them may be named Rev., 2095, which provides that a married woman can draw out her money in bank by her own check and that her husband's check will not be valid for that purpose, as formerly; that she can be a free trader, Rev., 2112-2118; that she can hold building and loan stock, Rev., 3885; that when a building is built or repaired on her land with her consent or procurement she shall be deemed to have contracted for the same, Rev., 2016; that she may sue without joining her husband when the action concerns her separate property, Rev., 408; that an execution can issue against her property; that the statute of limitations runs against her as against any other person, *sui juris*; that the savings from her separate estate are her separate property, Rev., 2100; that if the husband abandons her she can sell and convey her real property as if unmarried, Rev., 2117; that her earnings shall be her own and not subject to control of her husband, and that compensation for any tort to her person or her property and damages for physical and mental anguish suffered by her, she alone can recover, and without joining her husband, Laws 1913, ch. 13; that if she own land for life or a longer period she shall be a freeholder, Laws 1915, ch. 22; and many other statutes changing decisions of the courts
thwarted Clark's efforts by not surrendering past discriminatory practices, even when confronted with a clear legislative mandate.

In *Nicholson v. Eureka Lumber Co.*,\(^\text{243}\) for example, a majority of the court recognized the validity in North Carolina of a deed acknowledged before a woman notary in another state, even though North Carolina did not allow women to be notaries public. Clark was related to some of the parties and did not participate. He nevertheless appended to the opinion the following observations.

That each State or country is sole judge of the qualifications for voters and for office therein, and that such matter cannot be inquired into in any other jurisdiction. In Great Britain seven times the Chief Executive—two of them its longest and most brilliant reigns, Queen Victoria and Queen Elizabeth—was a woman, and the same is true even of Russia, Austria and Spain, whose most brilliant reigns were those of Catherine the Great, Maria Theresa and Isabella.

In ten States of this country, and in many foreign nations, women have now equal suffrage with men, and usually the right of suffrage carries with it the right to hold office. While the women have the full right of suffrage in only ten States of this country, they vote in school matters and on local assessments in most of the other States.

These are matters for each jurisdiction to settle for itself, and when the certificate of a notary public is sent to this State from another under a notarial seal, our courts cannot go back of it to inquire into the qualifications of the officer. It may be that under our present statute a notary public is a public office here, but "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Const. U.S., Art. IV, sec.1.

At common law in England, women have not only seven times held the highest office, as Queen, regnant, but also that of Lord Chancellor, sheriff . . . and others. Very few courts in this country (and none in England) have held that at common law she could not be a notary public.\(^\text{244}\)

Subsequently, the 1915 General Assembly expressly authorized appointment of women as notaries.\(^\text{245}\) In *State ex rel. Bickett v. Knight*, however, the court revoked the Governor's power "to appoint women as well as men to be notaries public,"\(^\text{246}\) ignoring the fact that the position was "‘deemed a place of trust and profit and not an office.’"\(^\text{247}\) Instead, the court held that the position was in fact an office; since the state constitution allowed only voters to hold

\(^{243}\) 160 N.C. 33, 75 S.E. 730 (1912).
\(^{244}\) *Id.* at 37-38, 75 S.E. at 731.
\(^{246}\) *State ex rel.* Bickett v. Knight, 169 N.C. 333, 353, 85 S.E. 418, 428 (1915).
office, and only men could vote, the act was unconstitutional.\(^{248}\)

In dissent Clark stated that: no court had held the position to be an office when the legislature had decreed otherwise;\(^{249}\) the court had allowed the licensing of women as lawyers, a far more important position;\(^{250}\) and whether women could be notaries was a pure policy question for the legislature.\(^{251}\) He concluded:

If the [defendant] were a man he would not be debarred from holding this appointment unless he were an idiot, a lunatic, or a convict. The Legislature, voicing the sentiment of the people of the State, have enacted that it is neither a crime nor a defect in this appointee to discharge the clerical duties of a notary public because she is a woman. Shall the Court hold that it is?\(^{252}\)

The *Knight* opinion illustrates not only Clark’s persistence in his cause, but his colleagues’ tenacious resistance of that position. Their resistance is exemplified best by Justice Robert M. Douglas’ statement that “[t]he wife is legally presumed to be always under the protection of the husband, whose stronger character renders him less liable to sinister influences, and whose wider range of experience gives him a better knowledge of business affairs.”\(^{253}\) Similarly, Justice William R. Allen stated that the judges opposing Clark “recogniz[ed] the gentler qualities of woman, and [knew] how she may be influenced to her own hurt when her affections are enlisted, [and thus] determined to [rule] not for her enslavement, but for her protection.”\(^{254}\) Such statements prompted Brooks to conclude that “the other judges, while men of ability, were distinctly the product of a past age.”\(^{255}\)

Clark usually responded to his colleagues’ resistance by employing his expertise in history, literature, language, and rhetoric. For example, he characterized one decision of the court as

harking back to the time when a married woman not only had no

\(^{248}\) *Id.* at 353, 85 S.E. at 428.

\(^{249}\) *Id.* at 356, 85 S.E. at 429 (Clark, C.J., dissenting).

\(^{250}\) *Id.* at 357, 85 S.E. at 430 (Clark, C.J., dissenting).

\(^{251}\) *Id.* at 360, 85 S.E. at 431 (Clark, C.J., dissenting).

\(^{252}\) *Id.* at 363, 85 S.E. at 432 (Clark, C.J., dissenting). Earlier Clark, had lamented decisions such as these, stating: “In England and all her colonies and in nearly every State . . . , by statute or constitutional provision, the emancipation of . . . women has been decreed . . . . In this State alone have the decisions of the courts failed to . . . accord with such action of the lawmaking power.” Harvey v. Johnson, 133 N.C. 353, 356, 45 S.E. 644, 648 (1903) (Clark, C.J., dissenting in part). In a subsequent case Clark pricked further at his colleagues:

The answer in this case was sworn to before “Alleene” C. Jones, notary public . . . . If the majority opinion in *S. v. Knight* . . . is to be adhered to, it must be upon the ground that women are inherently incompetent, under the Constitution, to discharge that duty, and hence they must have been so at the date that this answer was filed. Consequently, the answer of the defendant not being legally verified, the allegations of the verified complaint would be taken as true, and the discussion in the opinion of the rights of the parties is unnecessary.


\(^{253}\) Slocomb v. Ray, 123 N.C. 571, 574, 31 S.E. 829, 830 (1898).


\(^{255}\) A. Brooks, *supra* note 1, at 61.
control over her property, but was a chattel herself, and when Shake-
speare correctly expressed the English law as to wives by making Pe-
truchio say:

"I will be master of what is my own;
She is my goods, my chattels; she is my house;
My household stuff, my field, my barn,
My horse, my ox, my ass, my anything."

He subsequently alluded again to "Petruchio's theory that the wife is the chat-
tel or property of her husband."257

In perhaps his most piercing statement on the subject, Clark dissented
from a holding that a divorce a mensa et thoro did not sever the marital re-
lationship so that separated spouses would hold land as tenants in common
rather than by the entirety.258 He called the effect of the decision—the hus-
band's continued entitlement to the rents and profits from the property—"un-
righteous,"259 and reiterated his complaint that, despite the fact that the
constitution conferred equal property rights on married women, "the Supreme
Court . . . has followed in every decision the former judicially created doc-

256. Walton v. Bristol, 125 N.C. 419, 429, 34 S.E. 544, 547 (1899) (Clark, J., dissenting). In
this dissent Clark also stated caustically that "[c]ommercial paper is sexless." Id. at 431, 34 S.E. at
548 (Clark, J., dissenting).

concurring).

