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From 1889-1924 Walter Clark served on the North Carolina Supreme Court. Clark, the son of a wealthy slaveholding eastern North Carolina family, emerged as a force for progressive change in North Carolina law and politics. During Justice Clark's tenure on the North Carolina Supreme Court (Associate Justice, 1889-1902; Chief Justice 1903-1924) he forged a progressive jurisprudence that defied the traditional perception of the judiciary as a conservative bulwark against reform and instead promoted labor rights, women's rights, and public regulation. Clark's often controversial judicial decisions and political positions led to conflict with the state's railroad interests, textile mills, and even the wealthy Duke family. While Clark's activism often pushed the limits of acceptable political engagement by a sitting Supreme Court justice, he was continuously reelected to the North Carolina Supreme Court up until his death in 1924.

Clark's judicial and political career provides insight into progressive politics in North Carolina history. Early twentieth century progressives in North Carolina enacted moderate reforms in education, child labor, women's rights, and utility regulation through the legislature. Yet Chief Justice Clark offers us a popular political figure whose views pushed for much greater reform. Clark, through legal and political means, influenced Supreme Court opinions and legislation that protected North Carolina's laborers from workplace injury, limited child labor in the industrial workplace, expanded property and voting rights to women in North Carolina, and pushed for active public regulation of private utility companies. These changes can be attributed to the unique way in which

Clark used the usually conservative courts as a means of influencing the legislature toward embracing progressive change. Although in the age of segregation and disfranchisement, Clark's progressivism did not extend to black citizens, and his support of white supremacy may be one reason why his other egalitarian reforms have gone unappreciated. While Clark did not live to see many of the transformations of law and politics he hoped to see enacted, his influence can be seen in many progressive changes in North Carolina both during and after his life.

JUDICIAL KNIGHT ERRANT: WALTER CLARK AND THE LONG PROGRESSIVE
ERA IN NORTH CAROLINA

by

John James Kaiser

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Approved by

Mark Elliott
Committee Chair

To my wife, Allison Jane Kaiser

and

My children, Oleksandra, Sasha, and Aramis

APPROVAL PAGE

This dissertation written by John James Kaiser has been approved by the following committee of The Faculty of The Graduate School at the University of North Carolina at Greensboro

Committee Chair

Mark Elliott

Committee Members

Charles C. Bolton

Linda M. Rupert

Alfred L. Brophy

Date of Acceptance by Committee

Date of Final Oral Examination

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CHAPTER I

INTRODUCTION

He found the law dear, and left it cheap; found it a sealed book—left it a living letter; found it a patrimony for the rich—left it the inheritance of the poor; found it a two edged sword of craft and oppression—left it the staff of honesty and shield of innocence.

— Henry Broughman, British Reformer¹

In the spring of 1903, William Jennings Bryan posed the question, “What do you say to Judge Walter Clark, of North Carolina?”² Bryan was advancing Clark’s name for consideration for the Democratic presidential nomination—Bryan was sitting out the 1904 election after two consecutive losses. Several weeks before Bryan’s statement, *The Commoner* had lauded Clark as “one of the leading democrats of the south, a lawyer of great ability and a jurist with the (sic) record of long years of able conscientious service.”³ The *New York Evening Post*, a Republican newspaper, published an incredulous editorial, that “ninety-nine-one-hundredths of the party would [say] ‘Never heard of the man.’”⁴ The *Post*’s exaggerated response, given their past articles about

¹ From Henry Brougham’s six-hour speech in the House of Commons on February 7, 1828, urging the English Monarch to enact legal reforms similar to Napoleon’s *Civil Code*. Kieran Dolin, *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (Cambridge: Cambridge University Press, 1999), 79.

² “The Democratic Dilemma,” *Washington Post*, May 23, 1903; “Nebraskan Favors North Carolinian [sic] for the Nomination,” *San Francisco Call*, May 20, 1903; “Clark Bryan’s Choice,” *Minneapolis Journal*, May 20, 1903.

³ “Judge Walter Clark,” Lincoln (Nebraska) *Commoner*, May 1, 1903.

⁴ “The Democratic Dilemma,” *Washington Post*, May 23, 1903.

Justice Clark, is echoed by twentieth-century historiography. Clark's legacy as a southern reformer during the long Progressive Era has slumbered with only brief interruptions since his death in 1924. This dissertation poses Bryan's question to a different audience—historians and legal scholars.

Within North Carolina politics Walter Clark rose to fame and prominence as the son of a prominent antebellum planter and as a distinguished Confederate Civil War veteran.⁵ His work collecting and editing sixteen volumes of the *State Records of North Carolina* and the definitive five-volume *Histories of the Several Regiments and Battalions from North Carolina in the Great War 1861-'65* (both labors completed without monetary compensation) around the turn of the century left both his contemporary North Carolinians and modern historians and genealogists in his debt.⁶ His antebellum and Confederate bona fides granted Clark considerable leeway from orthodox Democratic politics of the Gilded Age and Progressive Era to advocate unorthodox reforms locally and nationally—although it did not protect him from occasionally being labeled a Populist, radical, or, worse still, socialist.⁷ Clark's successful legal practice and

⁵ Aubrey L. Brooks, *Walter Clark: Fighting Judge* (Chapel Hill: University of North Carolina Press, 1944), 25-26; 1860 U.S. Census, Halifax County, North Carolina, population schedule, Western District, p. 45, dwelling 463, Family 425, David and Anna Clark; digital image, Ancestry.com, accessed February 26, 2015, <http://ancestry.com>; 1860 U.S. Census-Slave Schedules, Halifax County, North Carolina, Western district, pp. 51-54, David Clark, digital image, Ancestry.com, accessed on February 26, 2015, <http://ancestry.com>.

⁶ Brooks, *Fighting Judge*, 239.

⁷ For claims Clark was an ambitious Populist and radical, see *Some Campaign Letters about Walter Clark*, Pamphlet, dated 1902, accessed April 16, 2012, <http://archive.org/details/somecampaignlett00nort>. For claims that Clark was a socialist, see "Culture and Socialism," Edison (Washington) *Industrial Freedom*, May 21, 1898; Rome G. Brown, *Addresses, Discussions, Etc.* (Minneapolis: Self-published, 1917), 20, 73, accessed December 21, 2014, <https://books.google.com/books?id=WQ40QAAMAAJ>.

run as the owner of the *Raleigh News* during the 1870s and early 1880s was followed by a superior court appointment in 1886. After three years of service on the superior court, Clark, a lifelong Democrat, was nominated by the Democratic governor Daniel Fowle to fill a vacancy on the North Carolina Supreme Court in 1889.⁸ Clark would remain on the court, winning five subsequent judicial elections, until his death in 1924. During his thirty-four year tenure on the North Carolina Supreme Court, Clark authored 3,235 opinions—among the most ever written by any sitting state or federal appellate judge.⁹

In addition to Justice Clark's reputation as a state Supreme Court justice, by 1904 Justice Clark had gained a national reputation as a political and legal reformer. At the 1896 Democratic National Convention he received the support of fifty Democratic delegates for Vice President as a southern Progressive alternative to northern banker Arthur Sewall.¹⁰ Indeed, Clark had built up a national reputation as a Progressive reformer with articles in several leading legal journals, *The American Law Review*, *The Michigan Law Review*, and *The Green Bag*; and in middle-class reformist journals, *The Arena*, *Harper's*, and *The Independent*. In these national forums Clark consistently argued for a progressive program of reforms that would bring the telegraph, telephone, and railroad under government ownership; democratize the national government with the

⁸ Brooks, *Fighting Judge*, 51, 54, 59.

⁹ *Ibid.*, 265. These sorts of claims are hard to ascertain given that there is no existing tally of opinions for state appellate court judges, however, previous scholars have made similar claims about other prominent appellate judges. For example, Leonard Levy wrote in his 1957 monograph on Massachusetts judge Lemuel Shaw that Shaw wrote "2,200 opinions, probably a record number." See Leonard Levy, *Law of the Commonwealth and Chief Justice Shaw* (New York: Oxford University Press, 1957), 3.

¹⁰ *Official Proceedings of the Democratic National Convention Held in Chicago, Ill.*, (Logansport, Indiana: Wilson, Humphreys, and Co., 1896), 339, 350, 352, 353.

election of post-masters, Senators, and federal judges (including the United States Supreme Court) and the elimination of the Presidential veto and judicial review; and the need to reform, or abandon, the antiquated system of common law jurisprudence embraced by American courts and taught in law schools.¹¹ All of these reforms were meant to provide “the masses” with greater access to the economic benefits of modernization, a more direct role in government, and to break the power of political machines and the infamous trusts.

Clark frequently challenged the conservative jurisprudence of state and national supreme courts with attacks on judicial review, common law, and even the *Magna Carta*.¹² It was within the muddled and disputed intellectual territory of early twentieth-century judicial standards that Clark’s Progressive jurisprudence formed. His Progressive jurisprudence consisted of: a deference toward legislative will; a direct attack on common law traditions used to narrow or nullify legal actions brought by women, children, and workers; a strong theme of corporate accountability for usury, utility rates, workplace accidents, and even the enforcement of segregation by railroad corporations;

¹¹ For an almost complete listing of Clark’s publications, see Brooks, *Fighting Judge*, 257-265. For an example of Clark’s writings on government ownership of communication and transportation networks, see Walter Clark, “The Telegraph and the Telephone Properly Parts of the Post Office System,” *Arena* 5 (March 1892): 464-471. For an example of Clark’s articles on the democratization of the national government, see Walter Clark, “The Election of Postmasters by the People,” *Arena* 10 (June 1894): 68-75; Walter Clark, “The Election of Senators and the President by Popular Vote, and the Veto,” *Arena* 10 (September 1894): 453-461; and Walter Clark, “Revision of the Constitution,” *Arena* 19 (February 1898): 187-198. For Clark’s articles on reforming, or abandoning, the common law, see Walter Clark, “The Progress of the Law,” *The American Law Review* 31 (May-June 1897): 410-414; Walter Clark, “Law and Human Progress,” *Arena* 29 (March 1903): 225-242.

¹² Walter Clark, “Some Myths of the Law,” *Michigan Law Review* 13 (1914-1915): 26-32, republished in the *Congressional Record*, 64th Cong., 1st Sess., Senate Doc. No. 308.

the expansion of state police powers from policing stores hours to mandatory vaccination; and lastly, the adaptation of new legal methods from sociological jurisprudence to the admissibility of photographic evidence in court.

During Clark's thirty-five year tenure on the North Carolina Supreme Court he forged a Progressive jurisprudence whose central commitment was to "the public welfare."¹³ This meant taking into consideration the married woman in her economic "shackles"; "the Joneses who pay the freight" in railroad rate cases; the "little sufferers" in child labor cases; "the casualties" of the railroads and the "needy employee seeking bread to maintain himself and family" in the cotton mills in personal injury cases; and "men in the humbler walks of life" in the case of enforcing Jim Crow laws on the state's railroads.¹⁴ To achieve these ends Clark at times advocated judicial restraint and at others pushed ahead of the legislature; at times he overruled, and strongly condemned, common law precedent and at other times imported common law doctrines to aid plaintiffs in recovery; he looked backward to the Lost Cause to better understand the casualties suffered by the nation's "vast army of soldiers of toil"; he heavily referenced the increasing number of statistics collected by labor and railroad commissions (in the United States and abroad) to support his opinions; and a common thread of Jacksonian

¹³ Brooks, *Fighting Judge*, 144.

¹⁴ *Ibid.*, 95; *Sallie Pettit, Administratrix v. Atlantic Coast Line Railroad Company*, 156 N.C. 119, 136 (1911) (Clark, C.J., dissenting); *S. H. Troxler v. Southern Railway Company*, 124 N.C. 189, 192 (1899); *Pressly v. Yarn Mills*, 138 N.C. 410, 424 (1905) (Clark, C.J., concurring); *W. M. Merritt v. Atlantic Coast Line Railroad*, 152 N.C. 281, 284 (1910) (Clark, C.J., dissenting).

fear of, and contempt for, concentrations of power beyond the reach of the people underlined his opinions in personal injury, segregation, and telegraph cases.¹⁵

Unlike most of his judicial contemporaries, Clark continued to advocate Progressive reform measures during his tenure on the court. He spent a considerable amount of his time playing the role of political gadfly, testifying before Congress, touring the lecture circuit, and writing over sixty articles for law reviews and Progressive magazines. In the quiet of his study he received letters from (and composed letters to) prominent national Populist and Progressive leaders: William Jennings Bryan, Robert La Follette, Theodore Roosevelt, Upton Sinclair, and many others.¹⁶ Clark's addresses, articles, letters, opinions, and testimony provide a useful, and largely neglected, tool to evaluate his judicial opinions as well as the role of southern courts generally in responding to popular calls for reforms in child labor laws, workplace safety measures, women's rights, and many other liberal reforms advocated by Populists and Progressive politicians of the era.

Jurisprudence in the Long Progressive Era: Barbarians at the Gate

During Clark's career on the bench, the nation's courts struggled with the tension between classical legal thought and legal realism. Classical legal thought left too little room for evidence and argument beyond the accumulated weight of judicial decisions; however, judges could not help but sympathize when the law required what seemed an

¹⁵ Walter Clark, "The Rights of the Workers," *American Federationist* 21 (November 1914): 977.

¹⁶ Brooks, *Fighting Judge*, 204.

unjust outcome. Yet, many judges hid behind formalism. It was an era when the justification for judicial power rested on jurists claim that they could not make law—“the judge was an instrument, a vessel” for interpreting Constitutional, statutory, and common law.¹⁷ As legal scholar Lawrence Friedman described the formalism of the era, it was “less a way of thinking than a way of disguising thought.”¹⁸ The judges who introduced labor injunctions, substantive due process, and other such legal mechanisms made law; they simply refused to acknowledge it.

Nineteenth-century American courts jealously guarded the field of legal tradition and interpretation, ever wary of encroachments by reformist legislatures at the state and federal level.¹⁹ In a series of infamous cases—*Lochner v. New York*, *Pollock v. Farmer’s Loan & Trust Co.*, *Smyth v. Ames*, *United States v. E.C. Knight*, and *Hammer v. Dagenhart*—the United States Supreme Court employed conservative legal doctrines rooted in common law jurisprudence to overturn state and federal statutes that provided for social welfare and expanded state power.²⁰ In a similar fashion North Carolina’s Supreme Court shared fears of legislative meddling in “the unwritten law” (common law jurisprudence), and consequently, its majorities sometimes overturned or narrowed (and

¹⁷ Lawrence M. Friedman, “American Legal History: Past and Present,” *Journal of Legal Education* 34, no. 4 (December 1984): 287.

¹⁸ Lawrence Friedmen, *A History of American Law* (New York: Touchstone, 2007), 384.

¹⁹ For a contrary view, see Michael J. Phillips, “The Progressiveness of the *Lochner* Court,” *Denver University Law Review* 75, no. 2 (1998): 453.

²⁰ See *Lochner v. New York*, 198 U.S. 45 (1905); *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895); *Smith v. Ames*, 171 U.S. 361 (1898); *U.S. v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

its minorities issued strong dissents against) statutory laws related to officeholding by women, women's property rights, liability for injuries in the workplace and on public transportation, and other pieces of social welfare legislation. Moreover, in areas where statutory law was absent, the North Carolina Supreme Court proved reluctant to move on from common law positions that English courts had given up half a century earlier—and in at least one case a position the common law courts of England never even held.²¹

Despite the break from British governance via the Declaration of Independence, the new states often held onto, and indeed lauded, the English common law tradition. At the time it served as the basis for the rights professed by the rebellious colonists—a revolutionary tradition in a world defined by monarchy. And in an era when governments played a smaller role, the common law, in the words of Chief Justice Story, filled up “every interstice, and occupie[d] every wide space which the statute law cannot occupy.”²² Yet by the second half of the nineteenth century the common law had transformed from revolutionary to reactionary doctrine.²³ A new generation of legal scholars increasingly questioned its antiquated origins and usefulness in an industrial age. Lionized Progressive Supreme Court Justice Oliver W. Holmes spoke of the legal profession's tendency for “blind imitation of the past,” and Harvard Law School dean

²¹ See *Small v. Morrison*, 185 N.C. 577, 584 (1923). For a discussion of the vitality of the parent-child immunity doctrine, see Elizabeth Ashley Baker, “Closing One Door on the Parent-Child Immunity Doctrine: Legislature Rejects the Decision of *Coffey v. Coffey*,” *Campbell Law Review* 13, no. 1 (January 1990): 105, 107.

²² Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought before Modernism* (Cambridge: Cambridge University Press, 2011), 1-3.

²³ *Ibid.*; Friedman, *A History of American Law*, 271-272.

Roscoe Pound criticized it as “a jurisprudence...[clothed] in the rags of a past century.”²⁴ Chief Justice Clark went beyond these criticisms of the common law. Clark’s political foes declared that the Chief Justice “held [Lords Blackstone and Coke] in derision and utter contempt,” while his allies lauded Clark’s judicial modernism: “to him the common law is obsolete [and] inapplicable to our day or any modern civilization.”²⁵ Neither side exaggerated much. Clark’s list of adjectives for the common law was long and overwhelmingly negative: “cruel,” “barbaric,” a “jumble of absurdities,” while common law judges of the often idealized English past were described as “prejudiced,” “boozy,” and “incompetent.”²⁶

Judges like Clark and Holmes strained against mental and stylistic restrictions as imposed by common law practice. Jurists like Holmes would retrospectively be labelled Realists by the legal scholars of the New Deal era. They were often defined as men who had a “conception of a law in flux, of moving law, and of judicial creation of law.”²⁷ For these judges law became a means to an end (the creation of more equitable judicial outcomes) and not an end unto itself (the distillation and formulation of universal principles of law). Early twentieth-century legal scholar Karl Llewellyn once remarked

²⁴ Roscoe Pound, “Law in the Books and Law in Action,” 43.

²⁵ W.T. Shaw, “Is [the] Chief Justice Being Vamped?” *Carolina Magazine*, n.d., Miscellaneous Materials, 1836-1925, Walter Clark Papers, State Archives of North Carolina [hereafter SANC].

²⁶ Walter Clark, “Some Myths of the Law,” *Michigan Law Review* 13 (November 1914): 26-32, republished in the *Congressional Record*, 64th Congress, 1st Session, Senate Doc. No. 308.

²⁷ Karl N. Llewellyn, “Some Realism About Realism—Responding to Dean Pound,” in *American Legal Realism*, ed. Morton Horowitz and Thomas Reed (New York: Oxford University Press, 1993), 72-73.

when discussing the emergence of Realism within the legal community that Supreme Court Justice Oliver W. Holmes's "mind had travelled most of the road two generations back."²⁸

Clark makes for an interesting contrast to Holmes, despite their shared legal philosophy. While Justices Holmes and Clark were contemporaries and Clark's decisions often mirrored the Realism of Holmes, Clark differed considerably from the iconic justice in several regards that highlight Clark's distinctive Progressive jurisprudence. Whereas Holmes was noted for his detachment (indeed, he "remained aloof from or contemptuous of the great struggles of the day"), Clark was often attacked for "trailing the judicial ermine" by engaging in the reformist politics of the Progressive Era.²⁹ Moreover, in the ongoing legal struggle between what Justice Cardozo called "competing claims of stability and progress" that often divided Formalists and Realists, Clark took a Whiggish view of history as inevitably moving toward greater political democratization and economic equality. Yet, the path to the Progressive changes Clark envisioned was one that courts all too often blocked via formalistic reasoning and activist application of common law doctrines to virtually nullify Progressive statutes.

²⁸ Karl Llewellyn, "Holmes," *Columbia Law Review* 35, no. 4 (1935): 488.

²⁹ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 320; Robert Winston, Review of *Walter Clark: Fighting Judge*, by Aubrey Brooks, *North Carolina Law Review* 22 (1943-1944): 183.

The Significance of Justice Clark

By the end of his life, Clark had established an impressive national reputation and seemed poised to be remembered as a leading jurist of his day. In the 1940s Aubrey Brooks noted that there existed a “general and wide interest shown in Clark’s life.”³⁰ The publication of Brooks’s *Walter Clark: Fighting Judge* and Brooks’s and Lefler’s *The Papers of Walter Clark* was greeted positively by reviewers in historical journals and law reviews alike.³¹ Virginius Dabney, Pulitzer Prize-winning progressive southern journalist, writing in his *New York Times* review of *Fighting Judge*, heralded Clark as “one of the most daring thinkers and most progressive jurists in America.”³² Dabney, and several other reviewers, listed Clark alongside Justices Brandeis and Holmes as a judge willing to overturn precedent and one open to “extra-legal reports, statements, and statistics.”³³ To some reviewers Clark was “the jurist of the Populist movement,” while others classified him as a prototype New Deal activist and “warrior for liberalism.”³⁴

³⁰ Aubrey L. Brooks and Hugh T. Lefler, eds., *The Papers of Walter Clark*, Vol. II (Chapel Hill: University of North Carolina Press, 1950), vii [hereafter *PWC*].