In a case involving the sale of intoxicating liquor by a husband and wife, Clark stated:
If the wife acted voluntarily, she ought to be liable, whether her husband was present or
not. If she acted under his compulsion, she ought to be exempt from punishment, not
because of the marital relation, but like anyone else acting under compulsion. At com-
mon law there was a presumption that when a crime was committed by the wife in the
presence of her husband, she acted under compulsion; but that presumption does not
comport with Twentieth Century conditions. The contention that a wife has no more
intelligence or responsibility than a child is now out of date. No one believes it.

. . . .

. . . It was as to this very presumption of the wife being under the direction of the
husband that in Oliver Twist . . . Bumble, the Beadle, said: "If the law presumes that,
the law is a Ass—a idiot."

State v. Seahorn, 166 N.C. 373, 378-79, 81 S.E. 687, 689 (1914) (Clark, C.J., concurring) (quoting
C. DICKENS, OLIVER TWIST ch. 51 (1837-38)). Later, in discussing a husband's liability for the
torts of his wife, Clark again alluded to Mr. Bumble:

The common law was formulated before there was any Parliament, or when they
were enacting very few statutes. It was created by judges who were for centuries Catho-
lic priests only, and for centuries more they all were priests or laymen. It is not astonish-
ing that under the influence of priests, who presumably knew little about such matters, it
was laid down as a conclusive and irrebuttable presumption of law and fact that the wife
acted solely under compulsion of her husband, and therefore that he was liable for her
torts.

A great writer, who was far better posted on such matters, in the last century
presents that when Mr. Bumble was told that he was responsible for his wife's conduct,
and that "indeed he was the more guilty of the two in the eye of the law; for the law
supposes that your wife acts under your direction." Mr. Bumble replied: "If the law
supposes that, the law is a ass—a idiot. If that's the eye of the law, the law's a bachelor;
and the worst I wish the law is that his eye may be opened by experience."

Young v. Newsome, 180 N.C. 315, 316, 104 S.E. 660, 661 (1920) (Clark, C.J., concurring) (quoting
C. DICKENS, OLIVER TWIST ch. 51).

259. Id. at 586, 92 S.E. at 489 (Clark, C.J., dissenting).
trine of the inferiority of the wife and the submergence of her existence in that of the husband . . . .”260 He stated:

The ruling by which a devise or conveyance of property jointly to husband and wife becomes the sole property of the husband during his life is without any authority in any statute here or in England, but was created solely by men judges in the barbarous days in England, and was the expression by them of the sentiment which still prevails among savages, based upon their idea of the superiority of men and the incompetence and incapacity of women, and pictured the state of such society where men are loafers and women are drudges doing all the work, whose results are appropriated by the men.261

If it is absolutely necessary when there is a conveyance or a devise to a man and his wife of property jointly that one shall have the whole of it, why should it not be the wife instead of the husband? There is as much reason for one as for the other.262

At a time when women are no longer disposed to submit to enthroned wrong and to suffer in silence as their mothers did; . . . when the irresistible tide of long delayed justice is sweeping over all other countries as well as in ours, it is surely not an auspicious hour by judicial construction to extend in this State the discrimination against women to new fields where it has not heretofore obtained and further restrict the constitutional guarantee of their personal or property rights.263

The above statements are only selective examples of Clark’s numerous protests against legally sanctioned sex discrimination. Clark’s opinions, spanning his thirty-five years on the appellate bench, are filled with similar fervent calls for change.

During his lifetime the legislature responded to many of Clark’s recommendations.264 It did not respond to others, however, until considerably later. The law required the privy examination of married women, when executing legal documents generally, until 1945;265 for women contracting with their husbands, such examination was required until 1977.266 The legislature did not eliminate the husband’s entitlement to the rents and profits from entireties property until 1982.267 Clark had advocated all these reforms, and this advo-

260. Id. at 587, 92 S.E. at 489 (Clark, C.J., dissenting).
261. Id. at 587-88, 92 S.E. at 489 (Clark, C.J., dissenting).
262. Id. at 589, 92 S.E. at 490 (Clark, C.J., dissenting).
263. Id. at 589-90, 92 S.E. at 490 (Clark, C.J., dissenting).
264. See supra notes 239-42 and accompanying text.
265. The requirement was abolished by Act of Feb. 7, 1945, ch. 73, § 21, 1945 N.C. Sess. Laws 84, 91.
266. The requirement was abolished by Act of May 13, 1977, ch. 375, § 1, 1977 N.C. Sess. Laws 375 (repealing former N.C. GEN STAT. § 52-6 (1966)).
cacy was influential long past his death.

VII. CLARK AS CITIZEN AND AS JURIST

The oration at Clark's funeral separated his activities on behalf of women into those of "[t]he Justice on the bench" and those of "the citizen." Applied generally, this dualism is not altogether accurate, for Clark's thoughts and activities as jurist and as citizen were not always or necessarily discrete. The categories nevertheless provide a useful, though at times inexact, framework for the remainder of this profile.

A. Citizen

Clark never confined his life to his juridical duties. He managed both his ancestral family plantation and another that his father had given him, and he concerned himself with numerous subjects and endeavors. His thoughts and activities as a citizen are too extensive to be explicated fully here. Some of them are mentioned, however, to demonstrate his versatility.

In 1889, the year Clark joined the supreme court, Henry W. Grady, who was famous as an advocate for a new, industrialized South, made perhaps his best-known statement on the condition of the preindustrialized South:

I attended a funeral once in Pickens county in my State . . . . They buried [the deceased] in the midst of a marble quarry: they cut through solid marble to make his grave; and yet a little tombstone they put above him was from Vermont. They buried him in the heart of a pine forest, and yet the pine coffin was imported from Cincinnati. They buried him within touch of an iron mine, and yet the nails in his coffin and the iron in the shovel that dug his grave were imported from Pittsburg [sic]. They buried him by the side of the best sheep-grazing country on the earth, and yet the wool in the coffin bands and the coffin bands themselves were brought from the North. The South didn't furnish a thing on earth for that funeral but the corpse and the hole in the ground. There they put him away and the clods rattled down on his coffin, and they buried him in a New York coat and a Boston pair of shoes and a pair of breeches from Chicago and a shirt from Cincinnati, leaving him nothing to carry into the next world with him to remind him of the country in which he lived, and for which he fought for four years, but the chill of blood in his veins and the marrow in his bones.

Almost a quarter of a century before Grady's speech, in the immediate aftermath of the Civil War, a nineteen-year-old Clark had written much the same:

268. See supra note 209 and accompanying text.
269. A. Brooks, supra note 1, at 35-36; 1 THE PAPERS OF WALTER CLARK, supra note 1, at 189-90.
270. LIFE OF HENRY W. GRADY INCLUDING HIS WRITINGS AND SPEECHES 204-05 (J.C. Harris ed. 1890).
Our magnificent country is unimproved, our factories unbuilt, our wants supplied from without . . . . From the inkstand from which I write and the pen with which I trace these lines, to the printing press on which they are promulgated, from the cradle in which we are rocked and the carved bedstead on which we repose, to the coffin that will receive us at our death, and the tombstone that shall commemorate our virtues to the succeeding generation, there is but little of the comforts or conveniences, and few even of the necessities of life for which we are not indebted to that same universal Yankee nation. The very cotton that whitens our fields must pass through Yankee looms before it adorns our belles or clothes our laborers.271

This penchant for writing that Clark displayed in youth endured throughout his life. As citizen and jurist, he produced prolific writings on a variety of subjects.272 He wrote many articles advocating reform,273 as well as items relating primarily to law, government, history, and agriculture, that were published in such magazines as The Green Bag, The Arena, Harper's, and the American Law Review.274 The editor of the American Law Review wrote to him: "We welcome anything from your pen."275

From 1909 to 1913, Josephus Daniels published the North Carolina Review, a literary and historical journal.276 In 1911 Clark wrote for the Review on the "Tercentenary of the Translation of the Authorized English Version of the Bible."277 He also compiled a five-volume history of the regiments and battalions from North Carolina in the Civil War,278 compiled a sixteen-volume set of the State Records of North Carolina,279 composed and secured legislative adoption of the North Carolina state motto, esse quam videri ("to be rather than to seem"),280 and with his wife, an accomplished French scholar, translated into English Constant's three-volume history of the life of Napoleon.281

A long-time trustee of Trinity College, the predecessor to Duke University,282 Clark actively associated himself with academia for most of his life. A history of Trinity and Duke describes him as "a trustee after 1890 and a man of some scholarly interests."283 He was nominated to be president of Trinity in 1894, but "declined to run."284

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271. 1 THE PAPERS OF WALTER CLARK, supra note 1, at 159-60.
272. See A. BROOKS, supra note 1, at 257-65 (selected list of Clark's writings).
273. Id. at 67.
274. See id. at 257-65.
275. Id. at 66; 1 THE PAPERS OF WALTER CLARK, supra note 1, at 239.
277. Id.
278. A. BROOKS, supra note 1, at 239, 247.
279. Id. at 66, 247.
280. Id. at 160.
281. Id. at 66, 247.
282. 1 THE PAPERS OF WALTER CLARK, supra note 1, at 239.
284. Id. at 51.
The trustees of the University of North Carolina also offered Clark the presidency of their institution, and Wake Forest College asked him to be its law school dean.\textsuperscript{285} He delivered several commencement addresses, and received an honorary Doctor of Laws degree from the University of North Carolina.\textsuperscript{286}

Clark lived during the “progressive era” and associated with many significant proponents of “progressive” thought and action. A 1909 letter from Senator Lee S. Overman\textsuperscript{287} advised Clark that Senator Robert M. LaFollette, a leading progressive, had referred to Clark as “the great Chief Justice of North Carolina” and had “passed the highest encomium upon [Clark] that [Overman] ever heard passed upon any man.”\textsuperscript{288} LaFollette himself wrote in 1916\textsuperscript{289} as did Louis Brandeis\textsuperscript{290} to thank Clark for supporting Brandeis’ nomination to the United States Supreme Court.

Theodore Roosevelt, Woodrow Wilson, Samuel Gompers, William Jennings Bryan,\textsuperscript{291} Gifford Pinchot,\textsuperscript{292} Upton Sinclair,\textsuperscript{293} and other national figures of the progressive era also corresponded with Clark.\textsuperscript{294} Further, Clark communicated with virtually every prominent leader in North Carolina regarding issues of prevailing public interest.\textsuperscript{295}

Clark both influenced, and was influenced by, the social and political thought of the progressive movement. He has been described as “always steadfast in his advocacy of advanced progressive reform and a radically democratized Constitution.”\textsuperscript{296} His “sympathies and interests were always enlisted in behalf of the laboring classes.”\textsuperscript{297} Apparently, if a matter involved a corporation, lawyers expected him to be against the corporation.\textsuperscript{298} Labor, he wrote, “is the basis of civilization. Let it withhold its hand and the forests

\begin{thebibliography}{99}
\bibitem{Brooks} A. Broooks, \textit{supra} note 1, at 65.
\bibitem{Id.} \textit{Id.} at 65.
\bibitem{Senator} United States Senator from North Carolina, 1903-30. \textit{2 THE PAPERS OF WALTER CLARK, supra} note 8, at 75.
\bibitem{LaFollette} \textit{Id.} at 99.
\bibitem{Gifford} \textit{Id.} at 291-92.
\bibitem{Pinchot} \textit{Id.} at 296.
\bibitem{Bryan} William Jennings Bryan wrote to Clark on January 7, 1913: “I need not assure you that I appreciate your long devotion to the progressive cause, and that I regret that you are not in position to make a larger contribution to the public than you can in the position which you now occupy.” Letter from William Jennings Bryan to Walter Clark (Jan. 7, 1913) in Clark Manuscripts, Vol. V, at 615 (available in North Carolina State Archives, Raleigh, North Carolina).
\bibitem{Sinclair} Gifford Pinchot, a leading conservationist, wrote in 1917 to advise Clark that he had been elected director of the National Conservation Association. \textit{2 THE PAPERS OF WALTER CLARK, supra} note 8, at 338-39.
\bibitem{Sinclair2} Clark corresponded with novelist Upton Sinclair in 1922, writing that “[t]he Corporations seem determined to crush labor.” \textit{Id.} at 437. He decried the Rockefellers’ accumulation of wealth, and advocated government ownership of railroads, telegraphs, telephones, coal mines, water power, and “other Monopolies.” \textit{Id.} Sinclair wrote Clark a few weeks later requesting information on “the activities of the Fundamentalists in the Southern Colleges.” \textit{Id.} at 443-44.
\bibitem{Sinclair3} \textit{Id.} at 365.
\bibitem{Sinclair4} \textit{Id.} at 365.
\bibitem{Paul} Paul, \textit{Legal Progressivism, the Courts, and the Crisis of the 1890’s}, 33 \textit{BUS. HIST. REV.} 495, 508 n.61 (1959).
\bibitem{Whitener} A. Whitener, \textit{supra} note 155, at 36.
\bibitem{Id.} \textit{Id.} at 137.
\end{thebibliography}
return and the grass grows in the silent streets."\textsuperscript{299}

Clark forcefully advocated a workers’ compensation system. His judicial opinions manifest his sympathy for employees injured in the workplace,\textsuperscript{300} and as citizen he spoke for legislative intervention on their behalf.\textsuperscript{301} He decried the conventional system as pitting “poor and needy plaintiffs against an influential company . . . at a serious disadvantage to the plaintiff,” and urged instead payment of “a fixed rate of compensation for these injuries . . . without litigation and, therefore, without deduction for counsel fees, and that it . . . not be open to the corporation to defend upon the ground either that it was not negligent or that the plaintiff was negligent.”\textsuperscript{302}

Although Clark dealt sternly with criminal offenders as a trial judge and supreme court justice,\textsuperscript{303} he also advocated humane treatment of prisoners. As jurist, when confronted with a record of “unprintable evidence of brutality, almost beyond conception,”\textsuperscript{304} he berated the practice of flogging convicts. The State, in his view, had a responsibility to protect prisoners from violence. “Nothing less than this can be tolerated in the treatment of these unfortunates by a Christian, civilized people.”\textsuperscript{305} He further stated that “[t]he growing humanity of the age demands that punishment for crime, however justly inflicted, should be humanely administered, with due regard to the rights of the prisoner.”\textsuperscript{306} As citizen, he urged the enactment of legislation to provide public support for “dependent families of person[s] undergoing imprisonment.”\textsuperscript{307}

Clark envisioned a utopian society evolving from the reforms he championed. He prophesied:

that every village will be connected with its neighbor by electric roads, for steam will have ceased to be a motive power; that education will be universal and poverty unknown; that every swamp will have been drained to become the seat of happy homes; that every river will be deepened and straightened; that public works operated for the benefit of the people and not for the enrichment of a few, will bring comforts and conveniences, now unknown, to the most distant

\textsuperscript{299} Pressly v. Yarn Mills, 138 N.C. 410, 424, 51 S.E. 69, 75 (1905) (Clark, C.J., concurring).\textsuperscript{\textendash}Cf. W. J. Bryan, Cross of Gold Speech (1896), \textit{reprinted in William Jennings Bryan: Selections} 46 (R. Ginger ed. 1967) ("Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms and the grass will grow in the streets of every city in the country.").