³¹ Virginius Dabney, “Fighting Colonel—and Liberal Judge,” *New York Times*, March 19, 1944, BR28; Christopher Crittenden, Review of *Walter Clark: Fighting Judge*, by Aubrey Brooks, *Journal of Southern History* 10, no. 3 (August 1944): 369-370; Malcolm Young, Review of *Walter Clark: Fighting Judge*, by Aubrey Brooks, *University of Chicago Law Review* 12, no. 3 (April 1945): 306-308; Walton Hamilton, Review of *Walter Clark: Fighting Judge*, by Aubrey Brooks, *The American Historical Review* 50, no. 2 (January 1945): 355-357; Archibald Henderson, Review of *Walter Clark: Fighting Judge*, by Aubrey Brooks, *Mississippi Valley Historical Review* 31, no. 1 (June 1944): 137-138; Review of *The Papers of Walter Clark, 1857-1901*, by ed. Aubrey Brooks and Hugh Lefler, *Michigan Law Review* 46, no. 7 (May 1948): 1009.

³² Dabney, “Fighting Colonel—and Liberal Judge,” *New York Times*, March 19, 1944.

³³ *Ibid.*; Malcolm Young, Review of *Walter Clark: Fighting Judge*, 306; Walton Hamilton, Review of *Walter Clark: Fighting Judge*, 356.

³⁴ Walton Hamilton, Review of *Walter Clark: Fighting Judge*, 355; Malcolm Young, Review of *Walter Clark: Fighting Judge*, 307.

Leading national reformers such as Carrie Chapman Catt, Robert M. La Follette, Samuel Gompers, and Upton Sinclair sought Clark’s legal advice and support.³⁵ One reviewer put it best when he acknowledged that the often controversial Clark was, to both his supporters and adversaries, a man they “could not ignore.”³⁶

Unfortunately, the positive reception of Clark’s judicial legacy was followed by his conspicuous absence from both legal histories and general academic histories of the Progressive Era and the New South. As World War II and the New Deal faded into the past—to join the Populist Party of the 1890s in the mists of history—an America less afflicted with industrial accidents, less beholden to railroad trusts (because of the ubiquitous automobile), and increasingly suspicious of the southern racial order found little to interest them in a pro-labor, anti-trust, pro-segregation southern jurist. Although Clark’s multi-volume *State Records of North Carolina* was frequently cited, the man himself faded from the historical picture in uncharacteristic silence.

Aside from a brief reference to Clark in Woodward’s *Origins of the New South*, and occasional references in the footnotes of Charles Aycock’s and Hoke Smith’s biographies, Clark’s legacy slumbered until the publication of Willis Whichard’s 1985 *North Carolina Law Review* article, “A Place for Walter Clark in the American Judicial Tradition.”³⁷ Since the publication of Whichard’s article Clark’s legacy as a reformer,

³⁵ Brooks, *Fighting Judge*, 168, 206, 251-252.

³⁶ Christopher Crittenden, Review of *Walter Clark: Fighting Judge*, 369.

³⁷ C. Vann Woodward, *Origins of the New South, 1877-1913* (Baton Rouge: Louisiana State University Press, 1951), 469; Oliver H. Orr, *Charles Brantley Aycock* (Chapel Hill: University of North Carolina Press,

especially with regard to his call for the popular election of the judiciary, has received some attention from scholars, yet he remains on the periphery of the historiography of the Progressive Era—both in North Carolina and in the nation.³⁸ There is little difference between the *New York Evening Post* and the last nearly hundred years of historiography in their respective responses to Bryan’s important question.

Why has Clark been so neglected by scholars over the last ninety years?

Returning to the comparison between Justice Walter Clark and Justice Oliver W. Holmes, Jr. may provide some insight. Holmes is arguably the most well-known jurist in the history of the American judiciary and is widely recognized by many prominent legal scholars as “the most illustrious figure in the history of American law.”³⁹ His legacy has spawned several biographies and countless law review articles.⁴⁰ The similarities between Clark and Holmes are abundant. Both men were children of considerable wealth and aristocratic lineage. Holmes descended from Boston elites and Clark from a family

1961), 290; Dewey Grantham, *Hoke Smith and the Politics of the New South* (Baton Rouge: Louisiana State University Press, 1967), 227.

³⁸ Dewey Grantham, *Southern Progressivism: The Reconciliation of Progress and Tradition* (Knoxville: University of Tennessee Press, 1983), 77, 78, 144; Willis Whichard, “A Place for Walter Clark in the American Judicial Tradition,” *North Carolina Law Review* 63 (1985): 287-337.

³⁹ Fred Shapiro, “The Most-Cited Legal Scholars,” *Journal of Legal Studies* 29, no. 1 (January 2000): 424; Richard Posner, *The Essential Holmes: Selections from the letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: University of Chicago Press, 1992), ix.

⁴⁰ See Gary J Aichele, *Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge* (Boston: Twayne Publishers, 1989); Sheldon Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (Boston: Little Brown & Co., 1989); G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993); Albert Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000); Mathias Reimann “Horrible Holmes,” *Michigan Law Review* 100, no. 6 (May 2002): 1676-1677.

of wealthy plantation owners going back several generations.⁴¹ Their respective fathers were influential figures.⁴² Holmes's father was at first a noted medical doctor and Harvard lecturer and later a respected and nationally known literary figure; Clark's father was one of eastern North Carolina's largest planters and operated a steamship line that transported agricultural goods from Virginia and North Carolina to New York and the Caribbean.⁴³ By the time of the 1860 census Clark's father's property was listed at a value in excess of \$350,000.⁴⁴ Their fathers' positions within their respective communities brought both men considerable opportunities in life, including the opportunity to attend college and study law—Harvard and the University of North Carolina, respectively. When the Civil War began both men enthusiastically answered the call to serve. A twenty-year-old Holmes joined the well-known Harvard Regiment, and Clark (then a fourteen-year-old cadet at Tew's Military Academy) joined the Twenty-Second North Carolina Regiment.⁴⁵ Both men served on the front lines of the conflict and even came within about one hundred yards of one another at the Battle of Antietam, where both were wounded on that bloodiest day of the Civil War.⁴⁶

⁴¹ Brooks, *Fighting Judge*, 24-26; White, *Law and the Inner Self*, 10-13, 17-18.

⁴² Brooks, *Fighting Judge*, 25-27.

⁴³ *Ibid.*, 25-26.

⁴⁴ 1860 U.S. Census, Halifax County, North Carolina, population schedule, accessed February 26, 2015, <http://ancestry.com>.

⁴⁵ Brooks, *Fighting Judge*, 4.

⁴⁶ *Ibid.*, 5; White, *Law and the Inner Self*, 56-57.

Soon after the war's conclusion both men entered into the legal profession, and in the latter portion of the nineteenth century, they climbed the ladder of judicial office from superior court to their respective states' Supreme Court. By 1902 both men had reached the apex of their judicial careers, Holmes receiving an appointment to the United States Supreme Court and Clark winning an election to the Chief Justiceship of the North Carolina Supreme Court. Because of several near-misses at a United States Supreme Court appointment during the Wilson Administration and a failed 1912 United States Senate campaign, Walter Clark would continue to serve on the North Carolina Supreme Court bench until his death in 1924. Holmes would continue on the United States Supreme Court almost a decade longer, until in 1932, citing his advanced age, Holmes stepped down from the bench into retirement.⁴⁷ Finally, and posthumously, both men were lauded as leading Progressive jurists who embraced judicial modernism, rejected outdated Formalism, and paved the way for subsequent Progressive reforms.⁴⁸

While the influential Supreme Court Justice Holmes has been the subject of much scholarly attention, Clark is one of many State Supreme Court justices whose name has faded into the past. The historiography naturally possesses a federal court bias that diminishes the importance of state courts and the justices who served on them. Unfortunately, the focus on federal courts distorts the actual influence state courts often have, not only within their own states, but on federal jurisprudence and that of other states facing similar judicial issues. Second, legal history remains significantly biased

⁴⁷ White, *Law and the Inner Self*, 467-468.

⁴⁸ White, *Law and the Inner Self*, 353, 363, 365, 367.

toward northern courts and justices, especially in dealing with issues not involving race and black rights. Third, historians of New South and progressivism have tended to focus almost exclusively on the legislative branch and paid little attention to the role of state and federal courts in the numerous reform movements that were operative during the Progressive Era.

State courts are worthy of greater scholarly attention. Yet many historians have assigned much greater importance to the federal judiciary and largely ignored state court systems as the chief residence of lackluster judicial talent—the minor leagues of the federal judiciary. State and federal courts were not always treated this way. In 1795 Chief Justice John Jay resigned his position on the Supreme Court for the more prestigious office of Governor of New York. The Marshall Court’s expansion of judicial authority in *Marbury* was significant but was not employed by the court until its now infamous ruling in the *Dred Scott* case.⁴⁹ By the eve of the Civil War the United States Supreme Court had come a long way from when Marshall ascended to the bench of a court that met in the basement of the Capitol Building, but the federal courts as a whole remained underfunded, understaffed, and the weakest of the three branches of American government. In the latter half of the nineteenth century the situation changed considerably as the Reconstruction Amendments along with the Removal Act of 1875—meant to protect the rights of beleaguered freedmen in the former Confederate states—drastically expanded the powers of the federal government and particularly the federal

⁴⁹ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 213.

court system. While the United States Supreme Court whittled away at the ability of African Americans to effectively sue to enforce their rights, rapidly expanding corporations found shelter under the Fourteenth Amendment. Yet federal courts were expensive and often distant institutions (both geographically and culturally) with limited jurisdiction. Consequently, the bulk of cases that affected the day-to-day lives of citizens (their debts, contracts, injuries, and divorces) worked their way through the various state court systems.

Yet state court decisions have been all too often ignored by historians, as state court judges have disappeared in the shadow of Marshall, Harlan, Holmes, Brandeis, et al. Lawrence Friedman described the 1880s as a period when ambitious lawyers filled State Supreme Courts and “few were educated gentlemen like John Marshall; few had a sense of style and *Noblesse Oblige*.”⁵⁰ By that time, Friedman lamented, “The golden age of state judges had ended.”⁵¹ Indeed, despite all his wit and talent, without his tenure on the United States Supreme Court Oliver Wendell Holmes’s twenty years on the Massachusetts State Supreme Court would have gained him only a small portion of his present fame.⁵² However, the judicial talents of state Supreme Court justices were not always viewed so unfavorably. When Roscoe Pound, one of the leading legal scholars of the early twentieth century, compiled a list of the top ten judges in American history in

⁵⁰ Lawrence Friedman, *A History of American Law*, 289, emphasis in original.

⁵¹ *Ibid.*, 286.

⁵² *Ibid.*, 286-287.

1936, only four of them had served on the federal judiciary.⁵³ To be certain, the balance in prominence and importance between federal and state judicial systems and jurists was changing in the late nineteenth and early twentieth century during Clark's tenure on the North Carolina Supreme Court, but the general public one hundred years ago did not share our modern obsession with the federal judiciary.

Second, southern courts have carried the mantle of sluggards in the Progressive march toward modernization.⁵⁴ Nowhere is this view more obvious than in legal history. A quarter century ago legal scholar Lawrence Friedman noted that southern legal history—with the exception of slavery—was “badly neglected.”⁵⁵ It was a field left unplowed, no doubt because few expected it to yield a significant crop. Prodigious legal scholar Paul Finkelman expressed similar sentiments a year later in the *North Carolina Law Review*, noting the almost exclusive focus of legal history on the North.⁵⁶ Despite considerable progress in the field of southern legal history, Finkelman's concern for the lack of a scholarly biography of a single significant southern state judge remains true twenty-five years later.⁵⁷ Even Finkelman's suggestion of a biography of noted North

⁵³ John W. Wertheimer, *Law and Society in the South* (Lexington: University Press of Kentucky, 2009), 1.

⁵⁴ See Jack Temple Kirby, *Darkness at the Dawn: Race and Reform in the Progressive South*, Critical Periods of History (Philadelphia: Lippincott, 1972); Kimberley Johnson, *Reforming Jim Crow*, 23-24; Alan Dawley, *Changing the World: American Progressives in War and Revolution* (Princeton: Princeton University Press, 2003), 56.

⁵⁵ Lawrence Friedman, *American Legal History: Past and Present*, 563, 575.

⁵⁶ Paul Finkelman, “Exploring Southern Legal History,” *North Carolina Law Review* 64 (November 1985): 77-84.

⁵⁷ For recent examples of works that fit within the paradigm of southern legal history see Laura Edwards, *The People and their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary*

Carolina jurist Thomas Ruffin remains unheeded. Only southern judges who went on to serve on the United States Supreme Court—Justices Marshall Harlan and Louis Brandeis—have attracted the attention of historians and become the subject of biographies.⁵⁸

Third, most works on the New South and Progressive Era focus heavily on the actions of state legislatures. Whether Link's *The Paradox of Southern Progressivism*, Ayers' *Promise of the New South*, or any of a host of scholarly works on the New South or southern progressivism, state courts take a backseat to the legislative branch when it comes to political reform.⁵⁹ Many scholars lack of attention to southern courts makes sense to a certain degree since the strictures of common law and precedent often render the courts the most conservative branch of government. Nevertheless, despite the courts' inherent conservatism they were not entirely unresponsive to reformist appeals. Courts could, and sometimes did, enact reforms even as state legislators, beholden to powerful interests, remained unresponsive to the popular will. For reasons discussed below, such

South (Chapel Hill: University of North Carolina Press, 2009); Joseph Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law* (Westport: Praeger Publishers, 2006); Timothy Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890* (Athens: University of Georgia Press, 2008); Wertheimer, *Law and Society in the South*; Finkelman, "Exploring Southern Legal History," 81.

⁵⁸ See Loren P. Beth, *John Marshall Harlan: The Last Whig Justice* (Lexington: University Press of Kentucky, 1992); Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* (Oxford: Oxford University Press, 1995); R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2007); Robert Saunders Jr., *John Archibald Campbell: Southern Moderate, 1811-1889* (Tuscaloosa: University of Alabama Press, 1997); Melvin Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon, 2009).

⁵⁹ William Link, *The Paradox of Southern Progressivism, 1880-1930* (Chapel Hill: University of North Carolina Press, 1992); Edward Ayers, *The Promise of the New South: Life After Reconstruction* (New York: Oxford University Press, 1992).

action is often unsettling or contradictory to the expectations of many historians and therefore goes unnoticed or unrecorded. If the historians' goal is to, as Ayers noted in *Promise of the New South*, measure the impact of industry in terms of people's experience, court records are invaluable. Yet despite the easy availability of state Supreme Court decisions and case files, historians often spend far more time digging through legislative records.⁶⁰

To make matters worse, the courts most often enter the stage only to act as the nefarious antagonist, ever hostile to populist and progressive reforms intended to benefit farmers and industrial laborers. *Lochner*, *Pollock*, *E.C. Knight et al.* cast a long shadow that allowed Progressives to paint the federal (and to a lesser extent states') judicial system(s) as obstructionist anti-democratic forces, a rhetorical lambasting that Justice Clark embraced. Not only was that image of federal courts exaggerated, such criticisms lent credence to a shifting public focus from state to federal courts.⁶¹ Beginning in the late nineteenth century a formerly distant federal court system whose operations seemed to have little impact on the day-to-day lives of most Americans began to represent, to many reformers, the chief obstacle to improving the material conditions of farmers, workers, and the nation as a whole. Meanwhile, state courts continued to represent the

⁶⁰ Timothy Huebner, *Southern Legal Tradition: State Judges and Sectional Distinctiveness, 1790-1890* (Athens: University of Georgia Press, 1999), xi.

⁶¹ See David P. Currie, "The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910," *University of Chicago Law Review* 52 (Spring 1985): 324; Phillips, "The Progressiveness of the *Lochner* Court," 453.

best chance injured passengers, laborers, and bystanders had to secure justice for their injuries.

Consequently, this dissertation looks to the North Carolina courts during the long Progressive Era and examines how the actions of its justices advanced or hindered progressive change in statutory and common law of the state. This basis in case law of workplace accidents, women's property rights, and segregation allows a history, focused around the life and career of a prominent Supreme Court Justice, to remain connected to the lives of everyday North Carolinians whose cases appeared before the state's courts and whose lawsuits outcomes were influenced by the holdings of the state's Supreme Court.

Moreover, in studying the judicial career of Justice Walter Clark we can better understand the ways in which his roles as politician and jurist interacted. Clark's legacy challenges the traditional view of the nineteenth-century judge as an apolitical creature. Later chapters in this dissertation explore the connection between Clark's decisions on women's property rights and their connections to his advocacy of women's suffrage; workplace injury law and anti-trust activism; and legal interpretation of property in political office with beliefs about majoritarian (white) democracy.

The next two chapters lay the groundwork for understanding the common themes that tie together Justice Clark's political and legal thought on an array of issues. Chapter 2 describes the formative influences on Clark, from his youth as a member of the slaveowning aristocracy of North Carolina to his service in the Confederacy and his decision to follow a career in the law in the postwar South. Chapter 3 provides an

overview of Clark's legal and political views. It touches upon each of the major themes of Clark's legal and political career and provides the context for the more detailed chapters that follow. Each of the following chapters will pick up one of the major themes of his complex career and explore it in greater detail. Although not strictly chronological, these chapters begin with his Clark's original conflict with the powerful Duke family and trace how his judicial career unfolded, following several threads from the 1890s until his death in 1924.

Chapter 4 examines Clark's original conflict with the Duke family over the future of Trinity College. Clark's battle of wills with Dr. John C. Kilgo over funding for Trinity College would prove one of Clark's worst political miscalculations. Clark sought to cut-off the development of Tobacco Trust influence over Trinity, which he believed threatened to spread anti-silver and pro-monopoly sentiments among the state's college students. Yet, Clark did not foresee the negative impact of the development of the Simmons machine that would be a thorn in his side, and an obstacle for progressive reforms, for the first quarter of the twentieth century. Chapter 5 examines the judiciary's role in the aftermath of the White Supremacy Campaign and how Clark played a crucial role in entrenching the power of a Democratic majority that often opposed the progressive measures Clark sought to implement. Chapter 6 covers Clark's support of women's suffrage in North Carolina and nationally. Clark was one of the earliest male proponents of women's suffrage in North Carolina, and certainly the most prominent as the state's Chief Justice. His arguments for suffrage often turned anti-suffrage arguments about race, womanhood, and the antebellum past into arguments for enfranchisement.

Moreover, Clark's conversion to women's suffrage is examined as an outgrowth of his frustration with women's legal disabilities and the North Carolina Supreme Court's habit of placing obstacles in the way of women's legal rights and responsibilities. Chapter 7 concludes with Clark's struggle over water power and the state's public energy policy. Once again Clark found himself opposing the Duke family. In this instance Clark's plans for a state-run monopoly on public waters and energy generated therefrom conflicted with J. B. Duke's plans for an energy monopoly operating in a laissez-faire energy market. Once again Clark's decisions on energy regulation as a jurist would overlap with, and blur the lines between, his advocacy of progressive measures like public ownership.

While there is not a specific chapter devoted to race or the Jim Crow system in this dissertation, issues of race appear in each chapter and their discussion seemed best left within the specific context of the legal cases and political causes wherein they arose. In Chapter 4 racial arguments were used by Clark's opponents to attack the idea of free tuition at Chapel Hill. In Chapter 5 Clark's conspicuous silence during the White Supremacy Campaign and his role in the impeachment of Fusion judges, that Democrats worried might overthrow the state's disfranchisement amendment, raise important questions about Democratic Party political strategy in 1898 and 1900. Chapter 6 examines Clark's arguments for women's suffrage which were rooted in white supremacy and meant to advance white women's voting rights while maintaining black disfranchisement.

Clark suffered from the same limitations as many white southerners when it came to the nexus between traditional racial beliefs and progressive reforms that culminated in the growth of Jim Crow in the American South in the latter half of the nineteenth century. Justice Clark, whose racial views were deeply influenced by his youth on his father's large plantation in eastern North Carolina, reflected the patrician paternalism of many in the antebellum planter class.⁶² His life after the war, and until his death, included the administration of his family's plantations where some 125 or so primarily black tenant farmers lived and labored.⁶³ His worldview presumed white supremacy, and consequently, he rarely felt it necessary to defend or even mention it. He rarely engaged in the race baiting demagoguery of men like Furnifold Simmons, Alfred Waddell, or any of a host of politicians whose appeals to racism often dominated their rhetoric. And unlike in the legislature where segregation imposed a color line, the results of Justice Clark's decisions on subjects such as child labor, workplace injuries, and married women's property rights did not explicitly limit their application to whites. While Clark's progressivism might have followed Woodward's description of progressivism as "for white men only," the impact of his decisions could not be so easily limited.⁶⁴ The only areas which must be excepted are criminal law and transportation segregation—discussed in Chapters 3 and 5. Clark's support of segregation, and his muted critique of

⁶² For Clark's plan to keep his tenant farmers from accumulating too much merchant debt, see Brooks, *Fighting Judge*, 52.