\textsuperscript{300} See, e.g., Stewart v. Raleigh & Augusta Air Line R. Co., 137 N.C. 688, 50 S.E. 312 (1905); Greenlee v. Southern Ry., 122 N.C. 977, 30 S.E. 115 (1898).

\textsuperscript{301} E.g., Labor Day Address by Judge Clark, Wilmington, North Carolina (Sept. 7, 1914), \textit{quoted in} A. Whitener, supra note 155, at 37-38.

\textsuperscript{302} Id.

\textsuperscript{303} A. Brooks, \textit{supra} note 1, at 56-59; see also Winston, \textit{supra} note 15, at 184.

\textsuperscript{304} A. Brooks, \textit{supra} note 1, at 62-63.


\textsuperscript{306} Id. at 902, 90 S.E. at 432.

\textsuperscript{307} State v. Nipper, 166 N.C. 272, 275-76, 81 S.E. 164, 166 (1914).

fireside; that the hours of labor will be shortened; that the toil of agriculture will be done by machinery and that irrigation will have banished droughts; that the advance of medicine, already the most progressive science among us, will have practically abolished all diseases save that of old age; that simple laws and an elevated and all-powerful public opinion will have minimized crime and reduced the volume of litigation; that religion less sectarian and disputatious about creeds and forms will be a practical exemplification of that love of fellow man which was typified by its divine founder; that every toiler with brains or with hand will prosper; and that under juster laws the only inequality in wealth or condition will be that due to the difference in the energy, efforts and natural gifts of each possessor.\(^{309}\)

Although this vision was patently naive in some respects, it since has been fulfilled in others.

B. Jurist

Clark's contribution as jurist is voluminous. During his 35 supreme court years he wrote 3,235 opinions, of which 182 were concurring and 371 were dissenting.\(^{310}\) His long judicial career, with its countless expositions and endeavors, cannot be detailed fully here. This profile thus concludes with a necessarily truncated version of those experiences.

Brooks asserts that "Clark was the first jurist in America to employ extensively the technique of writing dissenting opinions, bolstering his arguments with documented extra-legal matters, such as government bureau reports, statistics, scientific discoveries, and occasionally reports of American Bar Association committees."\(^{311}\) Whether Clark actually originated this practice may be questioned; clearly, however, he relied extensively on such materials, and his opinions abound with references to them.\(^{312}\) Thus, he preceded Justice Traynor in believing that judges "could inform themselves on matters beyond the facts of a particular case, and, when reliable data were lacking, 'construct . . . environmental assumptions.'"\(^{313}\)

Clark's opinions also are filled with historical and literary references. Sir Walter Scott, in *Guy Mannering*, states that "[a] lawyer without history or liter-

\(^{309}\) A. Brooks, *supra* note 1, at 148-49.

\(^{310}\) *Id.* at 63.

\(^{311}\) *Id.* at 63-64.

\(^{312}\) See, e.g., Cheek v. Lumber Co., 134 N.C. 225, 231-32, 47 S.E. 400, 400-01 (1904) (Clark, C.J., concurring). In this opinion Clark cited U.S. Consular Reports to describe a device used on European railroads to prevent fires caused by locomotive sparks. The opinion demonstrates that Clark was well read and was something of a scientist.

Another illustration of Clark's use of materials not of record is Mayo v. Town of Washington, 122 N.C. 5, 17-30, 29 S.E. 343, 346-51 (1898) (Clark, J., dissenting). In that case, the majority held that the erection and operation of an electric plant for lighting streets was not a necessary municipal expense; Clark dissented, citing the modern need for electricity and its increasing use by municipalities in other parts of the world. *Id.* A unanimous court subsequently adopted the view that Clark expressed in Mayo. Fawcett v. Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903).

\(^{313}\) G. White, *supra* note 3, at 304.
Justice Walter Clark

Nature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect. Clark, by this standard, was preeminently an architect. He began studying history and literature as a youth in his father's large private library and continued the study throughout his years. As a result, he knew the classics thoroughly and referred to them repeatedly, in both his legal opinions and his public articulations.

As chief justice, Clark had an aptitude for organization and efficient disposition of cases. Although modern chief justices generally carry a diminished caseload to allow time for administrative duties, Clark did not. Rather, he often wrote the difficult opinions, or assisted others in writing them.

Clark introduced the doctrine of last clear chance into North Carolina jurisprudence to mitigate the often harsh results of contributory negligence findings. In Smith v. Norfolk & Southern Railroad a train had killed plaintiff's decedent, who, while intoxicated, had fallen asleep with his head on a railroad track. The trial court instructed, in effect, on last clear chance, and the supreme court, refusing to adopt the doctrine, awarded a new trial principally because of that instruction. Clark dissented, stating:

[The negligence of the man does not authorize the engineer to kill or cripple him and if, after discovery of his helpless condition, when made in time to avoid injury, the man is killed or crippled, such killing or crippling is wanton or reckless, and the company is liable, though of course, the negligence of the party on the track continues up to the very moment of the impact. . . . This is common sense and justice. It can never be made a part of the law of the land that these Goliaths of mechanism can kill or crush whatever they shall find in their path. . . . The failure of one in charge of so powerful, dangerous and rapidly moving a machine to keep a proper lookout is recklessness which makes the company liable whenever the jury find that, by a proper lookout, the helpless man could have been discovered in time to avoid killing him. Human life is worth that much consideration if it is worth anything.]

Six years later, in Arrowood v. South Carolina & Georgia Extension Railway, Clark wrote for a unanimous court upholding a verdict for plaintiff that was based on the last clear chance doctrine. He stated:

[Notwithstanding a human being is down helpless on the track, and is there in his own wrong, the railroad company acquires no right to run over and kill him for his foolhardiness if by ordinary care it can be avoided. Even a cow or a hog does not forfeit its life under such circumstances, if the company's servants can by ordinary care avoid killing. If . . . defective lookout caused the killing which might

314. W. Scott, Guy Mannerering 251 (1829) in Scott's Waverly Novels (Boston ed.).
315. See Note, supra note 13.
316. A. Brooks, supra note 1, at 158.
317. Id. at 159.
318. 114 N.C. 728, 19 S.E. 863 (1894).
319. Id. at 767, 19 S.E. at 871-72 (Clark, J., dissenting).
320. 126 N.C. 629, 36 S.E. 151 (1900).
otherwise have been prevented, then, notwithstanding the negligence of the deceased, the defective lookout kept by the defendant was the proximate cause of the death.\textsuperscript{321}

Clark also introduced the tort of negligent infliction of mental anguish or emotional distress into North Carolina jurisprudence. In \textit{Young v. Western Union Telegraph Co.}\textsuperscript{322} Western Union waited for eight days to deliver a telegram reading, "Come in haste. Your wife is at the point of death."\textsuperscript{323} The addressee's business had been located near the Western Union Office for many years. Because the telegram was delivered late, plaintiff did not know of his wife's death and burial.