⁶³ *Ibid.*, 52, 252-253.

⁶⁴ C. Vann Woodward, *Origins of the New South*, 373.

lynching, remained rooted not only in a paternalist worldview toward blacks but also in his belief that common white men should not be excluded from the privileges of citizenship, the protections of the law, and the ability to rely upon the courts to enact punishments expressing the community's will.

CHAPTER II
ROOTS OF A PATRICIAN RADICAL

Our people are being robbed by wholesale. They do not receive the just rewards of their labor. They are being pauperized and kept in want, while a few men by trick and combinations are gathering to themselves the earnings of a continent. Search all history, and you will find no age when the robbery of the just earnings of the masses was more systematic, more shameless and less resisted than today. There was never a time when the worship of great riches, however badly acquired, was more open than now.

—Walter Clark¹

Walter Clark was born on August 19, 1846, at Prospect Hill Plantation in Halifax County. Clark's first cries echoed through the halls of a plantation mansion that represented the riches and lavish lifestyle of the plantation South. Hand-carved hardwood mantels, doorways, and stairways (imported at considerable expense from England) and ornate floor-to-ceiling paneling decorated each room, from the bedrooms to the large ballroom, in a conspicuous display of wealth that gave Clark's entry onto the world stage the auspicious beginning attendant to the birth of a son of the planter class. Shortly after his birth, Clark's parents, David and Anna Clark, removed to their Ventosa Plantation—over five thousand acres of prime cotton-producing land along the Roanoke River. The size and scope of the plantation was noted by a visitor who remembered

¹ Walter Clark, "Political Teachings of the Nazarine Carpenter," *Dallas Southern Mercury*, January 27, 1898.

watching from the front porch at Ventosa “seventy plows drawn by seventy mules driven by seventy slaves.”² The numbers no doubt were poetically rounded for effect, but they still accurately captured the size and scope of the Clark’s Ventosa Plantation—one of at least two plantations owned by Clark’s father David. Ventosa Plantation was home to almost two hundred enslaved laborers; over half of a dozen of whom were the same age as Clark at the time of the 1850 census—although their births occurred in less auspicious circumstances and surroundings.³

Clark’s origins amongst the conservative elite of North Carolina’s planter class, combined with his actions on the court as a progressive reformer, presents two important historical questions. First, how did a son of the wealthy antebellum ruling class become the “knight errant” of progressive causes, tilting his lance at the wealthy giants of the railroads, telegraph, and cigarette trusts? How could a man nurtured and raised amidst a plantation system that extracted “the just rewards of labor” from the enslaved possess such sensitivity to the plight of the working class during the Gilded Age and Progressive Era? Second, how could Clark fail to notice the obvious historical example of slavery when he “search[ed] all history” and failed to find an example of “the robbery of just earnings of the masses...[as] systematic...[and] shameless” when seeking a correlation between the Robber Barons of the great trusts of the late nineteenth century?⁴ In

² Brooks, *Fighting Judge*, 30-31.

³ 1850 U.S. Census-Slave Schedules, Halifax County, North Carolina, pp. 31-33, David Clark, digital image, Ancestry.com, accessed on February 26, 2015, <http://ancestry.com>.

⁴ Walter Clark, “Political Teachings of the Nazarine Carpenter.”

retrospect the relationship is clear enough, but nevertheless it eluded a man as well read and socially responsible as Clark. Understanding the origins and limits to Clark's often radical progressive vision provides important revelations about the limits of reform movements in the Progressive Era South.

A Planter's Son

Clark's earliest years paralleled those of many other planter youths. Foremost among those similarities was the relation between Clark's family and their enslaved laborers. At the Clark family's principal residence, Ventosa Plantation, approximately two hundred slaves lived in two villages located roughly a mile from the main house.⁵ Given the significant size of the enslaved population there was a great diversity of age and occupation among the enslaved. The 1860 census recorded 192 slaves on the Ventosa Plantation alone. The slave population was heavily weighted toward younger workers with over half of the Clark's slaves being twenty years old or younger. Clark's biographer and friend, Aubrey Brooks, claimed that at the Clark's plantations slaves were "well fed, well clothed, and kindly treated" and that "families were not separated, and there is no evidence of miscegenation." Perhaps Brooks was correct as a large minority of slaves on the Clark plantation were over the age of fifty, which may indicate sufficient medical care. And only three were listed as "Mulatto" by census takers in 1860, which may indicate the non-existence, or low levels, of sexual exploitation.⁶

⁵ Brooks, *Fighting Judge*, 28.

⁶ *Ibid.*, 29; 1860 U.S. Census-Slave Schedules, Halifax County, North Carolina, Western district, pp. 51-54, David Clark, digital image, Ancestry.com, accessed February 26, 2015, <http://ancestry.com>.

The rural nature of plantation life kept young Clark removed from white playmates, and, as was the case with many planter children, “his playmates...were mostly Negro boys of his own age and older.”⁷ Brooks understood the unfamiliarity of his audience in the 1940s (accustomed to segregation) with this sort of interracial play. Consequently, he noted with apparent frustration that “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.’”⁸ The degree to which Clark’s playmates were “obedient” to him and “adored” him is no doubt overstated in Brook’s nostalgia for an Old South he was born too late to partake in. Indeed, others who reflected on Clark’s life shared Brooks’s nostalgia for the bygone Neverland of the Old South, where “upon the vast plantations...of his ancestors..., [Clark grew up] amid surroundings now gone [i.e. slavery]...which tended to develop qualities of leadership and habit of command from infancy.”⁹

Outside of his relations during childhood recreation, Clark’s experiences reified his status as “master” in the midst of his father’s many slaves. The Clark family’s time was divided between his father’s two main plantations—Ventosa and Airlie. The majority of the year was spent at Ventosa, the family’s primary residence, until the summer months when the family fled the onslaught of mosquitoes (and malaria) to the

⁷ Brooks, *Fighting Judge*, 30.

⁸ Brooks, *Fighting Judge*, 30-31.

⁹ “[In Memory Of] Chief Justice Walter Clark,” Mecklenburg County, Miscellaneous Records, 1759-1959, SANC.

relative safety of their Airlie Plantation. On the annual fifty mile, two day trek David Clark's prized horses pulled a small host of carriages while a "large retinue of trained servants" followed close behind on foot.¹⁰ From the window of one of his family's carriages Clark could not have helped but notice the distinctions of his family's position contrasted with that of its slaves who trailed behind on foot.

As many of the progeny of the planter class, Clark's parents put a great deal of emphasis upon his education. Until the age of eight young Walter Clark studied under the efforts of a governess. Yet after his eighth birthday Clark was sent away to Vine Hill Academy.¹¹ By his eleventh birthday his father sent him to Ridgeway Academy where his school master delighted in his "studiousness" and "love of study."¹² His letters home—most often written to his mother—reflect an interest in current events and his studies. Indeed Clark claimed to overcome his youthful homesickness "by studying hard." His studies resulted in an exceptional performance in earning the highest marks in all his subjects ranging from Greek to Algebra. By his fourteenth birthday Walter was ready to move on to the next level of his education. Walter desired to attend the Hillsborough Military Academy, but his Principal, R. H. Graves, at the Belmont Select School was less than enthusiastic. Graves expressed his concerns to Clark's father that "Walter's connection with a Military School will not add to his classical knowledge

¹⁰ Brooks, *Fighting Judge*, 31.

¹¹ *Ibid.*

¹² William K. Bass to David Clark, December 14, 1857, in *PWC*, Vol. I, 6.

and...the mental food will bear too small a proportion to the physical exercise.”¹³ Instead Graves suggested to Clark’s father that Clark continue his studies at the school until he was sixteen and then that he attend collegiate studies at the University of Virginia.¹⁴ David Clark disregarded Graves’s advice and enrolled his son at the Hillsborough Military Academy (otherwise known as Tew’s Academy) the same year.¹⁵

Colonel Tew, founder of the academy in the early 1850s, established the school to recreate his own experiences as a cadet at West Point. From its opening Tew’s Academy attracted the children of North Carolina’s leading planter families—among them Walter Clark. The short and slender Clark took well to military drill and discipline, so well, in fact, that after a little less than a year at Tew’s, Clark was chosen from among the cadets to train North Carolina’s first batch of wartime recruits that would become the Twenty-Second North Carolina Regiment.¹⁶ Clark would leave his regiment in February 1863 and take up his college studies at the University of North Carolina. He graduated within a year as the highest ranked student in his class. He then went on to study law under Judge Battle at the same university.¹⁷ Clark found law interesting but doubted he had a career in it. Clark jokingly told his father about his future ambitions, “I have no idea of entering any profession except the army, but don’t you think I am doing well enough to

¹³ R.H. Graves to David Clark, 1860, in *PWC*, Vol. I, 20-21.

¹⁴ *Ibid.*

¹⁵ Brooks, *Fighting Judge*, 3.

¹⁶ *Ibid.*, 3-5.

¹⁷ *Ibid.*, 14-15.

read Law, as the only possible disadvantage that could arise would be that I might injure my eyes.”¹⁸

Clark frequently exchanged letters with his mother Anna. Anna Clark was the daughter of the wealthy, plantation owning Thorne family. Raised at her family’s Prospect Hill plantation, educated in an exclusive finishing school in New York, she was an intelligent woman and a loving mother. Clark, a dutiful son, often worried of disappointing his mother, yet sometimes strained at her religious and social expectations. The correspondence between Clark and his mother was wide-ranging and covered numerous topics. Of course many of Clark’s mother’s letters included the usual concerns of a mother for her child: that he should wear a hat to avoid getting freckles; that he should remember to brush his teeth; that he should eat his vegetables; and that he should remember to write his siblings.¹⁹ Moreover, their letters covered many topics related to plantation management: his father’s planting of a twelve hundred tree apple orchard; the successful employment of qualified overseers; his father’s experiment with the purchase of two thousand pounds of American guano; and the often tardy journeys of his father’s steam ships and barges that carried local goods to Richmond, Baltimore, and the Caribbean.²⁰

¹⁸ Brooks, *Fighting Judge*, 15.

¹⁹ Anna Clark to Walter Clark, November 20, 1862, in *PWC*, Vol. I, 96-97; Anna Clark to Walter Clark, January 29, 1863, in *PWC*, Vol. I, 101-102.

²⁰ Brooks, *Fighting Judge*, 12-14; Anna Clark to Walter Clark, April 10, 1860, in *PWC*, Vol. I, 23-24; Anna Clark to Walter Clark, April 24, 1860, in *PWC*, Vol. I, 24-25; Anna Clark to Walter Clark, January 9, 1862, in *PWC*, Vol. I, 64; Anna Clark to Walter Clark, October, 1862, in *PWC*, Vol. I, 81-82.

Perhaps the most common topic of their letters was religion. Anna Clark often reminded Clark of his religious obligations.²¹ She wrote her son, “I think of & pray much for you, *my dear boy*, & commit you into the hands of that Great & Good being...pray to him my child to you & guide you each day, yes, every hour.” Clark, his mother’s favorite, eagerly sought her approval: “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.”²² Yet her injunctions to the young boy continued. On the eve of the fateful 1860 election she admonished Walter, “Never neglect getting on your knees, in humble submission to your maker...& read your Bible every day...never, do you swerve from your duty to your God...you must try to be a good example for others & not be led off by wild & wicked boys.”²³ Similar admonishments would continue as Mrs. Clark and her son continued their correspondence throughout Clark’s service in the Confederate Army. Clark’s parents instilled in him a strong Protestant strand of temperance that saw his friends acknowledge that they could not remember a single instance of Clark’s having uttered a curse word, sipping an alcoholic beverage, or wasting a single minute of his time in idleness. Indeed, Clark’s piety would provide a strong edge of efficiency and morality to Clark’s latter participation and advocacy of progressive causes.²⁴

²¹ Anna Clark’s admonitions can be found throughout her correspondence with her son, see the letters exchanged between Anna Clark and Walter Clark in *PWC*, Vol. I, 8-45.

²² Walter Clark to Anna Clark, August 12, 1858, in *PWC*, Vol. I, 8-9.

²³ Anna Clark to Walter Clark, August 20, 1860, in *PWC*, Vol. I, 29-30.

²⁴ “[In Memory Of] Chief Justice Walter Clark, “ Walter Clark Papers, SANC.

“Much to Fear”: A Union Divided

The first news of an impending secession reached Clark in Hillsborough on November 2, 1860. His father conveyed to young Walter the opinion of a friend who had recently returned from New York that the Republicans were rapidly losing ground in the state to John Bell’s Constitutional Union ticket.²⁵ That hopefulness had started to evaporate by November 7 when Anna Clark wrote to her son that “it is generally thought...that Lincoln is elected, & if so, we have much to fear.”²⁶ The news set Tew’s Academy at Hillsborough stirring with a mix of anxiousness and excitement. The academy attracted students from across the South, and the South Carolina contingent was particularly aroused to the potential for civil war. Clark reported to his mother that “some of our cadets have joined the army at Charleston (in vacation) [yet] there are still a good many South Carolina cadets.” The cadets regularly conveyed new information to their fellows about Fort Sumter and other prominent issues of the crisis as it occurred.²⁷

Meanwhile, Clark’s mother relayed information to Clark about his father’s Unionist activities. David Clark spurned multiple requests that he run as a Unionist for the first attempt at a North Carolina Secession Convention and maintained his customary refusal to run for office and even refused to vote for or against secession or in electing convention delegates despite his objections to secession.²⁸ But as the Secession

²⁵ David Clark to Walter Clark, November 2, 1860, in *PWC*, Vol. I, 41.

²⁶ Anna Clark to Walter Clark, November 7, 1860, in *PWC*, Vol. I, 42.

²⁷ Walter Clark to Anna Clark, February 4, 1861, in *PWC*, Vol. I, 42.

²⁸ Anna Clark to Walter Clark, March 2, 1861, in *PWC*, Vol. I, 44.

Convention neared held David Clark no longer maintained his lifelong avoidance of political office. This time Clark served on a committee of three that approved a pro-secession resolution. One hundred Halifax County residents gathered together in Clarksville, Halifax County (named after the Clark family), where David Clark joined William R. Smith and Dr. William R. Wood in accepting a resolution from Richard Smith that called for “the Governor to convene the Legislature forthwith” to call for a Secession Convention.²⁹ The committee “reported them to the meeting without amendments, and they were unanimously adopted.”³⁰ In the wake of the Confederate attack on Fort Sumter Clark’s unionism waned, and he joined the tide moving toward secession. Moreover, David Clark entered the quasi-political contest for the office of brigadier general in the state militia. Yet the elder Clark’s heart was not entirely in the race, as Anna told her son “his object is not to gain office for himself, but to defeat some who are not fit for it & get efficient men to take it.”³¹ Although the elder Clark had opposed the war initially, he was determined that the war, if it must be fought, should be fought well.

By May 20, 1861, North Carolina was no longer part of the Union, and by July 1 a fourteen-year-old Walter Clark took up the position of Drill Master to the volunteers assembled at Camp Ellis, outside of Raleigh. The slight, slender, and youthful Clark no

²⁹ Raleigh *Semi-Weekly State Journal*, April 24, 1861.

³⁰ *Ibid.*

³¹ Anna Clark to Walter Clark, April 20, 1861, in *PWC*, Vol. I, 44.

doubt contrasted considerably against the mass of volunteers described by one source as “husky mountaineers... all much older than Walter.”³² This distinction was not lost on the volunteers who took to calling their diminutive drill instructor “Little Clark.” (Clark, a great admirer of Napoleon, no doubt found the nickname flattering since Napoleon’s nickname had been “little colonel”). The volunteers were soon organized into the Twenty-Second North Carolina Regiment. In late September Clark was relieved of his duty as Drill Master in the Twenty-Second and sent to report to the Adjutant General in Raleigh. Soon thereafter he was appointed to the Thirty-Fifth Regiment at Camp Mangum where, due to promotion of the existing adjutant, Clark acted as Adjutant of the regiment. However, the position was temporary and Clark lamented, “If I was only 2 or 3 years older...I could get the Adjutancy of the Post with all ease.”³³ Stationed at New Bern the regiment saw little action and Clark resigned and returned to Tew’s to pursue his studies until the summer of 1862 when he rejoined the Thirty-Fifth Regiment as first lieutenant and also adjutant to Colonel Matthew W. Ransom. This time there would be plenty of action and no need to return to his studies at Tew’s.³⁴

Soon after Clark’s arrival for his second tour of duty his regiment marched northward to join Lee’s Maryland campaign. From there the regiment saw heavy action; first at the capture of Harper’s Ferry and then, after a double-quick march, at Antietam

³² Brooks, *Fighting Judge*, 4-5.

³³ Walter Clark to Anna Clark, November 15, 1861, in *PWC*, Vol. I, 59-60.

³⁴ Brooks, *Fighting Judge*, 5.

the day of the bloody battle. At Antietam Clark saw “the dead and wounded lay[ing] thick” upon the ground of the West Woods. He wrote his mother several days later and told her of “noticing the poor Yankee wretches...lying about in heaps...mutilated in every form.” The piles of dead were so great that Clark had to “jump [his] horse over piles of the slain.”³⁵ Fredericksburg followed on the heels of Antietam in December of 1862. Badly depleted from the previous engagements Clark’s regiment was ordered back to North Carolina. Seeing little prospect for military engagement in North Carolina at the time Clark resigned his commission and enrolled at the University of North Carolina at Chapel Hill. He studied there from February 1863 through June 1864 and graduated with an education (but not degree) in languages (Greek and French), economics, and the law. After graduation he returned to the North Carolina troops as a member of the Junior Reserves, a troop of “picked men and picked officers” from North Carolina’s influential families.³⁶ Clark spent the remainder of the war with the Junior Reserves sometimes skirmishing against Union troops, but most often struggling with the drudgeries of life away from the front.³⁷ Finally, on May 2, 1865, Confederate forces under Johnston surrendered. Clark, whose regiment served under Johnston, was paroled and free to begin the trek home from Bennett Place (Durham County, North Carolina) to his family’s Ventosa Plantation in Halifax County.³⁸

³⁵ Walter Clark to Anna Clark, September 26, 1862, in *PWC*, Vol. I, 80.

³⁶ Walter Clark to Anna Clark, June 3, 1864, in *PWC*, Vol. I, 113.

³⁷ Walter Clark to Anna Clark, November 19, 1864, in *PWC*, Vol. I, 129.

³⁸ Brooks, *Fighting Judge*, 21-22.

Clark's service during the war gave no indication of his future success in the field of law and politics. Young Walter was ambitious and set upon the idea of a military career. Clark expended great effort in climbing the ranks from his initial assignment as a drill-master. He often despaired that his youth and inexperience would hinder his achieving a desired rank and command. In November 1861 Clark lamented to his mother that, "If I was only 2 or 3 years older...I could get the Adjutancy of the Post with all ease."³⁹ Clark would not only achieve the position of adjutant a year later but he would also be awarded in 1864 the rank of lieutenant colonel. However, this rank would be stripped by a local general who desired to fill the office of colonel with his chosen man.⁴⁰ The field officers resigned and Clark was elected to the rank of Major—which he retained throughout the remainder of the war. Even this was not without an element of drama that frustrated Clark's ambition. Clark sarcastically complained to his mother that "Gen'l Holmes was much opposed to my election—I was too young. He doubtless thought 65 the right age to qualify a man for my position, tho' it doesn't seem to fit *him* for Lt. Genl by the way."⁴¹

Blocked in his attempts to rise through the ranks of the North Carolina Troops, in 1864 Clark turned his attentions toward a commission in the Confederate Army. Despite his mother's repeated entreaties to return home, Clark wrote, "I am anxious to get a

³⁹ Walter Clark to Anna Clark, November 15, 1861, in *PWC*, Vol. I, 59-60.

⁴⁰ Brooks, *Fighting Judge*, 16.

⁴¹ Walter Clark to Anna Clark, June 3, 1864, in *PWC*, Vol. I, 113, emphasis in original.

position on the Staff of some Gen'l in the Army of No. Va. I shall have the chance of promotion there."⁴² To support his efforts for a Confederate commission Clark enlisted the aid of Confederate Congressional Rep. A. W. Venable, Confederate Sen. William T. Dortch, former Gov. Thomas Bragg, Sen. William A. Graham, and even the North Carolina State Legislature; all wrote letters to Confederate President Jefferson Davis on Clark's behalf.⁴³ The letters bore two common elements (most likely since they were based upon Clark's own written entreaties for the commission). First, they all mentioned Clark's family's position in North Carolina society. Senator Dortch referred to Clark's "position in society"; Gov. Bragg referred to Clark's father as "an Extensive Roanoke Planter....and one of our best & most respected citizens"; and the North Carolina Legislature's recommendation effusively praised Clark as a "member of one of the most widely extended and influential families in the State." Second, they recognized Clark's bravery on the battlefield and his commitment to a military life. Representative Venable's recommendation spoke of Clark as an example of "the gallantry of our [North Carolina's] youth" and his "gallantry on the battlefield at Sharpsburg"; Sen. Dortch also spoke of Clark's "gallantry" during the Maryland campaign and praised Clark's entry into military service despite being young enough to avoid such; Gov. Bragg similarly commented on Clark's "marked & distinguished gallantry"; and the North Carolina State Legislature's recommendation echoed that of Gov. Bragg. All of the above mentioned

⁴² Walter Clark to Anna Clark, November 19, 1864, in *PWC*, Vol. I, 129.