The court held that the addressee could maintain an action against the company and recover for mental pain and anguish, even though there was no accompanying physical injury. Clark wrote:

The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, . . . and it is better it should be left to them. . . . than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy.\textsuperscript{324}

In addition to his formal opinions, Clark made numerous other contributions to the judiciary and the legal system. He rewrote the rules of practice so that the courts could move their dockets efficiently.\textsuperscript{325} He encouraged and accelerated the building of an efficient, modern library for the supreme court\textsuperscript{326} and "drew heavily" on its resources in his own work.\textsuperscript{327} He instituted the practice that continues today of presenting portraits of deceased justices to be hung in the courtroom and halls of the supreme court building;\textsuperscript{328} he recorded the history of the supreme court, both the institution and biographies of its members;\textsuperscript{329} he solicited funds for the statue of Thomas Ruffin that stands at the entrance to the Court of Appeals Building;\textsuperscript{330} and he made the

\begin{flushleft}
\textsuperscript{321} \textit{Id.} at 633-34, 36 S.E. at 153.
\textsuperscript{322} 107 N.C. 370, 11 S.E. 1044 (1890).
\textsuperscript{323} \textit{Id.} at 370, 11 S.E. 1044.
\textsuperscript{324} \textit{Id.} at 385-86, 11 S.E. at 1049. In Meadows v. Western Union Telegraph Co., 132 N.C. 40, 43 S.E. 512 (1903), with Clark writing the opinion, the court reaffirmed the \textit{Young} doctrine in the limited context of telegraph companies.

When Clark ran for chief justice in 1902, the railroad interests, which considered him an irreconcilable enemy, attempted to use this decision against him. An official of one railroad wrote an open letter to a newspaper, stating: "To suffer mental anguish is the frequent lot of mortals here below. Judge Clark has found out that it is convertible into money. . . . I want to know how much money for a given amount of anguish." H. Page, \textit{Some Campaign Letters} 15 (1902). He closed by stating that the corporations had good reason to view Clark as a danger. \textit{Id.} at 15-17.
\textsuperscript{325} A. Brooks, \textit{supra} note 1, at 61.
\textsuperscript{326} \textit{Id.} at 159-60.
\textsuperscript{327} A note to this effect is appended on the opening page of the copy of \textit{1 The Papers of Walter Clark}, \textit{supra} note 1, available at the North Carolina Supreme Court Library, Raleigh, North Carolina.
\textsuperscript{328} A. Brooks, \textit{supra} note 1, at 160.
\textsuperscript{329} Clark, \textit{The Supreme Court of North Carolina}, \textit{4 The Green Bag} 457, 521, 569 (1892), reprinted in \textit{1 The Papers of Walter Clark}, \textit{supra} note 1, at 505-85.
\textsuperscript{330} A. Brooks, \textit{supra} note 1, at 159. Moving the statue to the mall area between the Justice
principal address at the statue's unveiling and presentation to the State.331

Clark edited and annotated the reprints of the North Carolina Reports, a task described as "immense . . . and of great value to the State and the [legal] profession." White notes that Justice John Harlan(II), in certain instances, "was prepared to accept a role for judges as glossators." Clark, however, in his editing of the Reports, reputedly went beyond merely glossing. He is believed not only to have edited, but actually to have rewritten opinions to read as he thought they should.334 Supposedly, Justice Clifton L. Moore, who served on the supreme court from 1959 to 1966, refused to rely on opinions as reported in the volumes Clark edited, but instead used originals from the court's files.335

Clark's rewriting of opinions perhaps can be attributed to his view of precedent. He did not consider a matter settled until it was settled correctly, in accordance with his point of view. Thus, precedent was not binding unless it was "right," and it was not "right" unless it addressed current social conditions. Clark would disregard even recent precedent if policy arguments, supported by statistics and developing science, so mandated. He stated that, to depart from precedent, "the Court, in response to the sentiment of a more enlightened and juster age, would need no authority further than to say, 'We have advanced from that barbarism.'" Such a view is not uncommon; jurists such as Judge Lemuel Shaw, Judge Charles Doe, and Justice Robert Jackson made similar statements.

In a law review article, Clark criticized the tendency to rely on precedent, stating that it retarded the progress of the law. He wrote:

In all the other professions, in the sciences and arts, there has been . . . progress. In the one calling of the law, for which we claim especial ability for the average of its membership, many doctrines remain as they were when patients were bled to death and heretics were burnt.340
He considered Blackstone's characterization of the common law as "[t]he perfection of reason" to be inapt.\textsuperscript{341} "This claim is absolutely without foundation and all progress in the law has consisted in getting away from the barbarous teachings, of the common law. In its origin, and in its continuance, this was merely judge-made law based upon alleged customs or traditions among a barbarous people."\textsuperscript{342}

Clark's opinions include similar expressions. In \textit{Pressly v. Yarn Mills} he stated: "The law is not fossilized. It is a growth. It grows more just with the growing humanity of the age and broadens 'with the process of the suns.'"\textsuperscript{343} He also wrote: ""The reason of the law is the life thereof,' and 'when the reason ceases, the law ceases.' These two rules are well recognized by sound common sense and must be observed to save the law from degenerating into mere technicality."\textsuperscript{344}

Clark also emphasized this theme in public addresses, saying of Ruffin: "While he had due regard for precedent he was great enough not to be hampered by them [sic] in reaching a just conclusion. He realized that the object of the administration of justice is to do justice."\textsuperscript{345} A court's opinion, Clark explained, should be viewed in the context of the times. Ruffin's opinion in \textit{Hoke v. Henderson},\textsuperscript{346} which Clark had worked to overturn, "should be judged from the standpoint of the times in which [Ruffin] labored and not by the view of the present day."\textsuperscript{347} It was overruled because "it had become out of line with the thoughts and the needs of a new generation, and the Constitu-

\begin{footnotes}
\item[341. ] Id. at 27.
\item[342. ] Id. Clark further posits:

The origin of the common law has been fictitiously claimed to be "as undiscoverable as the sources of the Nile." The sources of the Nile have now long since been discovered and as to the common law we know that its real origin was in the customs of our barbarous and semi-barbarous ancestors, added to by the decisions of Judges of more recent centuries, most of whom were neither wise nor learned beyond their age. One of these, in haste to get to his supper, or half comprehending the cause, or prejudiced, it may be, against a suitor, or possibly boozy (and such have been kenned) has rendered a decision, another Judge too indifferent, or unable, to think for himself, or oppressed by the magic of a precedent, has followed, other judges have followed each other in turn and thus many indifferent decisions being interwoven with perhaps a greater number of sound ones, there was built up, piece by piece, precedent by precedent, that fabric of law, that patchwork of many hands, that conception of divers and diverse minds, created at different times, that jumble of absurdities, consistent only in inconsistency, which those who thrive by exploiting its mysteries were wont to style "the perfection of human reason—the Common law of England." As a system, it resembles OTWAY'S Old Woman whose patched gown of many colors bespoke "Variety of wretchedness."

\textit{Id.} at 27-28.


\item[345. ] Addresses at the Unveiling and Presentation to the State of the Statue of Thomas Ruffin, \textit{supra} note 331, at 15.

\item[346. ] 15 N.C. (4 Dev.) 1 (1833).