⁴³ See *PWC*, Vol. I, 130-132.

references acknowledged in relatively similar language Clark's "desire to make arms his profession."⁴⁴

Yet Clark's desire conflicted with the expectations of his family. As their oldest (and only surviving) son, Walter was expected to inherit and manage his family's ancestral plantations in Halifax County. It was an expectation at odds with Clark's own vision for his future, a future full of adventure and free of the complicated nature of plantation management. Clark concealed his ambitions from his parents on all occasions save for one. In late 1864 Clark's mother wrote to Clark regarding recent rumors of Clark's courting a young woman while in the field. Clark, an independent-minded teenager, bucked against this expression of parental authority. In refuting the claims regarding his amorous relationship with a local woman from a family of lesser social standing, Clark responded harshly to his mother, "I have another aim in life than 'to live as my sires have lived, and die as they have died.'"⁴⁵ He had no intention of managing a plantation (or even a farm) and claimed that "with the profession I have chosen it is not probable that I shall own any land beyond my sabre's length." Walter then proceeded to make clear a grandiose vision of his future:

It is my intention, and has been, should our young Confederacy go down in the billows which threaten to engulf it (which Heaven forbid) to collect a band of the brave around me and in a brighter clime and more unclouded skies seek *that* which Fortune denies me on my native shores. Maximillian

⁴⁴ Thomas Bragg to President Davis, December 7, 1864, in *PWC*, Vol. I, 130; Recommendation of the North Carolina Legislature to President Davis, December 8, 1864, in *PWC*, Vol. 1, 130-131; William A. Graham to President Davis, December 12, 1864, in *PWC*, Vol. I, 131.

⁴⁵ Walter Clark to Anna Clark, October 15, 1864, in *PWC*, Vol. I, 123-125.

of Mexico will not refuse a brave man's sword and I trust I know how to wear one....These are my sentiments. Known to none, suspected by few.⁴⁶

It was a rebellious streak in Clark that would continue to develop. Although Clark would never serve as a soldier in another war, he would embrace the role of a metaphorical soldier in progressive political causes. The sentiments expressed above are the first sign of the view Clark would eventually form of himself as an honorable, self-denying, lone warrior (or part of a small minority) fighting against the odds. Some of his attitude may also be attributed to his mother's repeated injunctions to Clark to be "indifferent to ridicule, when in the pursuit of right."⁴⁷ It also expresses Clark's ambition that would reassert itself through his life as he sought out, unsuccessfully, a seat in the U.S. Senate, a chair on the United States Supreme Court, and even the Vice-Presidential nomination on a ticket with William Jennings Bryan.⁴⁸

This dispute with his mother also showed Walter's first attempt to downplay his ancestry and to criticize ideas of "natural aristocracy" that would later become a large part of his political thought.⁴⁹ Clark's mother's claim that "M" (the young woman) was not of "our stock of folks" was sharply addressed by Clark. "The only difference I have heard as yet between 'my stock of folks' & M's is that my father's father brought money

⁴⁶ Ibid., 123, emphasis in original.

⁴⁷ Anna Clark to Walter Clark, August 20, 1860, in *PWC*, Vol. I, 29.

⁴⁸ Brooks, *Fighting Judge*, 73-74, 177, 191.

⁴⁹ Walter Clark to Anna Clark, October 15, 1864, in *PWC*, Vol. I, 124-125; Walter Clark, "All Americans of Royal Descent," *Arena* 38 (December 1907): 630.

and respectability into our family while I believe he can only trace his as far back as his father.”⁵⁰ Clark would later expand on his ideas about the aristocracy, ideas that formed in the final years of the war and would evolve into an attack upon both the antebellum aristocracy and the postbellum robber barons.

Clark’s commitment to military life was not merely rhetorical or poetic. Despite his frequent sickness, and even more frequent entreaties from his mother to return home, Clark remained in the field. Even his departure to university was only intended to better his chances at an officership in the regular army, not an avoidance or departure from service.⁵¹ Later in the war, when his bothers had passed away and his father was called away to service as a Brigadier General and Walter was eligible for an exemption to take over management of his father’s plantation, he steadfastly refused to return home “while a banner floats to tell where Freedom and freedom’s sons still support her cause.”⁵²

Post War Obligations and Expectations

In April and May of 1865 that banner sank as Confederate armies surrendered one after another. After Johnston’s surrender Walter was paroled and began a 150 mile horseback ride from High Point, through Hillsborough, the home of Tew’s Academy, to Ventosa Plantation in Halifax County.⁵³ Clark must have despaired at the scene that

⁵⁰ Walter Clark to Anna Clark, October 15, 1864, in *PWC*, Vol. I, 124.

⁵¹ Walter Clark to David Clark, August 20, 1863, in *PWC*, Vol. I, 110.

⁵² Walter Clark to Anna Clark, April 10, 1865, in *PWC*, Vol. I, 139-140.

⁵³ Brooks, *Fighting Judge*, 21.

welcomed him. His family was no longer there, having fled to their Airlie plantation. Indeed, the plantation mansion and even the outlying buildings (save the slave quarters) were also absent. The buildings had been burned to the ground. In addition, the family's gardens and fields were overgrown with weeds, and the family's enslaved workers were reported to be "wandering aimlessly about." Much of what Clark had known had been destroyed in the final months of the war.⁵⁴

To make matters worse, Clark's father's health was ruined by the war. During the war David Clark had struggled to maintain his plantations, aid his neighbors, and fulfill his duty as Brigadier General of North Carolina's State Troops in the northeastern portion of the state. The burden wreaked havoc upon his already fragile health. By the end of the war he was unable to manage his plantation and the responsibility that Walter sought to evade fell squarely upon his shoulders.⁵⁵ A responsibility young Walter felt keenly as it was essential for the support of his father, mother, and over half-a-dozen sisters who depended on the income from the family's plantations. Moreover, any desire Clark may have possessed to follow through on the dreams of glorious combat in Mexico came to an end with the capture and execution of Emperor Maximilian of Mexico in 1867. According to Clark's longtime friend, and later political enemy, Robert Winston, Walter spent the time after the surrender "regretting the fate which brought him into the world too late to have been a major general, and asking himself 'what next?'"⁵⁶

⁵⁴ *PWC*, Vol. I, 54.

⁵⁵ Brooks, *Fighting Judge*, 35.

⁵⁶ Robert Winston, "North Carolina: A Militant Mediocracy," *Nation*, February 21, 1923, 209.

Clark took his new responsibilities seriously. Walter put aside his dreams of military glory and settled into the banalities of plantation management and developing a career in the law. A diary he kept from 1866–1868 shows Walter assuming almost the entirety of managing his father’s five thousand acres worth of plantations. He hired and fired overseers for his family’s plantations. He bargained with, sought after, and signed contracts with free black laborers. He traveled frequently between plantations to oversee their operations. This new life was not without its own dangers. One time his hands were badly injured mending a broken cotton gin; another time he nearly drowned trying to cross a river to visit Ventosa. Yet, even these many responsibilities did not occupy all of Clark’s time.⁵⁷

During the first couple of years after the conclusion of the Civil War Clark pursued education and politics with zeal. First he set about improving his legal credentials. He headed to New York in August 1866 to study law and business. He thought the experience would give him a new perspective and that he might “see how the Yankees do it.”⁵⁸ He spent the months of August and September enrolled at Bryan, Stratton, & Co. Commercial College and under-studying at a sizeable New York law firm. After a brief return home to check on his plantations Walter traveled to Washington, D.C. and then on to New York to study law at Columbia University for a law course that ran from October through December. He left Washington D.C. in

⁵⁷ See Diaries Kept by Walter Clark, 1866-1868, in *PWC*, Vol. I, 148-153.

⁵⁸ *PWC*, Vol. I, 147.

December 1866 with a diploma from the commercial college and a better understanding of the law. His trip to D.C. even included a visit to the offices of Thaddeus Stevens.⁵⁹ It was the first example of Clark's willingness to talk (and work) with political adversaries most Democrats found repugnant, a trait that would become a theme in Clark's political career. Much later in his career he would confidentially cooperate with Republican Gov. Daniel Russell and Populist Sen. Marion Butler—both men reviled and hated by North Carolina's Democratic Party—during the Fusion Era and in the wake of White Supremacy Campaign.⁶⁰

Shortly after Confederate surrender, and his parole, Clark took up the habit of writing newspaper editorials to influence the political and economic direction of postbellum North Carolina. Between November 30, 1865 and December 12, 1865 Walter submitted three articles on the issue of labor, one each, to *The Daily Sentinel*, *The Standard*, and the *Daily Progress*. Each article is different but follows the same general argument: each acknowledges that the end of slavery is a positive good; each praises the natural bounties of the state of North Carolina; each ascribes to a belief that free black labor is unreliable for exploiting the state's natural wealth; and each calls for a solution in the form of opening up the state to white immigrant labor.⁶¹ The call for reliance on

⁵⁹ Brooks, *Fighting Judge*, 40.

⁶⁰ Jeffrey J. Crow and Robert F. Durden, *Maverick Republican in the Old North State: A Political Biography of Daniel L. Russell* (Baton Rouge: Louisiana State University Press, 1977), 121; Walter Clark to Colonel E. J. Holt, *News and Observer*, May 11, 1902, in *PWC*, Vol. II, 17-31.

⁶¹ See copies of Clark's editorials in *PWC*, Vol. I, 154-163.

white labor in the wake of the Thirteenth Amendment was not novel or radical. Yet, Walter's articles do contain three radical sentiments: that slavery was an incubus better off dead, that the free black population must disappear, and that the government should influence the redistribution of undeveloped land.

Clark quickly and definitively heaped scorn upon the still warm corpse of the slave system. Slavery was not only an economically but also an intellectually stultifying system. Clark lamented that during the antebellum period "the brain was cudgelled [sic] and reason was put to the rack to convince our people that the prosperity of the South depended upon its further maintenance."⁶² Clark's editorials portrayed slavery as an "incubus," a "black pall," "an apple of discord"; for Clark its abolition was a "mercy in disguise." The state was now free, according to Clark, to pursue its course towards economic independence without slavery standing in the way of progress.⁶³

In calling for the utilization of white labor, Clark disparaged free black labor. His positive statements regarding white labor were coupled with vague claims not only that the free black population could not be trusted but also that black laborers must "like the red man of the forest... 'read his destiny in the setting sun.'"⁶⁴ With slavery gone Clark matter-of-factly stated, "The negro has fulfilled his mission. He must now pass from the stage."⁶⁵ Free blacks represented "the dead body of slavery" that must be disposed of to

⁶² "Black Labor versus White," Raleigh *Daily Progress*, December 12, 1865, in *PWC*, Vol. I, 161.

⁶³ *Ibid.*; "White Labor in North Carolina," Raleigh *Daily Sentinel*, November 30, 1865, in *PWC*, Vol. I, 155.

⁶⁴ "The Introduction of White Labor," Raleigh *Standard*, December 2, 1865, in *PWC*, Vol. I, 156-157.

⁶⁵ "White Labor in North Carolina," Raleigh *Daily Sentinel*, November 30, 1865, in *PWC*, Vol. I, 156.

solve the “perplexing questions of negro suffrage and negro equality forever.” Moreover, other statements echoed a common belief in the South that blacks could not survive in a white society without the paternalist “protection” of their slave masters: “The negro cannot live among us in the present state of things. *The proclamation of his freedom was the death knell of his race.*”⁶⁶ The fields of North Carolina were to be tilled, occupied, and tread by the feet of white immigrants. For Clark that was the only option to reinvigorate the state’s agricultural and industrial commerce.

Clark also called for a tax-based remedy to land ownership issues. A redistribution of land made possible by onerous taxes would encourage the sale of undeveloped land. Clark called for the legislature to “lay a heavy tax on all *unimproved* lands,” a plan just short of land redistribution.⁶⁷ Clark’s intent was twofold. First, such a tax would redress past grievances and inequalities of the antebellum system that had driven away the state’s white population to seek cheaper land elsewhere. Second, the reform would set the state on a future course of small and medium-sized land holdings; either the current owner must “make [the land] productive of some good to the country at large, or part with them to those who will.”⁶⁸ If employers and the legislature followed Clark’s advice, he expected these changes would bring a deluge of white immigrants from both within and without the United States. In Clark’s vision of white labor working

⁶⁶ *Ibid.*, emphasis in the original.

⁶⁷ “The Introduction of White Labor,” *Raleigh Standard*, December 2, 1865, in *PWC*, Vol. I, 158, emphasis in original.

⁶⁸ *Ibid.*

North Carolina fields, we find the first expressions of his later support for labor in the Progressive Era:

The South has to start anew. The labor of years has been destroyed in as many months. The industrial system has been completely prostrated, and until it is renovated we cannot hope for stability of our remaining institutions or the security of our lives and property, much less the prosperity of a country. A blow aimed at the labor of a country is a stroke at its very vitals.—Render labor uncertain and you unhinge the very fabric of society and unsettle the edifice of good Government. Fill your villages, your towns and your workshops with a hardworking, intelligent population, un-embittered 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.⁶⁹

While the “Black Republican Congress” would come to an end with the demise of Reconstruction in 1877, Clark’s views of labor would remain and evolve. From the idea that the nation needed a white working class that was united, intelligent, and an essential base for all “good government” sprang Clark’s agitation for various labor issues during his lifetime, ranging from equal pay to improved factory conditions to protect workers.⁷⁰

The controversial nature of these sentiments, alongside the handicap of his youth, led Clark to sign each of these letters with a pseudonym. Each letter was signed with a different pseudonym that carried separate, meaningful implications. The first letter in the *Daily Sentinel* was signed “Camillus,” most likely a reference to the patrician Roman designated the “Second founder of Rome” for saving the Republic from Gaelic

⁶⁹ “Black Labor versus White,” Raleigh *Daily Progress*, December 12, 1865, in *PWC*, Vol. I, 162.

⁷⁰ *Ibid.*

invaders.⁷¹ The second letter in *The Standard* was signed “Ossian,” most likely a reference to the mythical third century Scottish poet and his work *Fingal* (which translates as “white stranger”).⁷² The third letter in the *Daily Progress* was signed “L’Orient,” most likely a reference to the flagship of Napoleon’s naval fleet.⁷³

Several years later, under the pseudonym of “Notes by the Way,” Clark again published an attack upon the old political system and the current politics of the state. The *Roanoke News* published twenty-six articles from Clark in the summer of 1871.⁷⁴ Clark wrote the articles as part of a nationwide trip that took him over ten thousand miles from North Carolina to San Francisco and back. In one of these articles Clark advanced his criticisms of the Old and New South further. Without even the customary and perfunctory claims of abolitionist responsibility, Clark assailed the southern politicians, “who, seeing they could no longer rule in Washington, like gamblers, risked all on the throw of the die” to “agitate” for the Civil War. Clark continued:

The politicians, the leaders, knew the odds we had to face. The masses of the people did not know and they do not today. Honor to the soldiery of the South, whose gallantry bore up a sinking cause on the points of their bayonets for two long years after that cause had been lost by the want of statesmanship at Richmond, honor to the heroism and devotion of our beautiful women, honor to the integrity and patriotism of our Southern masses, but may history pursue with an eternal infamy the impracticable who precipitated a struggle which they knew at the time to be hopeless,

⁷¹ “White Labor in North Carolina,” Raleigh *Daily Sentinel*, November 30, 1865, in *PWC*, Vol. I, 156.

⁷² “The Introduction of White Labor,” Raleigh *Standard*, December 2, 1865, in *PWC*, Vol. I, 159.

⁷³ “Black Labor versus White,” Raleigh *Daily Progress*, December 12, 1865, in *PWC*, Vol. I, 162.

⁷⁴ “From Ocean to Ocean,” *Roanoke News*, Summer 1871, in *PWC*, Vol. I, 178-184.

and protracted the struggle for months after it was evident that all hope of success by arms had passed.⁷⁵

But the failure of the Confederate leadership and the antebellum aristocracy's errors did not end with the surrender at Appomattox, according to Clark. These men, and if not them their sentiments, continued on in the men Clark referred to as "Bourbons...[who] 'have learned nothing and...have forgotten nothing.'"⁷⁶ Commenting on the recent failed attempt to amend the state's constitution, Clark refused to accept his contemporaries' race baiting:

The defeat of the Convention at the late election was not due to the negro vote, but to the dislike of the people to these "men of reaction." With a forty-thousand white majority in the State, the defeat could not be due to the negro vote... These men [Conservative Democrats] too ill-disguised the fact that they hoped in the movement a restoration of the old order of things (excepting, of course, slavery, which was dead beyond hope of reaction). The people were not ready for There were two classes, whose power is every day becoming more felt in the State... i.e., the poorer classes, who have never willingly followed the leadership of these men, and the young men who are naturally unwilling to entrust the control of their State again to the hands of [the same] men.⁷⁷

Despite Clark's decidedly negative sentiments about the free black population several years earlier, now he viewed these claims as a distraction from a larger issue—the conflict between those who pined for an antebellum social and political order and those

⁷⁵ Ibid., 178-179.

⁷⁶ Ibid., 179.

⁷⁷ Ibid., 180-181.

who recognized the growing political power of the poor and middle-class. Moreover, in his references to the poorer classes, we see the roots of the patrician radical who minimizes his family's planter past to appeal to "the poorer classes who...never willingly followed the leadership" of the planter class.⁷⁸ Not wanting to be too closely associated with the antebellum aristocracy, it was at this time in his life that Clark dropped his middle name, McKenzie, as it "smack[ed] of Scotch aristocracy, and became plain Walter Clark."⁷⁹

Contrary to Clark's dislike of aristocracy and his desire to avoid its appearance, he remained a well-connected member of the ruling class. In 1871 he began courting Susan Graham. Susan's father was William A. Graham, whose had served as North Carolina State Senator and Governor, U.S. Representative, U.S. Senator, Secretary of the Navy in the Fillmore administration, Confederate Senator, and Vice-President on the Whig's 1854 ticket alongside Winfield Scott.⁸⁰ William Graham was as close to royalty as one could come in republican North Carolina. Indicative of the paradoxical nature of Clark, and southern progressivism in general, that mixed elements of old world and new, was Clark's courtship of Susan Clark. Susan was Graham's only daughter out of ten children and he took an active interest in her education. Susan Graham was a fairly cosmopolitan young woman. She frequently accompanied her father as he traveled the

⁷⁸ Ibid.

⁷⁹ Robert Winston, Review of *Walter Clark: Fighting Judge*, by Aubrey Brooks, *North Carolina Law Review*, 22 (1943-1944): 177- 185, 183.

⁸⁰ Brooks, *Fighting Judge*, 48-49.

country. He arranged for her education at Nash-Kollock Female School in Hillsborough (a school that attracted the daughters of many old plantation families) and, showing promise in French, she attended Madame Roustan's French School in New York City.⁸¹ Several decades later she worked with her husband to translate and publish Constant's *Recollections of the Private Life of Napoleon*.⁸² It was an effort that combined Clark's two great loves, his admiration for Napoleon as the "armed apostle of Democracy" and long hours translating alongside his beloved wife Susan.⁸³

For their first public outing, Clark traveled 150 miles to Hillsborough to meet Susan at a jousting tournament where each participant was "panoplied in striking attire to represent some ancient knight-errant."⁸⁴ Clark's love for "Susie" led him to stay with her so late on visits that he wrote in his journal of "catching midnight freight trains" to get back home.⁸⁵ The knight-errant and the locomotive, a theme and an industry, seem ideally suited to represent Clark's reform impulses throughout his life. One can be seen as a symbol for his advocacy of progressive reforms and the other representing an industry that would oppose those same efforts.

⁸¹ Ibid.

⁸² Louis Constant Wairy, *Recollections of the Private Life of Napoleon*, trans. Walter Clark (Akron, Ohio: Saalfield Publishing Company, 1902).

⁸³ Ibid., 5.

⁸⁴ Brooks, *Fighting Judge*, 47.

⁸⁵ Ibid., 49.