\item[347. ] Addresses at the Unveiling and Presentation to the State of the Statue of Thomas Ruffin, \textit{supra} note 331, at 18.
\end{footnotes}
tion, as we now understand its spirit.”\textsuperscript{348}

Other jurists of Clark’s time shared his concern that the common law was not responding to contemporary problems. Roscoe Pound wrote of these judges: “Today, for the first time, . . . instead of securing . . . what they most prize, they know [the common law] chiefly as something that stands between them and what they desire.”\textsuperscript{349} Frank Doster, populist chief justice of the Kansas Supreme Court (1897-1903), for example, also took liberties with precedent. Doster, however, felt compelled to defend his action as a return to, rather than a departure from, the “true” common law. He stated:

Many of the recent decisions have been along lines of new legal departure, extorted from the courts by the capitalistic institutions of the country. If I have any views at all different from that of everybody else it is that we need a return to the old ways and the old common law precedents. They will be found more consonant with theories of popular right at least.\textsuperscript{350}

Clark felt no such compunction to traditionalize his position. At a time when courts clung tightly to precedent, he was remarkably candid in assailing it. “[N]o judge or court is bound by an erroneous precedent,” he stated unequivocally, “but should correct it.”\textsuperscript{351}

Clark perhaps best demonstrated his unfettered approach to precedent in the overruling of \textit{Hoke v. Henderson}.\textsuperscript{352} Defendant in \textit{Hoke} had been appointed clerk of a county court pursuant to an 1806 statute. Prior to expiration of his term, the legislature established a new method of selecting clerks. Plaintiff had been elected clerk pursuant to the later statute. His motion to qualify and assume the office was disallowed by the trial court, and in a lengthy opinion by Chief Justice Ruffin the supreme court affirmed.\textsuperscript{353} Clark subsequently stated the \textit{ratio decidendi} of \textit{Hoke}, “that [the] office is not an agency, but property obtained by contract, and therefore protected by the contract clause of the Federal Constitution.”\textsuperscript{354}

In \textit{Walser ex rel. Wilson v. Jordan}\textsuperscript{355} the court relied on \textit{Hoke} in retaining incumbent judicial officials and ignoring legislation to reform the courts. Clark, in dissent, did not mention \textit{Hoke}, but simply stated that “[t]he emoluments of such officeholders cannot be more sacred than the right of the people to control their own government, and to change the management of their own property whenever they think proper.”\textsuperscript{356}

\textsuperscript{348} Id. at 21.

\textsuperscript{349} Pound, The Spirit of the Common Law, 18 The Green Bag 17, 19 (1906), quoted in Auman, Some Problems of American Legal Development During the Period of Industrial Growth, 1865-1900, 12 U. Cin. L. Rev. 519, 543 n.49 (1938).


\textsuperscript{352} 15 N.C. (4 Dev.) 1 (1833).

\textsuperscript{353} Id. at 31.

\textsuperscript{354} Mial v. Ellington, 134 N.C. 131, 163, 46 S.E. 961, 972 (1903) (Clark, C.J., concurring).

\textsuperscript{355} 124 N.C. 683, 33 S.E. 139 (1899).

\textsuperscript{356} Id. at 706, 33 S.E. at 151 (Clark, J., dissenting).
Four years later, in *Mial v. Ellington*, a majority of the court adopted Clark's position and overruled *Hoke*. The majority opinion, however, was crafted carefully in traditional terms. It expounded at length on foreign precedents contrary to *Hoke*, and demonstrated the court's trepidation in overruling its own precedent:

We recognize the gravity of the proposition that we shall reverse a decision of this Court, delivered by Chief Justice Ruffin, with the approval of Justices Daniel and Gaston, which we concede has received the unanimous approval of this Court in a number of cases, and a majority thereof in many others. If this were a question involving the title to property, upon the decision of which property rights have been acquired, settlements have been made, and the security and peace of families was dependent, we should feel it our duty to leave it to the legislative department of the government to bring the law into harmony with sound principle and the best thought and experience of the age in which we live. Being, however, a question of public constitutional law, involving the sovereignty of the State, if it is made to appear that the principle upon which *Hoke v. Henderson* is founded stands without support in reason and is opposed to the uniform, unbroken current of authority in both State and Federal courts, it becomes our duty to overrule it and place our jurisprudence in line with that of the other States and the Federal Government.

The majority opinion exemplifies what Karl Llewellyn describes as the "Formal Style" of dealing with precedent, in which the court virtually denies its ability to make law. Justice Robert M. Douglas, dissenting in *Mial*, was even more cautious. He stated:

I know it is said that even Homer sometimes nods, but I never heard of his going to sleep and continuing in a profound slumber for seventy years. It remained for the courts of North Carolina to take this more than Rip Van Winkle nap, and as we wake up we may well ask where are Ruffin and Daniel and Gaston and Pearson? Gone! And we who sit in the ever-widening shadow of their fame are asked to say that they knew not whereof they spoke! Let this be said by those who may—it shall not come from me.

Clark's concurrence contrasts sharply with these timorous opinions. He noted that "[i]f the Court that decided *Hoke v. Henderson* did not deem themselves infallible, for they overruled divers of their opinions as erroneous, and succeeding Courts have overruled other opinions of that Court. There is no peculiar sacredness attached to *Hoke v. Henderson*." Clark then traced the subsequent history of *Hoke* and concluded that "the doctrine of private property in public office, started on its course by the decision in *Hoke v. Henderson*,

357. 134 N.C. 131, 46 S.E. 961 (1903).
358. *Id.* at 139, 46 S.E. at 963-64.
361. *Id.* at 162, 46 S.E. at 971-72 (Clark, C.J., concurring).
will, like the ghost in Hamlet, 'no longer walk the earth' to disquiet the peace."

Clark also believed that the doctrine of judicial review had no legitimate basis in our jurisprudence. On several occasions the Constitutional Convention had rejected a proposal that judges pass on the constitutionality of acts of Congress. Thus, according to Clark, "the subsequent action of the Supreme Court in assuming the power . . . was without a line in the constitution to authorize it, either expressly or by implication." The doctrine was a "myth," and had "no validity apart from the acquiescence or toleration which has been accorded it."

Clark thought it "inconceivable that the veto power should have been given the judiciary, when it had never existed elsewhere, without any word or line intimating the conferring of such . . . and with no provision for its being overruled as in the case of the executive veto." The constitutionality of a law, in his view, was "for the legislative body which passes it." He shared Justice Holmes' belief that "the judiciary, not being elected representatives of the majority, was [not] to substitute its views for those of the legislatures. "They are the direct agents of the people and always have in their ranks more intelligence than the highest court of the State or nation . . . ."

Nothing can be more dangerous than to assume that the law-making authority . . . does not rest with the representatives of the people[,] subject to review by the people alone at the next election[,] but that the majority of a board of five, or of nine, lawyers can nullify at will the power of the people.

He saw an "immense liability to abuse of this irresponsible power assumed by the judiciary, without any express constitutional warrant, to nullify and set at naught the will of the people as expressed through their constitutional organs, their Legislatures and Congress."

Clark apparently believed that the doctrine of judicial review would not survive. "Being . . . without constitutional warrant," he wrote, "every extension jeopardizes its extinction."

362. Id. at 167, 46 S.E. at 973 (Clark, C.J., concurring).
363. E.g., Clark, Some Defects of the Constitution of the United States, Address to the Law Department of the University of Pennsylvania (Apr. 27, 1906), reprinted in Clark, supra note 329 at 26; 2 THE PAPERS OF WALTER CLARK, supra note 8, at 553-72.
364. 2 THE PAPERS OF WALTER CLARK, supra note 8, at 563-65.
365. Id. at 564.
367. Id. at 31.
368. Id.
369. Id. at 30.
370. G. WHITE, supra note 3, at 159.
372. Id. at 31.
374. Id. at 704, 33 S.E. at 151.
We have never given to the judges the "judicial veto" power. It has been assumed, but it can not be maintained. It makes of the courts small legislative bodies which may be appointed, or nominated, by the special interests. The question then is squarely presented which shall control—the "interests" or the body of the people? One must know little of the temper of the American people if he believes that this myth can long survive the fierce light that is being shed upon it.\(^\text{375}\)

Despite his opposition, however, the "myth" persists.

Clark, as jurist, cannot be classified into a singular category of legal thought. His repeated appeals to inherent justness, fairness, or rightness reflect a natural-law philosophy similar to that expressed by Cicero.\(^\text{376}\)

According to Cicero, however, natural law was "unchanging and everlasting," not "different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law... valid for all nations and all times."\(^\text{377}\) In this aspect Clark's philosophy differed, being similar to Holmes' belief "that law responds to unconscious and changing majoritarian impulses, so that it can never be static."\(^\text{378}\) Clark stated that "[e]very age should have laws based upon its own intelligence and expressing its own ideas of right and wrong. Progress and betterment should not be denied... by the dead hand of the Past."\(^\text{379}\)

Natural-law philosophy also led to the oracular theory of judging, a concept of law "as a mystical body of permanent truths, and the judge... as one who declared what those truths were and made them intelligible—as an oracle who 'found' and interpreted the law."\(^\text{380}\) Clark also expressly rejected this theory. "The fiction that the judges declared the 'common law,' and did not make it," he said, "is a mere decency."\(^\text{381}\)

Brooks reduced Clark's philosophy of law to the pithy maxim that "[t]he public welfare is the supreme law."\(^\text{382}\) He traces this philosophy to Jeremy Bentham, "the common law's... severest critic,"\(^\text{383}\) and depicts Clark as a Bentham disciple.\(^\text{384}\) "Bentham was fundamentally a positivist whose betes noires were natural law and metaphysics... ."\(^\text{385}\) Although Clark may have subscribed to Bentham's utilitarian principle of "the greatest happiness of the

\(^{375}\) Clark, supra note 340, at 30.
\(^{376}\) Cicero stated that "we are born for Justice, and... right is based, not upon men's opinion, but upon nature." DE LEGIBUS, Book I. X. 28-30, reprinted in CICERO, DE RE PUBLICA, DE LEGIHUs 329 (C.W. Keyes trans. 1928).
\(^{377}\) DE RE PUBLICA, Book III. XXII. 33, reprinted in CICERO, DE RE PUBLICA, DE LEGIHUs 211 (C.W. Keyes trans. 1928).
\(^{378}\) G. WHITE II, supra note 151, at 65.
\(^{380}\) G. WHITE, supra note 3, at 2.
\(^{382}\) A. BROOKS, supra note 1, at 79-80.
\(^{384}\) A. BROOKS, supra note 1, at 80-84.
\(^{385}\) L. LLOYD, INTRODUCTION TO JURISPRUDENCE 81 (4th ed. 1979).
greatest number," he did not depart as readily from "natural law and metaphysics" as did Bentham. Bentham, for example, was the harbinger of Austeinian positivism, one aspect of which was a "rigid separation of law and morals." Clark, on the other hand, shared Earl Warren's "conception of law as inexorably linked with ethics."

Clark's view appears to combine natural law with positivism. Sociological jurisprudence, however, also figures in his philosophy. Before Pound exposed and expounded on the "mechanical jurisprudence . . . in which conceptions [were] developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning [was] exaggerated," Clark had rejected it. Instead, he advocated "the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles." He used both legal and extra-legal materials within or without the record, to educate himself on the human conditions governed by his decisions—to create "an awareness of the social context of adjudication."

Finally, in this regard, Clark shared with the realists "a conception of law in flux." Although he denounced the "judicial creation of law," another tenet of realism he embodied it. He epitomized Jerome Frank's statement that "the personality of the judge is the pivotal factor in law administration, [and thus] law may vary with the personality of the judge who happens to pass upon any given case." His "idiosyncratic biases"—for example, as to children, women, corporations, and labor—are important factors in his decisions. He thus presents the conundrum of the "fighting judge" who excoriates "government by judges," the quintessential judicial activist who advocates judicial restraint, or, in Justice Gunderson's terms, the "active-positive" who philosophically rejects those attributes.

Clark, however, lived in an era in which jurists who did not share his social and political philosophy consistently struck down legislated "progressive" reforms that he championed. Perhaps his philosophy would have dif-

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386. Orth, supra note 383, at 712.
387. L. Lloyd, supra note 385, at 173.
388. Id. at 184.
391. Id. at 464.
392. See supra notes 311-13 and accompanying text.
393. G. White II, supra note 151, at 108.
394. Id. at 128.
395. Id. at 129.
397. G. White II, supra note 151, at 123.
398. "Fighting Judge" is the subtitle of Brooks' biography of Clark, A. Brooks, supra note 1. See text accompanying notes 74-77; the phrase recurs throughout the book in describing Clark.
399. This was the title of Clark's address to Cooper Union, New York City (Jan. 27, 1914), contained in 2 The Papers of Walter Clark, supra note 8, at 572-94.
fered had he lived when an activist judiciary, with equal consistency, created reforms consonant with his beliefs.

In one of his many barbs aimed at Clark, Winston said that “[i]n regard to substantive law . . . he was not so strong”\(^401\) yet there is evidence that Harvard Law School students were directed to read Clark’s opinions as legal classics.\(^402\) Winston also observes that the United States Supreme Court overruled, more often than it affirmed, Clark’s court, and he posits that Clark considered it an honor to be overruled in a “progressive” cause.\(^403\) Brooks, however, somewhat conversely, describes Clark as having “great pride in the tradition, good name, and fame of his Court.”\(^404\)

If Clark expressed his thoughts in this regard, the present research has not disclosed them. He perhaps best expressed, however, what he believed to be the significance of his work as jurist as follows:

> The work of all courts is in a large measure temporary; but there is a still larger part which abides and shapes the future. Our civilization is like the coral islands, built by individual and forgotten workers, on whose labors each successive generation climbs to higher things. The work of the courts is a potent factor in our civilization. It bears the impress of the present, but remains to instruct the future, as imprints of a passing shower of ages ago are preserved in strata of sandstone. In like manner, much of the work shaped out by the conjoined labor of bench and bar will have its effect long ages after the men of this generation and all memory of them “Like thin streaks of morning cloud shall have melted into the infinite azure of the past.”\(^405\)

**VIII. Conclusion**

Over two years before Clark’s death, E.C. Branson\(^406\) wrote to him:

> I have a notion that we shall have to measure you according to Emerson’s formula, namely: “The great man is he who brings the world around to his opinion twenty years later.” You are one of the men who in my opinion will be taller when he lies down to die than he was when he stood up alive.\(^407\)

Some, however, evaluated Clark while he lived. Branson himself, rather than waiting twenty years post-mortem, wrote, less than a year before Clark’s