Clark in Private Practice: 1875-1885

Following a three-year courtship, Susan Graham and Walter Clark married and began their life together in a modest house in Raleigh. Clark's life became a whirlwind of activity that revolved around his legal practice, management of his family's plantations, and state Democratic Party politics. Over the course of the next decade, 1875-1885, Clark began work on the sixteen-volume series, the *State Records of North Carolina*; wrote two well-researched and annotated legal guides to court procedures; served on the Democratic State Executive Committee; served as an active lay member of the Methodist Church; and managed his family's plantations, both personally and through overseers.⁸⁶ It was a list of responsibilities that created an exhausting day-to-day routine. Clark managed his busy routine by avoiding all distractions. Brooks described him as a man without a single hobby. He never drank, smoked, or gambled—a combination that helped many other men pass idle hours.⁸⁷ For Clark, his personal habits were matters of antebellum honor, religious concerns about idleness, and a reflection of the progressive desire for efficiency. The Methodist upbringing provided by his mother instilled in him a strain of the Protestant work ethic that abhorred idle time.⁸⁸ He prided himself on his efficiency and modernity. When Aubrey Brooks writes about Clark purchasing “the first typewriter that was ever owned in Raleigh”—whether such claim is true—it is no great

⁸⁶ PWC, Vol. I, 189; “Clark’s Code,” *Charlotte Democrat*, February 29, 1884.

⁸⁷ Brooks, *Fighting Judge*, 49-50.

⁸⁸ See Anna Clark to Walter Clark, August 20, 1860, in PWC, Vol. I, 29-30; For Clark’s mother’s Methodism see Brooks, *Fighting Judge*, 30.

leap to envision Clark as he bragged about such to Brooks during their friendship.⁸⁹

Clark's combination of efficiency and Methodist morality drove him to work at all hours during the week, save Sundays. It was also frustrating to his political and ideological opponents. As one of Clark's adversaries once said, "The trouble with him is that he hasn't the virtue of a single damned vice."⁹⁰

A couple elements of Clark's life are relevant to understanding Clark as a jurist and progressive reformer. First, he established relationships with the very industries and people that he would later loudly criticize—railroads, the Dukes, and the Democratic political machine. Second, Clark established himself as an advocate for educational funding and an anti-corruption reformer.

Clark's battles with the railroads were complicated by Clark's early legal career and personal relationships during this period. Indeed, Clark's relationship with Colonel A.B. Andrews, a man whose name would come to represent railroad rule in North Carolina, went back to the Civil War. And their association went beyond that of fellow Confederate soldiers, as Clark served as a groomsman at Andrews's 1869 wedding to Julia Johnston.⁹¹ Andrews, already at twenty-six years of age a superintendent of the Raleigh and Gaston Railroad, offered to send Clark "free Passes from Endfield to Charlotte & return."⁹² By the following year, 1870, Clark would have his own free

⁸⁹ *Ibid.*, 50.

⁹⁰ Brooks, *Fighting Judge*, 140.

⁹¹ Colonel A.B. Andrews to Walter Clark, July 31, 1869, in *PWC*, Vol. I, 171-172.

⁹² A.B. Andrews to Walter Clark, July 31, 1869, in *PWC*, Vol. I, 171-172.

passes to travel, as he was chosen to be director of the Raleigh and Gaston Railroad.⁹³

By 1873 Clark was both director and general counsel to both the Raleigh and Gaston Railroad and the Raleigh and Augusta Railroad.⁹⁴ It was a career trajectory that mirrored many young lawyers in the state, as railroad work was reliable and well paid.⁹⁵

Despite Clark's reputation as an advocate for greater liability of railroads for personal injury claims, he dutifully defended the railroads in nearly a decade as director and legal counsel for multiple railroads. In December 1883, John L. Robinson, President of the Seaboard and Roanoke Railroad Company, wrote to Clark about his role in personal damages cases: "The company has been served [well] by you, and has never seen so much interest manifested by any of our attorneys as you have manifested in these cases."⁹⁶ It is safe to assume Clark was not being congratulated for allowing plaintiffs large settlements. Clark preserved little of his correspondence from this period and never spoke of his time as a railroad attorney.⁹⁷ Yet, his many pronouncements later in life about the ability of defense counsel for railroads to delay and otherwise frustrate justice may have been born from personal experience.⁹⁸

⁹³ Brooks, *Fighting Judge*, 46.

⁹⁴ *PWC*, Vol. I, 189.

⁹⁵ See William G. Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge: Louisiana State University Press, 1999).

⁹⁶ John M. Robinson to Walter Clark, December 6, 1883, in *PWC*, Vol. I, 218.

⁹⁷ See Walter Clark Papers, SANC.

⁹⁸ See *Piedmont Wagon Company v. John Bostic, et al.*, 118 N.C. 758, 759 (1896) See also *Elizabeth A. Vivian v. Thomas Mitchell, et al.*, 144 N.C. 472, 476 (1907).

Clark's role as an owner, and contributor to, the *Raleigh News* often led him into divisive political issues, chief among them the funding of railroad development within the state. In 1879 the *New York Times* ran a story attacking the sitting Democratic governor, Thomas Jarvis, for organizing a political ring to guarantee his reelection, in league with James L. Robinson—former Speaker of the North Carolina House and sitting Lt. Governor.⁹⁹ The article included accusations of a corrupt ring run by Jarvis and Robinson to displace certain office-holders for their personal benefit. A subsequent article published the following month alleged further corruption by Robinson, and others, in withdrawing excess mileage reimbursements from the treasury.¹⁰⁰ Robinson rested the blame squarely at the feet of Walter Clark and the *Raleigh News*, a charge he later retracted after Clark denied involvement. Robinson counter-charged that a prominent newspaper, with the legislators in attendance and the *Times* presuming he meant Clark and the *News*, had menaced and threatened members of the General Assembly.¹⁰¹ The charge itself seemed retaliatory, as it related to alleged threats made two months earlier, that despite their nefarious nature, remained unreported until the *Times* article.¹⁰²

The incident itself was an outgrowth of a related intraparty squabble in a state that had often found itself divided along regional lines. The alleged Jarvis-Robinson ring

⁹⁹ "North Carolina State," *New York Times*, February 17, 1879.

¹⁰⁰ "Imitating Kilkenny Cats," *New York Times*, March 7, 1879.

¹⁰¹ *Raleigh Observer*, March 9, 1879.

¹⁰² "Imitating Kilkenny Cats," *New York Times*, March 7, 1879; *Raleigh Observer*, March 9, 1879.

involved a compromise between Currituck County native Jarvis and Macon County native Robinson. One aspect of this interregional alliance was the completion of a Western North Carolina Railroad that stretched to Asheville and beyond. It was the financial incentive for western representatives to give their collective assent to the loss of local, county-level control sought by Easterners who wanted to eliminate black and Republican officeholders as a result of their “redemption” of the state’s political machinery.¹⁰³ Yet by the end of the 1870s the railroad was literally bogged down in the mud of the Blue Ridge Mountains. Clark’s editorial in the *Raleigh News* openly attacked the railroad and the underlying bargain that created it:

The soil of “mud cut” is necessarily sacred. It is consecrated by the sweat and toil of hundreds of thousands of North Carolinians whose hard earnings are poured in there to cut a wide pathway to wealth for a few and to make foundation for the political promotion of the compact, well-defined, inner circle. It is sacred moreover because it will be the burying place of many aspiring politicians.¹⁰⁴

Here was an early example of Clark’s attacks on governmental corruption and benefits for the privileged few purchased at the price of the laboring majority’s toil, which Clark would employ over the next forty years against the plutocracy. Moreover, Clark criticized the Democratic Party in ways usually reserved to discuss allegedly extravagant and wasteful Republican rule during Reconstruction. While some Democrats

¹⁰³ Samuel A’Court Ashe, *History of North Carolina*, Vol. II (1971; repr., Raleigh: Edwards & Broughton Printing Company, 1925), 1184.

¹⁰⁴ “The Sacred Mud of ‘Mud Cut’,” *Raleigh News*, March 1, 1879.

sought to suppress the issue as it exposed the hypocrisy of charges of Republican misrule and Democratic Party stewardship, Clark pressed on with public attacks.¹⁰⁵

In February 1880 the North Carolina legislature called a special meeting to discuss ending funding for, and possibly selling, the Western North Carolina Railroad. Clark published a “People’s Platform for the Extra Session,” which once again criticized the \$300,000 “annual burden of that R.R. on the taxpayers.”¹⁰⁶ He called for the immediate repeal of the “Mudcut” Railroad, sale of the railroad at a fair price to a private purchaser, and use of the money saved to sign the School Bill (previously rejected) to “give the children of the poor a chance.”¹⁰⁷ Moreover, Clark proved deaf to those who worried about intraparty divisions. In a *Raleigh News* editorial signed “A. Taxpayer,” he mocked those politicians who attacked the party loyalty of railroad opponents as believing in “‘the right divine to rule’ of ‘mud cut.’”¹⁰⁸

By the time the special session had finished, not only had appropriations been repealed but the railroad had also been sold.¹⁰⁹ A major victory for Clark, he was now publicly associated with the sale of an unpopular and expensive railroad. Yet, as with many of Clark’s other victories, this one came with mixed results. While the taxpayers of North Carolina were saved a considerable sum annually in tax payments, the sale proved

¹⁰⁵ A.W. Graham to Walter Clark, December 17, 1881, in *PWC*, Vol I, 215.

¹⁰⁶ “The People’s Platform for the Extra Session,” n.d., in *PWC*, Vol. I, 206-207.

¹⁰⁷ *Ibid.*

¹⁰⁸ “The Taxpayers Boom,” *Raleigh News*, December 20, 1879.

¹⁰⁹ Brooks, *Fighting Judge*, 51.

more complicated than expected. Irish entrepreneur, William J. Best, purchased the Western Railroad, along with a handful of other financiers.¹¹⁰ Only a few months later Best's fellow investors reneged and left Best insufficiently financed to meet the requirements of the contract to develop the Railroad. With the railroad's sale falling apart, Gov. Thomas Jarvis sent Col. A. B. Andrews, an advisor and superintendent of several of the state's divided railroad interests, to meet with Best.¹¹¹ Andrews arranged backing through the financiers of the Richmond and Danville Railroad but acquired an equal control of the Western Railroad. By July of 1880, Best, still struggling financially, signed over a controlling share of his remaining stock in the Western to the Richmond and Danville.¹¹²

It was the first step toward a railroad trust, the Southern Railway Company, with Andrews as its First Vice-President, and this company would become Clark's most bitter political enemy throughout his time on the bench. Andrews's name would go on to become a byword for railroad manipulation of North Carolina's political system. By 1897 Clark would complain bitterly to Sen. Marion Butler that the Populist Party's efforts to create a railroad commission had been undermined by Andrews, who ran "the Commission as a Bureau of Andrews' office."¹¹³ And a few weeks later Clark

¹¹⁰ William S. Powell, ed., *Dictionary of North Carolina Biography*, Vol. I (Chapel Hill: University of North Carolina Press, 1971), 35.

¹¹¹ "A Republican on the North Carolina Railroad System," *Wilmington Morning Star*, April 21, 1881.

¹¹² *Ibid.*

¹¹³ Walter Clark to Marion Butler, February 20, 1897, in *PWC*, Vol. I, 304

complained to his brother-in-law that Andrews “ha[d] debauched more young men than you have any idea of” through the liberal giving of free passes and railroad cash for campaigns and newspapers.¹¹⁴ The fight against Andrews was, according to Clark, “no child’s play but real war.”¹¹⁵

At the same time that Clark served as legal counsel for multiple railroads, he also kept his practice busy by collecting debts for the Duke family. In December 1876, in a letter that clearly was not the first exchange between the two men (although it is the first preserved in Clark’s collection of papers), Washington Duke requested Clark to quickly collect on multiple accounts placed in Clark’s care. Follow-up letters on other accounts arrived at Clark’s law offices over the course of the year from both Washington Duke and Ben N. Duke. In September 1877 Ben Duke wrote Clark, “Can’t you stir up some of our other delinquents & make them pay?”¹¹⁶ The following year the Duke family would form W. Duke Sons & Co. and soon thereafter make the gamble on machine-rolled cigarettes that fueled their ascent to trust status by the late 1890s. And it was in the late 1890s that Clark’s first public political conflict with the Dukes filled the pages of newspapers across the state as they battled over the direction of education at Trinity

¹¹⁴ Walter Clark to A.W. Graham, March 15, 1897, in *PWC*, Vol. I, 307.

¹¹⁵ Walter Clark to Marion Butler, March 12, 1897, in *PWC*, Vol. I, 306.

¹¹⁶ Washington Duke to Walter Clark, December 13, 1876, in *PWC*, Vol. I, 193; Washington Duke to Walter Clark, January 23, 1877, in *PWC*, Vol. I, 194-195; Washington Duke to Walter Clark, June 21, 1877, in *PWC*, Vol. I, 195; Washington Duke to Walter Clark, July 16, 1877, in *PWC*, Vol. I, 195-196; Ben N. Duke to Walter Clark, September 24, 1877, in *PWC*, Vol. I, 197-198.

College. By the turn of the century Clark would renew his conflict with the Dukes, this time over the future of the state's public energy policy.

Clark the Superior Court Judge: 1885-1889

In March 1885 Governor Alfred M. Scales appointed Clark to the Superior Court.¹¹⁷ It was a significant transition in Clark's life. The previous summer Clark and his wife lost their fifteen-month-old daughter Anna. The loss deeply affected Clark, who "sat by [Anna's] bedside during the night and up to the hour she breathed her last." Forlorn, he wrote his elderly mother, "No length of time will dim the recollection of the bright little being that brought us so many days of happiness."¹¹⁸ Clark's appointment to the bench served in many ways as a break from the past decade, as judicial propriety required Clark to quit his role as director and counsel at various state railroads, and he closed down his legal offices in Raleigh.¹¹⁹ The next four years were dedicated to riding the exhausting judicial circuit that took North Carolina's superior court judges across the length of the state.¹²⁰

Clark's nomination met with popular approval in the state press. *The Farmer and Mechanic* noted no opposition to his nomination and his reputation as a "man of talent, force of character, and legal acquirements." It also lauded his service to the Confederate

¹¹⁷ Brooks, *Fighting Judge*, 54.

¹¹⁸ Walter Clark to Anna Clark, July 24, 1884, in *PWC*, Vol. I, 219-220.

¹¹⁹ Raleigh *Farmer and Mechanic*, June 17, 1885.

¹²⁰ Brooks, *Fighting Judge*, 54.

cause and his Democratic Party service while stockholder in the *Raleigh News*. Lastly, the paper noted his connection by marriage to the Graham family, his solid Methodism, and his Mud Cut Boom circular.¹²¹ The *Rocky Mount Reporter* expected Clark to make “an excellent judge, prompt, painstaking, just.”¹²² On the other side of the Old North State the *Charlotte Democrat* praised Clark as “a prudent, discreet hardworking gentleman... a first rate Judge.”¹²³

During his years in the state’s superior court system, Clark built up a reputation as an impartial law-and-order judge, issuing stern punishments for vice, and a progressive jurist intent on establishing an efficient, modernized court. The *Raleigh Christian Advocate* commented “how generally he is commended for his strictness toward all classes of men.”¹²⁴ When Jason Miller appeared before the court on charges of running for many years an illegal gambling establishment—conspicuously close to the Capitol building—Clark sentenced him to pay a \$2,000 fine and thirty days in jail.¹²⁵ When a jury convicted W. T. Bailey, described by the *Weekly State Chronicle* as a “man of property and position,” on charges of forgery, Clark sentenced him to ten years. Clark addressed Bailey from the bench and condemned him for “trusting...to his money and

¹²¹ “The New Judges—Who are They,” *Raleigh Farmer and Mechanic*, March 11, 1885.

¹²² *Rocky Mount Reporter*, quoted in “And Who Shall Judge and Prosecute,” *Weekly Raleigh Register*, March 11, 1885.

¹²³ *Charlotte Democrat*, March 20, 1885.

¹²⁴ *Raleigh Christian Advocate*, October 20, 1886.

¹²⁵ Brooks, *Fighting Judge*, 57.

social influence to save him from the consequences of his actions.”¹²⁶ Sometimes his sentencing efforts were criticized as overzealous. Robert Winston recounted the story of a “degenerate son of a noble family charged with embezzlement...represented by leaders of the bar.” The man successfully pled insanity as a defense. Clark, frustrated, set aside the verdict and “intimated that if the lawyers filed a petition to remove...he would put them in jail, and then tried the case over.” On the second trial the young man was convicted and sentenced to serve on the state’s roads for months.¹²⁷

Clark’s sentencing of criminals of all social classes provoked many comments in the press. *The Weekly State Chronicle* noted that “he has done more to give people a respect for the laws and wrongdoers a wholesome fear of them than any judge now upon the bench.”¹²⁸ *The Raleigh Christian Advocate*—after listing Clark’s sentencing of fourteen people to the penitentiary, twenty-three to the workhouse and jail, and imposing \$2,200 in fines—praised him as an “expensive judge to criminals, but a profitable one to the countd [sic].”¹²⁹ These cases established Clark’s reputation as a tough, if not harsh, judge who did not show undue respect for friends or social class in conducting the court’s business. And it provided an insight into future political success as his supporters pronounced, “We love him most for the enemies he has made.”¹³⁰ Given his strict

¹²⁶ Raleigh *Weekly State Chronicle*, December 1, 1887.

¹²⁷ Robert Winston, Review of *Fighting Judge*, by Brooks, 184.

¹²⁸ Raleigh *Weekly State Chronicle*, July 22, 1886.

¹²⁹ Raleigh *Christian Advocate*, January 20, 1886.

¹³⁰ Raleigh *Weekly State Chronicle*, August 12, 1886.

approach to criminal cases, no doubt at this stage in his career many of those enemies consisted primarily of the criminal defense bar.

Moreover, Clark went after elements of late nineteenth-century court practice that often rendered the system inefficient, slow, and backlogged. Clark was notorious for his timeliness and expected the same of lawyers, litigants, witnesses, and jurors. A popular story recounted that Clark, late to hold court for the first and only time in his career on the bench, fined himself. Clark objected to the story and told Aubrey Brooks such was not true, as he had never been late to hold court.¹³¹ *The Rocket* newspaper shared an account of Clark ringing the court bell himself at 9 a.m. due to the tardiness of the bell ringer. The same editor found humor in accounts of jurors “‘hitting the dirt’ at top speed” to avoid a judicial reprimand.¹³² And such was not an unreasonable fear, as Clark had before fined jurors as much as forty dollars for lateness. Intoxicated jurors fared even worse, with one sentenced to pay a hundred dollar fine and twenty days in jail.¹³³ The *Weekly State Chronicle*'s account of Clark's first term in Pender County followed similarly:

County officers were all on tip-toe to do their duty; witnesses jurors and suitors were promptly on hand as never before known, and discipline, so sadly wanting in the courts of North Carolina, ruled and reigned over all in our splendid new court house...a pin could be heard in the crowded court house during his charge, or at any other time while a trial was going on....The Poor and needy, learned anew that before Judge Clark, they

¹³¹ Brooks, *Fighting Judge*, 55-56.

¹³² *Rockingham Rocket*, February 17, 1887.

¹³³ *Wilmington Messenger*, February 9, 1888; *Pittsboro Chatham Record*, May 27, 1886.

stand as good a chance and have the same rights under the law, as the rich and influential. Gamblers, rascal, and depredators upon law and society squirmed....No waste of time is allowed by him. While patient, he pushes business, demands promptness from all, and makes his own desires to get home...subordinate to his duty to hold court until midnight on Saturday if there remains any unfinished business.¹³⁴

Clark also labored to modernize the courts during his tenure as a Superior Court judge. One of Clark's first actions on arriving in a new courtroom for the first time was to demand the installation of a clock so that court business could be conducted in a timely manner.¹³⁵ Robert Winston, in an attempt to label Clark a liberal and profligate spender, years later recounted that Clark had "standing orders in a hundred counties" to: replace jurors chairs with new swivel chairs, tear up and replace stained and odorous carpets, improve the law libraries, and in general to "transact public business in a business way."¹³⁶

The newspapers often lauded him for his conduct on the bench. *The Commonwealth* enthusiastically cheered, "If the people could have their way, Judge Clark would ride all the circuits and hold all the courts."¹³⁷ *The Shelby Aurora* called Clark "an able and fearless judge who pushes business," after a term in which Clark imposed almost \$1,000 in fines.¹³⁸ None were eligible for straw bonds; as straw bonds

¹³⁴ "Judge Clark in Pender," *Raleigh Weekly State Chronicle*. September 23, 1886.

¹³⁵ Brooks, *Fighting Judge*, 55.

¹³⁶ Robert Winston, "North Carolina: A Militant Mediocracy," 210.

¹³⁷ Scotland Neck *Commonwealth*, June 21, 1888.

¹³⁸ *Shelby Aurora*, quoted in *Newton Enterprise*, April 19, 1889.

allowed those without adequate financial means to post bonds they could not pay. Indeed by spring of 1888 several newspapers began calling for Clark's nomination for governor on the Democratic ticket. *The Weekly State Chronicle* found Clark's merit in his youthfulness and "record he has made...during his brief career on the bench."¹³⁹ The *Daily Journal* advanced Clark as a "live, progressive, fearless man for Governor; one who has ideas of his own."¹⁴⁰ *The Smithfield Herald* supported Clark as a candidate for "the masses of the people" who could "bring from his home...every white voter in North Carolina."¹⁴¹ The Franklinton *Dispatch* promoted Clark as a candidate whose victory "brings in its train reform and improvement."¹⁴²

Divergent Paths: Executive or Judicial

By 1888, Clark's popularity was such that he was considered a possible candidate for governor.¹⁴³ While Clark's biographer, Aubrey Brooks, portrays Clark's refusal to have his name entered for the nomination as an almost reflexive response due to his desire to pursue a career on the judiciary, Clark's response is actually more complicated.¹⁴⁴ Governor A. M. Scales was retiring after his term in office and a

¹³⁹ "For Governor: Hon. Walter Clark, Judge of Superior Court," *Raleigh Weekly State Chronicle*, March 23, 1888.

¹⁴⁰ "The Next Governor," *New Bern Daily Journal*, November 20, 1887.

¹⁴¹ "A Wise Choice," *Smithfield Herald*, March 17, 1888.

¹⁴² *Weldon Roanoke News*, March 22, 1888.

¹⁴³ *Raleigh Chronicle*, quoted in "Judge Fowle for Governor," *News and Observer*, March 23, 1888.

¹⁴⁴ Brooks, *Fighting Judge*, 59.

previous governor, Thomas Jarvis, sought a new nomination. Clark weighed his chances at winning the governorship and even reached out to his friends. Walter Montgomery wrote back to Clark that he feared the “fast set” and “political farmers” might oppose him; the former because of his stance on public morals as expressed from the bench (prohibition, prostitution, and gambling), and the latter might prefer a “farmer candidate.”¹⁴⁵ Undeterred Clark wrote to his brother-in-law, and closest friend, A.W. Graham, seeking to lock-up the support of Durham industrialist Julian Carr and railroad representative A. B. Andrews. Meanwhile, Clark planned to try and keep Daniel G. Fowle, a fellow reformist Democrat, out of the race. He worried various persons wanted Fowle in the race to “to divide Wake.”¹⁴⁶ W. H. Moore wrote Clark the following month that his “record as a Judge on the Superior Courts” would make him “acceptable to the Prohibition element,” but he worried another prohibitionist would split the vote.¹⁴⁷ Yielding to that fear, Clark wrote a public letter, reprinted in numerous papers, withdrawing his name from the convention for the sake of party harmony. Yet Clark still expressed some hope for nomination, as he wrote A.W. Graham that if there should be a deadlock, at the convention “my friends [can] use my name then if they see fit.”¹⁴⁸

¹⁴⁵ Walter A. Montgomery to Walter Clark, January 20, 1888, in *PWC*, Vol. I, 231-232.

¹⁴⁶ Walter Clark to A.W. Graham, March 3, 1888, in *PWC*, Vol. I, 233.

¹⁴⁷ W. H. Moore to Walter Clark, March 8, 1888, in *PWC*, Vol. I, 233-234.

¹⁴⁸ “Judge Clark Withdraws,” *Tarborough Southerner*, April 12, 1888.

Soon thereafter Clark began to express his political opinions more vocally in public forums. In June 1888 Clark delivered the ninety-third commencement address at the University of North Carolina at Chapel Hill. Judge Clark, addressing the assembled students, chose to speak on “the great question”: “The increasing accumulation of enormous wealth.” In the address he questioned the ability to accumulate large fortunes without illegal conduct by “means which would send operators on a smaller scale to your penitentiary.” Their generation would have to confront “the grinding rule of monopolies” that sought to impoverish the “toilers of the nation” and “control legislatures.” If nothing was done, Clark worried aloud, “the pillaged, plundered masses” would “furnish...swarms of communists, anarchists.”¹⁴⁹ It was his clearest condemnation thus far of great accumulations of wealth as inherently dangerous. And from this point forward Clark continued with such arguments, taking them to larger forums and in new intellectual directions.

In the 1890s Clark’s attacks on corruption by monopolies and plutocrats would reach nationally published journals, find themselves shelved in law libraries in the North Carolina Reports, inform crowds at various state bar association meetings, and even end up published as congressional documents. His arguments would take new directions: criticizing judicial review and calling for the election of judges; seeking expanded democracy through government ownership of telegraphs, telephones, railroads, and natural resources; even calling for a new constitutional convention to better hold plutocrats in check with a more democratic political system. Yet his political calls to

¹⁴⁹ “93rd Commencement,” Raleigh *Weekly State Chronicle*, June 8, 1888.

action remained centered on the themes Clark expressed in his commencement address, political beliefs in greater democratic faith in “the masses” to remedy corruption that often accompanied private monopolies and great accumulations of wealth.¹⁵⁰

By 1889 a vacancy on the Supreme Court offered an opportunity for Clark to climb the ladder of judicial office. Governor Fowle appointed Clark to fill the vacant Associate Justiceship, which would not be up for election until 1894. And with Clark’s ascension to the State’s Supreme Court, his progressive views now could be represented as the views of a southern Supreme Court Justice. Defying stereotypes of the courts and the South as “the most conservative positions and dwelling,” Clark’s position could be used to undermine claims of radicalism and socialism emanating from opponents of reform.¹⁵¹ And as women’s suffrage activists, public ownership advocates, and proponents of union labor included Clark’s statements and opinions in their campaign literature and publications, Clark’s judicial career and political views would combine to create a national reputation for Clark as a southern progressive jurist.¹⁵²

¹⁵⁰ Clark’s Announcement, May 17, 1911, in *PWC*, Vol. II, 129.

¹⁵¹ B.O. Flower, “Some Outspoken Champions of the Free Coinage of Silver,” *Arena* 16 (July 1896): 221.

¹⁵² Brooks, *Fighting Judge*, 189-190.

CHAPTER III
FORGING A PROGRESSIVE JURISPRUDENCE

The Struggle between the forces of progress and Conservatism was slow to develop in North Carolina, but when it came....Every department of state government was shaken to the center; the Supreme Court itself, whenever Chief Justice Walter Clark could dominate, becoming an incubator for remedial legislation, adviser of progressive political parties, defender and maintainer of radical propaganda.

—Robert Winston¹

When North Carolina's largest Bar Association issued a resolution that commemorated Chief Justice Clark shortly after his death in 1924, they praised the Justice's "great service" to the state for "interpreting precedents in accordance with modern condition and discarding the chaff in order to arrive at the kernel."² The usually conservative organization lauded how Clark "seized the bludgeons [of the law] on behalf of married women and their property rights" against a majority of the North Carolina Supreme Court that often proved unable to "accept so complete a revolution in marital relations."³ Just to the north, the Iredell County Bar Association issued a similar

¹ Robert W. Winston, "Chief Justice Shepherd and His Times," *North Carolina Law Review* 3 (February 1925): 12.

² "[In Memory Of] Chief Justice Walter Clark," Mecklenburg County, Miscellaneous Records, 1759-1959, SANC.

³ *Ibid.*

resolution that described the Chief Justice's jurisprudence as "drinking deep from the foundation of knowledge in sympathetic understanding with the real problems of humanity."⁴ The bar association went on to recognize how Clark's jurisprudence blended the political and legal in a way that often undermined the common law: "always being in the vanguard of important progressive movements refusing to stand by precedents of law, when they handicapped such movements."⁵ These descriptions of Clark's jurisprudence in the wake of his death briefly, but accurately, capture the conclusion of a career of a progressive jurisprudence that often ran contrary to the common law. As Clark himself often wrote, "All progress in the law has consisted in getting away from the barbarous teachings of the common law."⁶ And by his death in 1924, North Carolina, due in large part to Clark's efforts, had shed significant aspects of common law jurisprudence.

Clark's criticisms of the common law blended historical, political, economic, and moral factors. His critique extended not only to the law itself but due to the process whereby it was created and the English judges whose opinions constructed its edifice. In an article in the *Michigan Law Review*, Clark restated his view of the history and foundations of the common law:

One of these [judges], 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

⁴ "Resolutions...on the Death of Chief Justice Walter Clark," Iredell County, Miscellaneous Records, 1808-1949, SANC.

⁵ Ibid.

⁶ Walter Clark, "Some Myths of the Law," *Michigan Law Review* 13 (1914-1915): 27.

indifferent, or unable, to think for himself, or oppressed by the magic of precedent, has followed, other judges have followed each in turn and thus many indifferent decisions being interwoven with perhaps a greater number of sound ones....[formed] that fabric of law....that jumble of absurdities, consistent only in its inconsistencies.⁷

Clark's understanding of the origins of the common law led him to be less awed by precedent than many of his judicial colleagues, who echoed the sentiments of Blackstone that the judge made law was the "the perfection of reason."⁸ This distinction had important implications when North Carolinian's appeals reached the state's highest court. For example, in *Pettit v. Atlantic Coastline Railroad*, an eleven-year-old child messenger in the employ of the railroad, who died after his leg was severed by a train, was deemed contributorily negligent—allowing the railroad to escape civil liability.⁹ Justice William Allen, speaking for the Court's majority went to great lengths to evade moral responsibility for such a seemingly unjust outcome, admonishing that the court "must accept the [common] law" despite their "pity" for the child and his mother.¹⁰ Justice Platt Walker's concurrence went even further in denouncing the use of "sentiment" to decide the case, when courts should look "alone to the cold

⁷ *Ibid.*

⁸ Sir William Blackstone, *Commentaries on the Laws of England* (London: A. Strahan, 1803), 69, accessed on March 6, 2015, <https://books.google.com>.

⁹ *Sallie Pettit, Administratrix, v. Atlantic Coast Line Railroad Company*, 156 N.C. 119 (1911).

¹⁰ *Ibid.*, 128.

and unyielding facts of the case.”¹¹ And yet another Justice, George Brown, issued a concurrence to blandly state, “I do not think the Court should pass on matters not necessary to the decision of a case...it is a matter for...the General Assembly.”¹² The majority’s views fit within the classical legal thought of the last quarter of the nineteenth century when judicial formalism had, in the words of Clark, rendered the common law “fossilized”¹³ The court’s justices showed extreme caution in overturning precedents, as the court’s application of *stare decisis* placed past decisions just slightly below reverence for constitutions, and sometimes co-equal with or above statutory enactments.

Yet, Clark’s progressive jurisprudence increasingly questioned the hold the common law should have on modern courts. Testifying before the Federal Industrial Commission in 1915, Clark answered an inquiry on the application of common law to cases involving labor and the workplace, where he stated definitively, “I do not recognize the right of some unknown man, who lived in different surroundings and in a different state of society, to tell me what I shall say as to what is just between ‘A’ and ‘B’ to-day.”¹⁴ Indeed, as the questioning continued, Clark discussed his openness to considering factors beyond the law to determine the outcome of cases:

¹¹ *Ibid.*, 132 (Walker, J., concurring).

¹² *Ibid.*, 133 (Brown, J., concurring).

¹³ *Pressly v. Yarn Mills*, 138 N.C. 410, 424 (1905) (Clark, C.J., concurring).

¹⁴ Testimony of Walter Clark, United States Commission on Industrial Relations, *Final Report and Testimony*, Vol. 11 (Washington, D.C.: U.S. Government Printing Office, 1916), 10453-10454.

Chairman Walsh: Should counsel be given an opportunity to indicate fairly economic and social bearings on judicial decisions in arguments before the courts?

Judge Clark: Yes, sir: I think they should discuss them.

Commissioner Weinstock: What effect [do] public opinion and public sentiment have on court decisions?

Judge Clark: I think the decisions of the courts of the twentieth century ought to be delivered in accordance with justice, and we ought not to hark back to old opinions rendered three or four hundred years ago.¹⁵

Despite Clark's harsh rhetoric, his progressive jurisprudence did not destroy the common law so much as it sought to modify the common law to fit an industrial age. English courts had for centuries used the common law in a manner that adapted to changing economic and social change—admittedly with a significant lag between precedent and present conditions. The lag between jurisprudence and modern conditions often left courts “caught between contending forces: muddle, confusion, mixed messages, and conflicting tendencies.”¹⁶ In this environment of the early twentieth century, courts caught between the passing antebellum era and a new industrial age, it was not Clark's sympathies towards the victims of industrialization that set him apart, but his willingness to both work within the court and through the political process to immediately ameliorate the dangerous consequences of those changes. As twentieth-century legal scholar Lawrence Friedman has noted, the very nature of judicial remedies obscures “how many

¹⁵ Ibid., 10454-10455.

¹⁶ Lawrence Friedman, “Losing One's Head: Judges and Law in the Nineteenth-Century American Legal History,” *Journal of Law and Social Inquiry* 24, no. 1 (Winter 1999), 269.

cases were never brought—how many workers, passengers, and ‘trespassers’...were maimed or killed, and no compensation was ever paid out.”¹⁷

Justice Clark suggested several remedies to deal with the insufficiencies of the common law. The first, and most unlikely, was a complete shift from the English system to the French Civil Law—or Code Napoleon. Clark’s affection for the Civil Law can be found as far back as his studies at the University of North Carolina. In his Senior Speech at UNC in the spring of 1864 Clark spoke of the Civil Law with the reverence nineteenth-century jurists tended to reserve for English common law. He praised the Roman system as deserving “the attention, the admiration, and the wonder of mankind.”¹⁸ It was a system that “kept pace with the advance of civilization”; unlike Clark’s later description of common law as backward and archaic. In 1896, when Clark toured Mexico, reporting for the legal magazine *The Green Bag*, he once again praised the civil law and suggested it as a solution for a broken common law system.¹⁹ Mexican justices’ bookshelves were not replete with “groaning shelves filled with lengthening lines of reports”; errors were not incorporated into a system of *stare decisis* that reproduced them; and, instead of research precedent, “The legal mind is permitted to expand by arguing each case as it arises, upon the merits and ‘the reason of the thing.’”²⁰ While Clark’s hope of seeing the

¹⁷ Ibid., 268-269.

¹⁸ *PWC*, Vol. I, 421.

¹⁹ Walter Clark, “The Supreme Court of Mexico, and the Judicial System of That Country,” *Green Bag* 8 (1896): 203-208.

²⁰ Ibid., 205-206.

codified civil law implemented in North Carolina never came to pass, he was able to achieve partial success by writing statutes for the legislature that superseded common law doctrines on workplace injuries, women's property rights, and child laborers. And his opinions show a legal mind that used common law cases as a chance to explore "the reason of the thing."²¹

Second, Clark worked to overrule common law precedent where statutory law was silent—and whenever he could muster a majority of the court. Many of these decisions rested on economic, moral, and political information that often ensured dissents from formalist members of the court, or at the very least concurrences that disclaimed Clark's reasoning. In murder cases concerning the definition of premeditation, Clark referenced national and regional murder and lynching statistics; in child workplace injury cases, he provided long lists of jurisdictions that had passed child labor laws; in adult workplace injury cases, he cited government statistics on the wealth of railroads contrasted with the epidemic of workplace injury; in women's property cases, he referenced female labor statistics, jurisdictions that liberalized such laws, historical examples of female sovereigns, and even Shakespeare. Historian Morton White noted, the early twentieth-century intellectual community—including the legal community—was engaged in a "revolt against formalism."²² So it might be said that Clark resumed his earlier martial interests in the struggle against formalism. The most succinct

²¹ Ibid.

²² Morton White, "The Revolt Against Formalism in American Social Thought of the Twentieth Century," *Journal of the History of Ideas* 8, no. 2 (April 1947): 131-152.

statement of Clark's jurisprudence can be found in his fondness for the Latin maxim *Salus populi suprema lex* (The public welfare is the highest law).²³

Third, Clark often exercised his ability to dissent. During his time on the Court Clark wrote 371 dissenting opinions.²⁴ He was at his most outspoken when he dissented (often alone) from his fellow justices' applications of the common law that defied "every sentiment of justice."²⁵ He vocally objected that the court's decisions treated "all classes of [women], and all the time...as at least 'half idiots' and without legal rights."²⁶ When the legislature acted to grant women the title of notary publics, the court's majority nullified the law because it determined that at common law notary public was a public office, and a public office could not be filled by a person who lacked voting rights. Yet for Clark the determination rested on deference to legislative will and the present state of women's office holding: "In all progressive communities feudal ideas have passed, or are passing, and women are held to be human beings, entitled to equal rights with men."²⁷ In *Price v. Charlotte Electrical Railway Company* the court's majority awarded compensation to a woman injured in a horrific horse and buggy accident that ended in an

²³ *North Carolina State Board of Health v. Commissioners of the Town of Louisburg*, 173 N.C. 250, 258 (1917) (Clark, C.J., concurring).

²⁴ Brooks, *Fighting Judge*, 265.

²⁵ *Ebbert Ward, by his Next Friend, S.P. Ward v. Odell Manufacturing Company*, 126 N.C. 946, 949 (1900); *Fitzgerald v. Alma Furniture Co.*, 131 N.C. 636, 642 (1902) (Clark, J., dissenting); *Sallie Pettit, Administratrix v. Atlantic Coast Line Railroad Company*, 156 N.C. 119, 134 (1911) (Clark, C.J., dissenting).

²⁶ *State Ex. Rel. Attorney-General v. Noland Knight*, 169 N.C. 333, 363 (1915) (Clark, C.J., dissenting).

²⁷ *Ibid.*, 362.

amputation of her foot. Yet the court's majority insisted on a technicality that preserved the common law standard that a married woman could recover damages only through her husband. Clark's dissent chastised the court as it "still fondly clung to [common law]...as a clog upon progressive legislation."²⁸ The Chief Justice insisted that "every age should have laws based on and expressing its own ideas of right and wrong."²⁹ When the court's majority declared that under common law married women could not be freeholders, Clark's dissent decried the use of common law and decried the outcome rendered, as "illogical and unjust."³⁰ He protested loudly, "It is not the province of the courts to seek out strained analogies or to delve in the *debris* of a rejected and barbarous legal system...It is not for us to bivouac always by the abandoned campfires of more progressive communities. The courts should construe legislation from the standpoint of this age and of the men who enact it."³¹

Fourth, Clark proposed changing legal instruction. Speaking at the centennial of the North Carolina Supreme Court before a large crowd, the Chief Justice laid out a plan to limit the influence of the common law:

Among...the law schools of this country there is one great defect...and that is the history of the law is not taught. Not only are students, as a rule, and therefore lawyers, uninformed as to the development of our state

²⁸ *Louisa Price and Husband, R. S. Price, v. Charlotte Electric Railway Company*, 160 N.C. 450, 456 (1912) (Clark, C.J., dissenting).

²⁹ *Ibid.*, 457.

³⁰ *George E. Gill, et al. v. Board of Commissioners of Wake County*, 160 N.C. 176, 194 (1912) (Clark, C.J., dissenting).

³¹ *Ibid.*, 196.

law...but they are misinformed as to the origin and development of the law in England. From the charming narrative of Blackstone, students have conceived an admiration of the so-called common law...whereas though it may have been the best that could have been done by the judges who created it in a barbarous age, our progress consists in changing it in every way possible.³²

Clark's campaign against the legacy of Blackstone in law schools and courtrooms stretched over two decades. In a 1903 article Clark quoted with approval the words of James C. Carter, New York lawyer and legal reformer: "Blackstone, who held a professor's chair for and a salary for praising the common law...it is like the Knight of La Mancha extolling the beauty and graces of his broad-backed mistress 'winnowing her wheat or riding her ass.'" ³³ Clark continued to seek to discredit Blackstone and the common law. Aubrey Brooks, commiserated in a letter, "In the past you have been so conspicuously effective, namely, in disillusioning the public about the appreciation of old fossils and men who...did not deserve the consideration that posterity is according them." ³⁴ Those "old fossils" included Blackstone and the common law so closely associated with him.

Clark worked to convince influential men of the arguments for displacing common law. He mailed off numerous copies of his article "Coke, Blackstone, and the Common Law" to many prominent men. One recipient, Kemp P. Battle, former

³² Centennial of the Supreme Court of North Carolina, Response to Addresses, Walter Clark Papers, SANC.

³³ Walter Clark, "Law and Human Progress," *American Law Review* 37 (March 1903): 225-242.

³⁴ Aubrey Brooks to Walter Clark, September 24, 1915, in *PWC*, Vol. II, 279.

University of North Carolina (UNC) president and historian, was a noted defender of the common law. Clark's letter implored Battle, "A system which could compel such men...to sustain as a right in the husband the power of personal chastisement of the wife...was radically wrong, and as far as possible from the 'perfection of reason.'"³⁵ Eugene Branson, head of UNC's Department of Rural Economics and Sociology, responded to Clark's Blackstone pamphlet, "You are giving our men and me a liberal education in a field of concern that many of us would hardly get into otherwise."³⁶

While Kemp Battle was not swayed, University of Chicago history professor William E. Dodd praised Clark as "the only judge of a high court I know who thinks seriously about social and political problems." Dodd conveyed to Clark that his ideas had spread beyond the confines of the Old North State: "Your opinions are quoted by all the lawyers of liberal views I know, men like Roscoe Pound." When Dodd praised Clark's ability to "see things from the point of view of common men," he was identifying Clark's progressive jurisprudence.³⁷

And Clark's progressive beliefs mirrored those of Edward Bellamy, Henry L. George, and other Gilded Age reformers who prophesied a more politically democratic and economically equitable future. Unlike Bellamy or George's utopian plans, Clark's views were more conventionally Whiggish and mirrored the hopes of the Knights of

³⁵ Walter Clark to Kemp Battle, April 25, 1918, in *PWC*, Vol. II, 370.