\(^{401}\) Winston, supra note 15, at 184.
\(^{402}\) A. Brooks, supra note 1, at 251.
\(^{403}\) Winston, Chief Justice Shepherd and his Times, 3 N.C.L. Rev. 1, 12 (1925).
\(^{404}\) A. Brooks, supra note 1, at 159.
\(^{405}\) 1 The Papers of Walter Clark, supra note 1, at 584-85 (from Clark’s history of the North Carolina Supreme Court).
\(^{406}\) Chairman of the Department of Rural Social Economics at the University of North Carolina, 1914-33, and editor of The University News Letter. 2 The Papers of Walter Clark, supra note 8, at 314.
\(^{407}\) Letter from E.C. Branson to Walter Clark (Mar. 23, 1921) (available in E.C. Branson Papers, Southern Historical Collection, University of North Carolina at Chapel Hill Library, Chapel Hill, North Carolina).
death, that "no man whether he agrees or disagrees with you fails to recognize you as a valiant servant of the common good, with the highest possible ideals of civic righteousness, and with unflinching courage—a free, unterrified, un-routable democrat of the sort that Emerson sang."\(^{408}\)

On the warm, partly cloudy day\(^ {409}\) on which Clark was buried, a prominent railroad official told a friend at the funeral: "I have come to be sure that Walter Clark is dead. I never attended a funeral with more pleasure."\(^ {410}\) An editorial in a leading newspaper, however, stated:

[\[I\]]t is no exaggeration to say that no single man of his time exerted a greater influence upon legislation, upon the legal profession and upon the trend of court procedure. While he held opinions often counter to those of the majority of his court and sometimes almost startlingly contrary to the prevailing sentiment among a large portion of the bar of the State, such opinions were respected and had their influence upon the life of North Carolina.\(^ {411}\)

Five months after his death, Clark was appraised as a
diligent student and affectionate son—the patriot who endured the hardships and dangers of battle; partook of the privations of his de-spoiled State, developed into the able advocate, wise counsellor, skillful farmer, bold journalist, accurate author, accomplished linguist, learned scientist, profound economist and jurist who with knowledge judged righteously between men.\(^ {412}\)

The speaker, however, conceded that "[\[i\]]t remains to posterity to rightly appraise the towering statute [sic] of his intellect."\(^ {413}\)

There still was no consensus on Clark twenty years after his death.\(^ {414}\) Winston, who shortly after Clark’s death excoriated him as "that sociological, politico-pragmatist,"\(^ {415}\) still berated him. Brooks, in sharp contrast, apotheosized him. Even the person who had referred to him as "a testy, temperish man"\(^ {416}\) noted that "I think he wrote all the reasoned decisions of a forward-looking nature that came up in his tenure of office."\(^ {417}\)

\(^{408}\) Letter from E.C. Branson to Walter Clark (July 29, 1922) (available in E.C. Branson Papers, Southern Historical Collection, University of North Carolina at Chapel Hill Library, Chapel Hill, North Carolina). Governor Cameron Morrison wrote:

I want you [Clark] to let me say to you that I would rather have written into the Supreme Court reports of this state the great principles of justice and right that you have written than to have rendered any other service any other son of this state has ever given.

A. Brooks, supra note 1, at 250. O. Max Gardner, later Governor, wrote: "I think you have done more to impress yourself upon the constructive forces of North Carolina than any other man who ever lived in the state." Id.

\(^{409}\) The News and Observer (Raleigh, North Carolina), May 21, 1924, at 2, col. 1.

\(^{410}\) A. Brooks, supra note 1, at 141.

\(^{411}\) Charlotte Observer, May 20, 1924, at 8, col. 1.

\(^{412}\) Address by James A. Lockhart at Presentation of Walter Clark Portrait to North Carolina Supreme Court, reported in 188 N.C. 839, 849 (1924).

\(^{413}\) Id. at 849.

\(^{414}\) See supra notes 89-100 and accompanying text.

\(^{415}\) Winston, supra note 403, at 11.

\(^{416}\) See supra note 208 and accompanying text.

\(^{417}\) Diary of G. Hope Chamberlain, supra note 209, at 3.
Four years later, A.B. Neil, Chief Justice of the Tennessee Supreme Court, wrote:

Whether one agrees with Justice Clark's legal philosophy or rebels against it, all must have a profound respect for his intellectual integrity, his sincerity and his intense patriotism.

The Chief Justice was one of the great men of America, forward-looking and courageous, ever the champion of the rights of the underprivileged. As a jurist he had but one lofty ambition, which was to honor the cause of justice. No nobler attribute could be found as a motivating power in the life of any man. It was Ulpian who defined justice as "the constant and perpetual will to allot to every man his due." Dean Wigmore has said, "This is the noblest utterance that is to be found in any of the world's great legal systems."418

As this Article is written, over sixty years after his death, Clark still engenders controversy and eludes consensus. A law professor recently noted that he always had heard him described as "the great Walter Clark."419 A retired judge, however, observed that Clark is often referred to as a disgrace to the judiciary, and stated that residents of Clark's native county still are embarrassed keenly by him.420

Clark himself, writing of another jurist, referred to "the cool impartial award of history," and indicated that "[l]ike Cromwell, he would have said, 'Paint me as I am.'"421 In light of the dispute that Clark still evokes, "the cool impartial award of history" has not been rendered him; and a complete portrait of him, as he was, still may be unattainable.

Certain conclusions, however, can be drawn with confidence. Justice Holmes stated that "as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived."422 By this standard, Clark fully lived, for he shared fully in the passion and action of his time, addressing eloquently and forcefully many of its major issues. He influenced both the State and the nation during his life; and through a substantial legacy of writings and recorded public utterances, he has continued to speak in death.

If judged by Emerson's criterion—that those are great who bring the world to their opinion twenty years later—Clark clearly attained greatness. Many of the reforms he encouraged were adopted long after his advocacy, some long after his death, with his views influencing their adoption. He substantially influenced the common and statutory law of his jurisdiction relating

419. Conversation with Martin B. Louis, Professor of Law, University of North Carolina at Chapel Hill (Mar. 11, 1983).
420. Conversation with the Honorable Naomi E. Morris, Retired Chief Judge of the North Carolina Court of Appeals (May 11, 1983).
421. The Papers of Walter Clark, supra note 1, at 531 (from Clark's history of the North Carolina Supreme Court).
422. Oliver Wendell Holmes, Memorial Day Address, 1884, quoted in J. Bartlett, Familiar Quotations 786 (14th ed. 1968).
423. See supra text accompanying notes 406-07.
to women and children, making it more egalitarian and humane, and he prompted beneficial legal reforms for laborers and prisoners. He was one of the harbingers of sociological jurisprudence, and his judicial career foreshadowed certain essential tenets of legal realism. Clark thus presaged significant aspects of twentieth century American jurisprudence.

Walter Clark was not included in G. Edward White’s book, *The American Judicial Tradition.*\(^4\)\(^2\)\(^4\) He contributed substantially, however, within his jurisdiction, and to some degree nationally, to the shaping of the law of his time and beyond. He has continued to speak and influence policy from his grave under the hemlock, demonstrating White’s previously noted assertion that “[l]ike ancient English forms of procedure, American judges can rule us from their graves.”\(^4\)\(^2\)\(^5\) He is among those jurists who, notwithstanding exclusion from the book, merit an enduring place in the American judicial tradition itself.

**ERRATA**

Amend the listed footnotes by adding the following at the end of each:


\(^4\)\(^2\)\(^4\) G. White, *supra* note 3.

\(^4\)\(^2\)\(^5\) G. White II, *supra* note 151, at 193.