³⁶ E.C. Branson to Walter Clark, May 8, 1919, in *PWC*, Vol. II, 399.

³⁷ William E. Dodd to Walter Clark, April 19, 1919, in *PWC*, Vol. II, 396.

Labor and People's Party for a more democratic and equitable future. Yet even Clark could slip into fits of messianic hopefulness for the nation's future:

The world turns over completely every 24 hours, and at the end of every year we are thousands of millions of miles from where we were 364 days before. We ought to be gratified that we are living to see the dawn of the day when war and its miseries and abominations shall cease and when, like Moses, you and I can see into the land of Millennial period though like Moses we shall not be spared, to enter in ourselves.³⁸

Yet that "Millennial period" must have seemed far away to workers and women at the dawn of the twentieth century.

On Dangerous Ground: Labor and the Law

When Allen Tullos interviewed James Pharis, of Burlington, North Carolina, for an oral history of industrialization in the Piedmont region, Pharis vividly remembered the day his hand was "mashed into jelly." He was only eight or nine years old when he was injured riding an elevator pulley with a fellow child laborer. When Tullos asked, "Those things happened a good deal?" Pharis responded, "Oh, yes, back in them days. Nothing never said about it then."³⁹ Pharis went on to explain:

No use in suing. Poor people didn't stand a chance... They had a system back in them days. One company owned all the mills was around there. They had agreements with one another. If they said not to hire you they wouldn't hire you. So, if you done anything—anything the company didn't

³⁸ Walter Clark to Henry A. Forster, July 29, 1919, in *PWC*, Vol. II, 406.

³⁹ James and Nannie Pharis, interview by Allen Tullos, Burlington, North Carolina, December 5, 1978, in the Southern Oral History Program Collection, University of North Carolina at Chapel Hill, accessed May 5, 2014, <http://docsouth.unc.edu/nc/pharisjn/menu.html>.

like— they'd just fire you and tell the rest of them not to hire you. So, there you'd be. People who lived under them circumstances, back in them days, was nothing they could do. So they didn't try to do nothing.⁴⁰

Pharis's story is part of a much larger “accident crisis” that grew throughout the latter half of the nineteenth century into the early twentieth century.⁴¹ Workers in the nation's textile mills, furniture factories, and railroads were suffering an unprecedented number of work-related injuries and deaths. The industrializing South did not escape this explosion of industrial accidents. Indeed, in some ways the increase was all the more apparent in the post-Civil War South where mills, factories, and railroads sprang up across the southern landscape—North Carolina was no exception to this trend. North Carolinians were increasingly drawn from the state's farms into the mills in the last decade of the nineteenth century. Consequently, an increasing number of these laborers lost life and limb to the industrial machinery in textile mills, furniture factories, and lumber mills.⁴²

Between 1870 and 1902 the number of textile mills increased from 33 to 220; operational spindles in textile mills from almost 40,000 to just under 1.75 million.⁴³ There was a corresponding increase in mill employment from one 1,500 mill operatives

⁴⁰ Ibid.

⁴¹ John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge: Harvard University Press, 2004), 1-5, 22.

⁴² Ibid.

⁴³ United States Bureau of Labor, *Bulletin of the Bureau of Labor* (Washington, D.C.: Government Printing Office, 1904), 153-154.

in 1870 to 46,569 in 1902.⁴⁴ The most drastic change occurred in the last decade of the nineteenth century, when the number of textile mills doubled, while the number of spindles and operatives quadrupled.⁴⁵ In addition, the state's furniture industry grew rapidly during the same decade to include 106 factories with 4,095 employees.⁴⁶ And railroad corporations remained a large employer in the state reporting 11,157 employees in 1902.⁴⁷

Factory and railroad labor produced distinct and serious risks to employees. The textile mills and factories of the state housed dangerous machinery, which frequently consumed fingers, hands, arms, and lives. Young workers—often inattentive, uninstructed, or unattended—moved about a workplace crowded with potential dangers. For instance, thirteen-year-old Carrie Sims lost her fingers to a mangle in a steam laundry; nine-year-old William Fitzgerald had his hand mashed while leaning against a sander; and ten-year-old Willie Evans “arm was torn off” by live rollers.⁴⁸ Adult laborers also bore significant risk when working in the mills. Alice P. Levitt recalled how, when working in the speeder room of the mill, her apron was on multiple occasions “tore off

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid., 154.

⁴⁷ Ibid., 154-155.

⁴⁸ *Carrie Sims by her Next Friend v. Robert Lindsay, et al.*, 122 N.C. 678, 681 (1898); *Fitzgerald v. Alma Furniture Company*, 131 N.C. 636, 637 (1902); *Willie Evans, By Gideon Pendleton, Guardian v. Dare Lumber Company*, 174 N.C. 31, 33 (1917).

me two or three times a week” by the machinery.⁴⁹ She acknowledged the potential risks when she stated, “I was just lucky I managed to stop 'em and didn't get my arms in them. Them fliers would break your bones.”⁵⁰ While Levitt was fortunate enough to avert disaster on multiple occasions, many other laborers were not as lucky. Carl Thompson recalled one such incident at a textile mill where “one man, his shirt or something or other got caught in that belt, and that belt throwed him to the top of the mill and busted his brains out....it killed him.” Others, fortunate by comparison, got “their whole arm and all broke and the skin pulled off, maybe slam through the bone.”⁵¹

Railroad work also played host to its own line of dangers. Discussing the large number of “railroad casualties” before the Interstate Commerce Commission in 1899, Clark called the numerous deaths and injuries a “blood tax” on the laboring class.⁵² In 1890, the same year Clark’s tenure on the Supreme Court began, 2,451 employees died from work-related injuries while more than 20,000 employees were injured.⁵³ This amounted to the death of one in every 306 and the injury of one in every 33 men working

⁴⁹ Alice P. Everett, interview by James L. Leloudis, July 18, 1976, at Charlotte, North Carolina, in the Southern Oral History Program Collection, University of North Carolina at Chapel Hill, accessed May 5, 2014, <http://docsouth.unc.edu/sohp/H-0162/menu.html>.

⁵⁰ *Ibid.*

⁵¹ Jacquelyn Down Hall, et al., *Like a Family: The Making of a Southern Cotton Mill World* (1987; repr., New York: W. W. Norton & Company, 1989), 82-83.

⁵² “Address Before the Eleventh Annual Convention of Railroad Commissioners at Denver, Colorado,” August 10, 1899, in *PWC*, Vol. I, 485-486.

⁵³ William J. Chambliss, “The Creation of Criminal Law and Crime Control in Britain and America,” in *Making Law: The State, the Law, and Structural Contradictions*, eds. William J. Chambliss and Marjorie S. Zatz (Bloomington: Indiana University Press, 1993), 54.

for the railroads.⁵⁴ By 1899 North Carolina's growing railroad system contributed 26 killed and 648 injured railroad workers to a national total of 2,210 killed and 34,923 injured railroad employees.⁵⁵

For an injured workingman in Progressive Era North Carolina, Pharis' statement that there was "no use suing" was not entirely unfounded. In addition to any collusion by mill and railroad owners to blacklist litigious employees, the State's courts erected seemingly insurmountable barriers to recovery by injured employees, or their relations, who sought compensation and justice. First, upon completion of the plaintiff's evidence, the defendant could move to dismiss the case and "non-suit" the plaintiff, denying a potentially sympathetic jury the chance to decide the case and effectively granting a judgment in the defendant's favor.⁵⁶ Second, trial court judges sometimes crafted jury instructions that erred toward protecting business interests at the expense of injured plaintiffs. Third, common law doctrines of assumption of risk, contributory negligence, and the fellow servant rule acted as an almost complete bar to a plaintiff's attempts to recover damages and assigned the risks and costs of industrial accidents to injured employees, despite any negligence of the employer or one of his agents. Most of the legal precedents were the product of early and mid-nineteenth-century industrial changes

⁵⁴ *Statistical Abstract of the United States* (Washington, D.C.: U.S. Government Printing Office, 1956), 559, accessed February 1, 2015, <https://books.google.com/>

⁵⁵ *The Seventh Annual Report of the Board of Railroad Commissioners of North Carolina for the Year Ending December 31, 1898* (Raleigh: Guy V. Barnes, 1898); *S.H. Troxler v. Southern Railway Company*, 124 N.C. 189, 192 (1899); U.S. Congress, House, Committee on Interstate and Foreign Commerce, *Block Signals and Appliances for the Automatic Control of Railways*, 59th Cong., 1st sess., 1906, H.R. Rep. 4637, 4, Table Comparative summary of railway accidents for the years ending June 30, 1894 to 1904.

⁵⁶ *Public Laws and Resolutions of the State of North Carolina*, 1897, chap. 109.

confronted in Massachusetts and other industrializing northern states that were later embraced by other jurisdictions facing similar changes in their respective economies. Although courts in the latter half of the nineteenth century had already begun carving out exceptions to these common law doctrines, they remained in force and continued to impede the attempts of railroad laborers, factory workers, and mill operatives to recover damages against their employers.⁵⁷

A nonsuit was the equivalent of the common law practice known as a “demurrer to evidence.”⁵⁸ Upon the close of the plaintiff’s case, the defendant could demurrer on the evidence to nonsuit the plaintiff, alleging that the plaintiff had not produced sufficient evidence to prove his case. In theory, this action removed cases where the plaintiff failed to provide even a scintilla of evidence to support their suit.⁵⁹ In practice, judges often employed the nonsuit to remove cases where some evidence existed to prove negligence of an employer. The practice amounted to a non-prejudicial dismissal that allowed plaintiffs to renew litigation at a later date, but for what purpose? Nonsuits, combined with other highly technical legal issues, could drag out legal proceedings for years, and even decades, until key witnesses had died, the plaintiff’s attorney was dispirited, and the plaintiff’s ability to recover hopelessly frustrated.

⁵⁷ Friedman, *A History of American Law*, 354-366.

⁵⁸ *Prevatt v. Harrelson*, 132 N.C. 250, 252 (1903).

⁵⁹ *Meekins v. Norfolk and Southern Railway Co.*, 127 N.C. 29, 35-36 (1900) (Douglas, J., dissent; Clark, J., concurring in dissent); *Thomas Johnson v. The Southern Railway Company*, 122 N.C. 955 (1898).

Should a plaintiff's case reach the jury, a superior court judge could issue jury instructions that nudged juries toward finding in favor of the defendant corporation. In the case of a five-year-old mill village resident, drowned in a reservoir on the property of Selma Cotton Mills, Judge William Bond instructed the jury that North Carolina was "greatly indebted for its development to corporations and investment of capital by people who do not live in the state."⁶⁰ The judge went on to ask the jury to consider "how your county or our State would be today if we had no railroads in it, and no corporations, except those capitalized by residents of the State."⁶¹ Consequently, the jury returned a verdict in favor of the defendant. Although these jury instructions were later held to be erroneous by the North Carolina Supreme Court, they show the way in which a pro-business bias could find its way into the jury instructions provided by the trial judge.⁶²

Nonsuits and pro-industry jury instructions were not the only difficult obstacle to recovery for the prospective plaintiff. The many-headed hydra of common law defenses (contributory negligence, fellow servant doctrine, and assumption of risk) guarded the storehouse of compensation against the plaintiff's entry. These doctrines mutually supported one another in complex ways that effectively shifted risk from the employer to the employee and from industry to the public. Whereas contributory negligence sought to assign fault to the plaintiff, the fellow servant doctrine and assumption of risk were part

⁶⁰ *W. D. Starling, Administrator v. Selma Cotton Mills*, 171 N.C. 222, 226 (1916).

⁶¹ *Ibid.*, 227.

⁶² For an example of Judge W. M. Bond's pro-business bias, see *Proceedings of the Eighteenth Annual Session of the North Carolina Bar Association Held at Seashore Hotel, Wrightsville Beach, N.C., June 27, 28, 29, 1916* (Wilmington, N.C.: Wilmington Printing Company, 1916), 203, 205.

of a legal fiction that the laborer contracted with the employer knowing the respective dangers of both the machinery he worked upon and the fellows he worked with. These doctrines were all relatively new creations in North Carolina's courts, born or adopted into the law in the mid-nineteenth century. The earliest to be adopted in North Carolina was the fellow servant doctrine. It is a historical oddity that the common law doctrine that hindered attempts at recovery by industrial white laborers was adopted in a case concerning the rights of a slaveholder to recover from a local railroad for the death of a slave hired out to labor as a brakeman.⁶³

Unlike every other supreme court in the southern states, North Carolina's Supreme Court held that both hired-out slaves and free laborers could not recover damages from their employers caused by the negligence of a fellow servant. Justice Thomas Ruffin's opinion embraced the public policy concerns of English and Massachusetts courts, noting "the great number of servants needed and employed on the steamboats and railroads, which, have come so much into use in our times, and on which so many casualties or injuries from negligence happen."⁶⁴ Despite the inability of a slave laborer to contract for his labor, speak up about a negligent fellow servant, or leave his labors should the danger become too great—all underlying assumptions of the fellow servant doctrine when it was laid down in *Priestly v. Fowler*—Justice Ruffin waved these

⁶³ *Mungo T. Ponton v. Wilmington & Weldon Railroad Company*, 51 N.C. 245 (1858); See Frederick Wertheim, "Slavery and the Fellow Servant Rule: An Antebellum Dilemma," *New York University Law Review* 61 (December 1986): 1133-1137.

⁶⁴ *Mungo T. Ponton v. Wilmington & Weldon Railroad Company*, 51 N.C. 245, 246 (1858).

concerns aside as a “distinction [that] does not seem sound.”⁶⁵ The master retained the ability to “provide for the responsibility of the bailee for exposing the slave to extraordinary risks.”⁶⁶

Contributory negligence and assumption of risk were also fairly recent creations of the mid-nineteenth century. Contributory negligence as a complete bar to recovery by the plaintiff was adopted by the North Carolina Supreme Court in *Morrison v. Cornelius*. The 1869 case dealt with an abandoned saltpeter factory whose owners had fled the arrival of Union troops in April 1865, as the Confederacy fell apart. The plaintiff’s cattle had wandered onto the defendant’s property and consumed a poisonous liquid used to manufacture saltpeter, resulting in their subsequent deaths. After studying “leading American and English authorities,” the court concluded that an injured plaintiff “must show that he has exercised proper care and is free from blame in regard to the matter” or suffer *damnum absque injuria* (a loss without injury).⁶⁷ The doctrine was softened in 1887 when the North Carolina General Assembly passed an act to shift the burden of contributory negligence claims to the defendant.⁶⁸

Last, and most recent in adoption, was the doctrine of assumed risk. Although it was spawned alongside the fellow servant rule in the *Fowler* case, North Carolina courts

⁶⁵ *Ibid.*, 247.

⁶⁶ *Ibid.*

⁶⁷ *W. C. Morrison v. B. F. Cornelius and others*, 63 N.C. 346, 348 (1869); See also Charles F. Beach, *A Treatise on the Law of Contributory Negligence* (New York: Baker, Voorhis & Co., 1885), 425-426.

⁶⁸ *Laws and Resolutions of the State of North Carolina*, 1887, chap. 33.

were relatively slow to adopt the doctrine. However, by the 1880s the Supreme Court had adopted the doctrine of assumed risk as a bar to plaintiff's recovery in two circumstances. First, as in *Fowler*, a worker was assumed to have contracted with his employer for higher wages to compensate for any increased risk of his particular occupation.⁶⁹ Second, a worker could assume the risk of working a particularly dangerous piece of machinery if he either failed to report the defect to his employer or continued to labor on a dangerous piece of machinery of his employer whose defect the employer failed to remedy.⁷⁰ The worker was fixed with protecting himself from the risks of employment, as courts were fearful of making employers insurers of work-related injuries through the mechanism of tort law.⁷¹

Justice Clark's War on the Southern Railway Company

Despite, or maybe because of, Clark's employment with several North Carolina railroads in the 1870s and 1880s, Justice Clark emerged in the 1890s as a crusader against corrupt and dangerous railroad practices. From his private study in Raleigh, Justice Clark penned articles, editorials, and speeches denouncing the free pass system, high rates, and unsafe conditions. Often his struggle against the political influence of the railroads—that allowed them to block reform measures in the legislature—meant collaboration with

⁶⁹ *Samuel Johnson v. The Richmond and Danville Railroad Company*, 81 N.C. 453, 457 (1879).

⁷⁰ *Paul W. Crutchfield v. Richmond & Danville Railroad Company*, 78 N.C. 300, 302 (1878).

⁷¹ Friedman, *A History of American Law*, 350-366.

members of the Republican and Populist fusion movement that took control of the state legislature in 1894.

Justice Clark's first decision affecting the interests of the railroads was *Wilmington and Weldon Railroad Company v. B. I. Alsbrook*.⁷² In 1891 North Carolina's legislature passed an act authorizing the State's first Railroad Commission. The commission, still in its first year of operation, assigned a value of \$161,709 to a branch line of the Wilmington and Weldon line and instructed the Halifax County Commissioners to place the railroad's property on the county tax list. The railroad sought injunctive relief against the newly imposed tax based on an exemption from taxation granted by the North Carolina legislature before the Civil War.⁷³ The battle over the authority to assess and tax railroad property, especially in the infancy of the Railroad Commission, was perceived as a struggle between the sovereign power of the state to levy taxes and the ability of a railroad to avoid those taxes through exemptions over half-century old. Over the dissent of Chief Justice Merrimon, Justice Clark wrote a majority opinion strictly construing the railroads exemption so as not to cover newer branch lines—valued by Justice Clark at “ten to twelve millions.”⁷⁴ Clark's opinion in *Alsbrook* earned the ire of railroad operatives in the state, and his decision was appealed to the United States Supreme Court as a violation of the federal Constitution's Contract

⁷² *Wilmington and Weldon Railroad Company v. B.I. Alsbrook*, 110 N.C. 137 (1892).

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 151.

Clause.⁷⁵ While the United States Supreme Court upheld Clark's opinion, the state's railroad interests remained opposed to Clark's attempts to expand the powers of the Railroad Commission, as well as his attempts to whittle down traditional common law defenses they relied upon. Indeed, after the *Alsbrook* case Clark's colleagues on the court relied on him to write the court's majority opinions related to Railroad Commission cases.⁷⁶

Justice Clark viewed his relationship with the railroads—and by extension the people's relationship with them—as a “fight against R.R. domination.”⁷⁷ It was a struggle that saw Clark enter the public and legislative arena numerous times to contend for “the forgotten man” who paid the rates, labored for the railroads, or suffered from other illegal actions of railroads and their agents.⁷⁸ Often this stance put Justice Clark at odds with his fellow Democrats. A public feud with J. W. Wilson, a prominent member of the North Carolina Railroad Commission, who Clark resented as a functionary of the Southern Railway Company vice President, Alexander B. Andrews, strained Clark's relationship with the Democratic political machine in North Carolina.⁷⁹ This conflict led

⁷⁵ *Wilmington and Weldon Railroad Company v. B.I. Alsbrook*, 146 U.S. 279 (1892).

⁷⁶ Brooks, *Fighting Judge*, 225.

⁷⁷ Brooks, *Fighting Judge*, 306; “Walter Clark to A.W. Graham” March 15, 1897, in *PWC*, Vol. I, 306-307.

⁷⁸ Brooks, *Fighting Judge*, 95, 97.

⁷⁹ “Judge Clark Criticized,” *News and Observer*, August 21, 1896; “Judges in Politics,” *News and Observer*, August 22, 1896.

⁷⁹ Friedman, *American Legal History: Past and Present*, 563, 575.

Clark to work with the new Fusion legislature elected in 1894 and Republican Governor Daniel Russell elected in 1896 to achieve railroad reforms. Clark's collaboration with Republican and Populist elected officials led to legislation restricting the free pass system and abrogating the fellow servant defense for railroads in personal injury cases—Clark wrote both bills at the request of state legislators.⁸⁰ Shortly after Clark crafted these legislative bills, he also wrote two important majority decisions in railroad personal injury cases that served as the first interpretation of the federal Railroad Safety Act by a state court. Taken together, they significantly limited, or negated, the ability of railroads to avoid liability for negligent acts committed by their agents or injuries caused by faulty appliances.⁸¹

The conflict took a personal nature in 1894 when Clark crafted an amendment to the North Carolina State Constitution, modeled on a similar provision in the Constitution of New York, to strictly prohibit the practice of railroads issuing free passes.⁸² Of numerous railroad reform measures advocated by Clark, he considered a limitation on the railroads' practice of issuing free passes the most important. The original act authorizing the Railroad Commission in 1891 did include a prohibition on the issuance of free passes, but it was riddled with loopholes and almost entirely unenforced.⁸³ Indeed, Sen. Marion

⁸⁰ Brooks, *Fighting Judge*, 206.

⁸¹ See *S. H. Troxler v. Southern Railway Company*, 124 N.C. 189 (1899); *Steve Greenlee v. Southern Railway Company*, 122 N.C. 977 (1898).

⁸² Walter Clark, "About Railroad Rates," *Fayetteville Observer*, August 20, 1896.

⁸³ "Address Before the...Convention of Railroad Commissioners," in *PWC*, Vol. I, 483.

Butler, writing Clark in the winter of 1896, expressed frustration with the state's Railroad Commission as "slow & almost useless & powerless."⁸⁴ Enforcement was so lax that the state's Railroad Commission's chairman estimated that since the 1891 law was passed "100,000 free passes were issued annually."⁸⁵ Free passes offended Clark's progressive principles on two grounds. First, they acted as a non-monetary bribe to politicians. Second, and perhaps more odious to Clark, was that they served as a "cheap mode of controlling the politicians & officeholders of the state," paid for by "the masses."⁸⁶ The free pass system allowed the "rich and influential free [travel], by adding to the cost of their riding to the tickets of the poor and uninfluential."⁸⁷

With the New York State Constitution's anti-free pass amendment as a template, Justice Clark authored an amendment to graft a similar prohibition onto the North Carolina State Constitution. However, despite passing its first Senate reading, the bill was postponed when two of the state's three railroad commissioners counseled against its passage.⁸⁸ Clark expressed his frustration with the process and the constraints of his judicial role: "My position on the court and the jealousy & criticism of a judge taking part in politics, prevents my getting round among the members" of the legislature.⁸⁹ Clark's

⁸⁴ "Marion Butler to Walter Clark," December 29, 1896, in *PWC*, Vol. I, 297.

⁸⁵ "Address Before the...Convention of Railroad Commissioners," in *PWC*, Vol. I, 483.

⁸⁶ Walter Clark to Marion Butler, April 2, 1898, in *PWC*, Vol. 1, 330.

⁸⁷ *Ibid.*, 330-331; "Address Before the...Convention of Railroad Commissioners," in *PWC*, Vol. I, 483.

⁸⁸ Walter Clark to Marion Butler, February 20, 1897, in *PWC*, Vol. I, 304.

⁸⁹ Walter Clark to Marion Butler, February 11, 1897, in *PWC*, Vol. I, 303.

frustration was no doubt aggravated when a “well known railroad official” personally asked that the bill be withdrawn.⁹⁰ The conversation left Clark further ill-disposed toward the political activities of the railroad. When the anti-free pass amendment came back up for review on February 27, it was not even considered, according to Clark, because the bill was “stolen from the files no less than three times by some railroad lobbyist.”⁹¹ With his bill defeated, Clark lamented to Sen. Butler, “This fight between R.R.s & people as to the mastery is no child’s play but real war.”⁹²

The 1896-1897 legislative session was not a complete bust for Clark’s railroad reform agenda. Justice Clark wrote, and Rep. Hartness introduced to the state legislature, a fellow servant bill. The bill, if passed, would abolish the common law doctrine of fellow servant in cases involving railroad workers. The bill encountered similar resistance from the railroads, which sought to kill the bill by amending it to include “all dangerous callings—cotton mills, mine, steamboats and the like”—a proposition that could not have passed.⁹³ Unlike the contemporaneous free pass legislation, the fellow servant bill received near unanimous approval from the House Judiciary Committee and passed unanimously in the State House.⁹⁴ North Carolina’s Labor Commissioner praised the passage of the legislation as setting “human rights...at least equal to property

⁹⁰ Walter Clark, “About Railroad Rates,” *Fayetteville Observer*, August 20, 1896.

⁹¹ *Ibid.*

⁹² Walter Clark to Marion Butler, March 12, 1897, in *PWC*, Vol. I, 305-306.

⁹³ “The Fellow Servant Law,” *News and Observer*, February 18, 1897.

⁹⁴ “Fellow Servant Law,” *News and Observer*, February 21, 1897.\

rights.”⁹⁵ Years later Justice Clark still took pride in the law, disclosing publically for the first time in 1914 at a Labor Day rally that “[the] statute was drawn by me.”⁹⁶

Addressing the assembled crowd, he called for extending the Fellow Servant Act to include “factories, saw-mills, or other large companies employing great bodies of laborers.”⁹⁷

As the national economy recovered from the Panic of 1893 in the last several years of the nineteenth century, North Carolina’s Supreme Court increasingly encountered the problems created by the accident epidemic that plagued industrial labor—particularly the railroad industry. Steve Greenlee, an employee of the Southern Railway Company, lost an arm to a failed effort to couple two railroad cars at an Asheville, North Carolina, station.⁹⁸ A local jury found in Greenlee’s favor and awarded him \$1,500 in damages, to which the defendant company appealed, alleging that the judge’s jury instructions concerning contributory negligence and assumption of risk were in error.⁹⁹

Justice Clark, writing for a divided court, held that the railroad’s failure to provide automatic couplers for its freight cars constituted “continuing negligence” that overrode any contributory negligence of the plaintiff. Clark noted that the court had ruled in

⁹⁵ Ibid.

⁹⁶ Walter Clark, *American Federationist*, 976.

⁹⁷ Ibid.

⁹⁸ *Steve Greenlee v. Southern Railway Company*, 122 N.C. 977, 978 (1898).

⁹⁹ Ibid.; *Marion Messenger*, October 1, 1897.

Mason v. R.R. that the failure of a railroad to furnish automatic couplers for passenger cars constituted negligence per se; yet that decision put off a similar requirement for freight cars for reasons left unclear in the court's decision.¹⁰⁰ Consequently, *Mason* had left many railroad employees laboring on freight routes without protection from the dangers of old and often defective couplers. While the federal government had acted to remedy this problem with the Railroad Safety Appliances Act of 1893, the act only affected interstate railroads.¹⁰¹ In addition, the Interstate Commerce Commission gave railroads until January 1, 1900, to comply with the act's provisions, which called for automatic car-couplers—along with the implementation of several other safety devices.¹⁰² The delay in enforcement of the federal penalty and the limitation of federal enforcement to interstate railroads left a considerable number of railroad employees without protection.

Justice Clark's decision not only expanded *Mason* to include freight trains but ensured protection for employees who labored on intrastate railroads. With the establishment of railroad commissions by the federal and state governments to regulate the conduct of corporations, Clark remarked, "The courts will be very derelict in their duty if they do not force justice in favor of employees as well as the public."¹⁰³ *Greenlee*

¹⁰⁰ *Ibid.*, 978-979; *Mason v. Railroad*, 111 N.C. 482 (1892).

¹⁰¹ *Greenlee v. Southern Railway Company*, 122 N.C. 977, 980 (1898); Thomas, *Lawyering for the Railroad*, 227.

¹⁰² *Greenlee v. Southern Railway Company*, 122 N.C. 977, 979 (1898).

¹⁰³ *Ibid.*, 981.

granted injured employees the same protection passengers received six years earlier in *Mason*. Clark's chief purpose in creating the negligence *per se* standard was to grant "10,000 R.R. employees in N.C....equal protection of the law."¹⁰⁴

One year later the Southern Railway Company, dissatisfied with the court's ruling in *Greenlee*, appealed the case of S. H. Troxler, a brakeman, whose hand was mangled (and subsequently amputated) while coupling two cars.¹⁰⁵ The defendant requested the court "reconsider and overrule *Greenlee's* case."¹⁰⁶ They were no doubt encouraged by Justice Furches's dissent in *Greenlee*, which "was written as the opinion of the Court; but since it was written the Court has changed its opinion."¹⁰⁷ Public response to the decision was mixed, with the *News and Observer* and *Fayetteville Observer* responding positively, publishing the decision in full, while the *Charlotte Observer* labeled Clark's majority opinion "communistic."¹⁰⁸ It was not unreasonable on the part of the Southern Railway Company to think the earlier three-two decision might yet be overruled in its infancy.

Instead, in *Troxler* a unanimous court upheld *Greenlee* and issued an opinion, written by Justice Clark, that upbraided railroad corporations for their "indifference...in not adopting these life and limb-saving appliances" despite their small cost.¹⁰⁹ Turning to

¹⁰⁴ Walter Clark to A.W. Graham, June 1, 1898, in *PWC*, Vol. I, 334, emphasis in original.

¹⁰⁵ *Troxler v. Southern Railway Company*, 124 N.C. 189 (1899).

¹⁰⁶ *Ibid.*, 191.

¹⁰⁷ *Greenlee v. Southern Railway Company*, 122 N.C. 977, 986 (1898) (Furches, J., dissenting).

¹⁰⁸ Walter Clark to A.W. Graham, June 1, 1898, in *PWC*, Vol. I, 334; "An Important Decision," *News and Observer*, June 1, 1898; "An Important Decision," *Fayetteville Observer*, June 3, 1898.

¹⁰⁹ *Troxler v. Southern Railway Company*, 124 N.C. 189, 194 (1899).

the Interstate Commerce Commission's Twelfth Annual Report, Clark took notice of the "yearly casualties to railway employees" in 1897 that far exceed the number killed and wounded in the Spanish-American War.¹¹⁰ The nation's high accident rate was despite the increased use of automatic car-couplers throughout the 1890s which had led to a decrease of roughly 50 percent in railroad employee deaths and injuries from all causes. North Carolina suffered similarly, as the State's Railroad Commission's report for 1898 recorded an accident rate of one in six and-a-half injured or killed in the employ of the state's railroads.¹¹¹ Expressing his frustration with the slow pace of compliance with the federal Railroad Safety Act and the "terrible cost to life and limb" of older latch and skeleton couplers, Clark lamented that "it should not have required an act of Congress to enforce their universal adoption."¹¹²

Clark's condemnation of the railroads in *Troxler* was much stronger than in *Greenlee*. Responding directly to defense counsel's arguments seeking a reversal of the court's position in *Greenlee*, Clark wrote:

This matter of requiring these great corporations to protect the traveling public, and their employees as well, by the adoption of all safety appliances which have come into general use, is so important that we have gone into the subject at this length. Ordinarily owned by great syndicates out of the State in which they operate, and their management at all events removed from subjection to that sound public opinion which is so great a check upon the conduct of individuals and of government itself, the sole protection left to the traveler and the employee alike is the application of

¹¹⁰ *Ibid.*, 192.

¹¹¹ *Troxler v. Southern Railway Company*, 124 N.C. 189, 194-196 (1899).

¹¹² *Ibid.*, 193.

that law which is administered impartially, and which can lay its hand fearlessly upon the most powerful combination and protect with its care the humblest individual in the land.¹¹³

It was a conflict that did not end with a written opinion but continued into the public sphere. When the *Charlotte Observer* labeled Clark's opinion in *Greenlee* "communistic," he responded with public appeals through local newspapers, since the railroads "cut off all information from the people whenever they can." Indeed, Clark's letter to A.W. Graham is strikingly similar to an editorial in the *News & Observer*—suggesting that it was written by Clark himself and forwarded along to the newspaper but published as an editorial comment.¹¹⁴

Taken together, *Greenlee* and *Troxler* created a negligence *per se* standard that effectively blocked railroad companies from raising the common law defenses of fellow servant, contributory negligence, and assumption of risk, and thereby improved the chances of success for the plaintiff laborer. Moreover, the court's ruling was translated into other states and other industries. A few years after *Troxler*, Interstate Commerce Commission Secretary Edward A. Moseley wrote Clark to praise his opinion in *Greenlee* as a "great service to...the railroad employees of the country...it being the first judicial interpretation of the Safety Appliances Law."¹¹⁵ Moseley went on to compliment Clark

¹¹³ *Ibid.*, 195

¹¹⁴ Walter Clark to A.W. Graham, June 1, 1898, in *PWC*, Vol. I, 334; "The Greenlee Case," *News and Observer*, June 2, 1898.

¹¹⁵ Edward A. Moseley to Walter Clark, February 1, 1902, in *PWC*, Vol. II, 7.

for being “one of the judiciary who takes the people’s view on public questions and who hands down decisions in accordance with that view.”¹¹⁶

Justice Clark and the Mill Industries

With the combined efforts of federal and state authorities railroad workers were better protected at the beginning of the twentieth century than their fellow laborers in the furniture factories, lumber mills, and cotton mills of the South. The exclusion of southern mill laborers from these protections is most likely attributable to a combination of several factors. First, mill labor possessed less of an interstate nature, leaving federal authorities uncertain if they possessed the constitutional authority to intervene in intrastate industries. Second, unionization of mill laborers proceeded at a much slower pace than that of railroad employees. Local industrial leaders effectively resisted early attempts at unionization by the Knights of Labor in the 1880s and the American Federation of Labor’s National Union of Textile Workers in the 1890s.¹¹⁷

Third, the role of corporations and capital from outside the state was more apparent in the case of railroads, whereas the mill industry tended to be financed with greater local investment and managed or owned by local families.¹¹⁸ Thus, that the mill industry played less upon traditional southern resentment of northern wealth and foreign

¹¹⁶ Ibid.

¹¹⁷ Hall, et al., *Like a Family*, 100-102, 186-187; Dewey Grantham, *Southern Progressivism: The Reconciliation of Progress and Tradition* (Knoxville: University of Tennessee Press, 1983), 185.

¹¹⁸ See Bess Beatty, *Alamance: The Holt Family and Industrialization in a North Carolina County, 1837-1900* (Baton Rouge: Louisiana State University Press, 1999).

corporations. Whereas the wealth of northern and European railroad magnates reminded Southerners of their peripheral position in the national economy, cotton mills were seen as signs of a South that was maturing economically to regain its once prominent position in the national order.¹¹⁹ Richard H. Edmonds, prominent New South advocate and editor of the Baltimore *Manufacturers' Record* liked to brag that it was “southern men and southern money” that prompted the growth of southern industry.¹²⁰ Despite Edmond’s exaggeration, contemporary indictments of railroads compared with cotton mills show the general perception that cotton mills were less a creature of outside financial interests than railroads.¹²¹ Fourth, similar to railroads, cotton mill owners had influence in the state legislature and could trade their importance as employers, taxpayers, and community leaders to prevent or stall legislation against their interests. Fifth, the necessity of railroad travel kept the railroads in the public eye. To travel one had little choice in the last few decades of the nineteenth century but to take the train; few people who did not work at mills had any reason to visit them.

Clark was not opposed to industrial development. In 1865 Walter Clark, an eighteen-year-old Confederate veteran at the time, wrote to the *Daily Sentinel* complaining of the economic consequences of “southern indolence”:

¹¹⁹ C. Vann Woodward, *Origins of the New South, 1877-1913* (Baton Rouge: Louisiana State University Press, 1951).

¹²⁰ Richard Hathaway Edmonds, *Facts about the South: Promise of its Prosperity in the Light of its Prosperity in the Light of the Past Based on Limitless Resources* (Baltimore: Manufacturers' Record Publishing Company, 1907), 31-32, 43.

¹²¹ Broadus Mitchell, *The Rise of Cotton Mills in the South* (1921; repr., Columbia: University of South Carolina Press, 2001), 241-242.

Our magnificent country is unimproved, our factories unbuilt, our wants supplied from without, and the South, like the sun upon Gideon, has stood still in the onward race. The old declaimed against the Yankee enterprise as an abomination of Egypt, and the rising generation have lisped it in detestation.—Let them look around. 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 necessaries 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...we must foster enterprise.¹²²

Clark defended his criticism of Southern attitudes toward the North in 1865 in much the same manner he defended his more radical progressive beliefs—with an appeal to his southernness.¹²³ In the shared struggle for the Lost Cause (a myth Clark played a role in advancing but also manipulating to progressive ends) and his prominent southern pedigree as a descendant of the pre-war planter class, Justice Clark found common ground despite his uncommon, and often unpopular, political beliefs. Yet, despite Clark's openness to what some Southerners condescendingly referred to as "Yankee values," like many southerners, Clark was suspicious of foreign capital and corporations.¹²⁴ Clark favored industrialization similar to that proposed by J. S. Wynne

¹²² Walter Clark, "Yankee Cuteness and Southern Cant," *Daily Sentinel*, December 5, 1865, in *PWC*, Vol. I, 159-160.

¹²³ *Ibid.*, 159.

¹²⁴ Ayers, *Promise of the New South*, 26; Lawrence Larson, *Rise of the Urban South* (Lexington: University Press of Kentucky, 1985), 163-164.

in the *News and Observer Chronicle* that advocated investment by the local “capitalist, banker, merchant, clerk, laborer and all others.”¹²⁵ Writing the paper to commend Wynne’s plan, Justice Clark noted the rapid payment of the indemnity placed upon France after the Franco-Prussian War: “The prompt milliards which startled Germany and removed the last German soldier from the soil of France came from the hoarded savings of the people. The millionaires were ‘not in it.’”¹²⁶

With unionization efforts making little headway in the late nineteenth century, the strongest voices for industrial labor reforms came from anti-child labor advocates like Minister Alexander McKelway, Populist Clarence Poe, and Democrat Charles Aycock. Child labor reforms gained popular traction where other industrial labor reforms had failed because they could be advocated by their proponents as a “special kind of legislation having ‘nothing to do with’ the controversy between capital and labor.”¹²⁷ Yet it was not until 1903 that North Carolina enacted its first, flawed child labor law, which was relatively conservative and hard to enforce.¹²⁸ The sentiment of W. H. Williamson, owner of Pilot Mills in Raleigh represented that of many mill owners and legislators: “let the employer and employee settle these things, this is a free country for all.”¹²⁹

¹²⁵ J. S. Wynne, “One Mill a Year,” *News Observer Chronicle*, April 24, 1894.

¹²⁶ Walter Clark, “In Combined Effort Lies Prosperity,” *News and Observer*, April 25, 1894.

¹²⁷ Oliver H. Orr, *Charles Brantley Aycock* (Chapel Hill: University of North Carolina Press, 1961), 243-244.

¹²⁸ Woodward, *Origins of the New South*, 418; Timothy W. Vanderburg, *Cannon Mills and Kannapolis: Persistent Paternalism in a Textile Town* (Knoxville: University of Tennessee Press, 2013), 38.

¹²⁹ North Carolina Department of Labor and Printing, *Ninth Annual Report of the Bureau of Labor Statistics of the State of North Carolina for the Year 1895* (Winston, NC: Stewart’s Printing House, 1895), 70-71.

As child labor reforms progressed slowly in North Carolina, the need for child laborers increased in North Carolina's industrial enterprises. The North Carolina Bureau of Labor boasted that during the 1880s "the manufacturing and mechanical pursuits of the State have trebled and even quadrupled."¹³⁰ In 1895 the state's 156 cotton and woolen mills employed 15,752 laborers, of which 4,689 were children (and 1,558 were under fourteen years old).¹³¹ It should be noted that these numbers were self-reported by manufacturers to the Bureau of Labor Statistics and no doubt underreported the number of young children working in cotton and lumber mills throughout the state. By the end 1897 the number of textile mills in the state had increased to 207, operated 24,517 looms, and employed 26,287 (5,363, or 20.4 per cent were children).¹³² This growth trend continued as the economy recovered from the financial panic of 1893.

In an environment where "the threat of serious injuries was all around," child labor increased the risk of serious injury or death.¹³³ Children hung from, climbed upon, played ball (with improvised balls made of yarn) around, leaned against, and generally neglected to pay attention to the fast moving and powerful machines around them whose

¹³⁰ North Carolina Department of Labor and Printing, *Second Annual Report of the Bureau of Labor Statistics of the State of North Carolina for the Year 1888* (Raleigh, NC: Edwards & Broughton, 1888), 145.

¹³¹ North Carolina Department of Labor and Printing, *Ninth Annual Report of the Bureau of Labor Statistics of the State of North Carolina*, 1 ½.

¹³² North Carolina Department of Labor and Printing, *Eleventh Annual Report of the Bureau of Labor Statistics of the State of North Carolina for the Year 1897* (Raleigh, NC: Guy V. Barnes, Printer, 1898), 11, 14-15.

¹³³ Hall, et al., *Like a Family*, 84-85.

exposed parts offered the constant threat of lost fingers, hands, limbs, and lives.¹³⁴

Unfortunately for those children injured in the mill, the common law doctrine of contributory negligence often held the inattentive child to the same standard as a negligent adult.¹³⁵

Such was the case for Ebbirt Ward, an eleven-year-old boy whose parents brought suit against Odell Manufacturing in the winter of 1899.¹³⁶ While employed by Odell Manufacturing, Ward walked past a workbench where a co-worker was cutting wire and one of the errant pieces struck the child in his eye. The injury caused Ward permanent blindness in the injured eye. An Iredell County jury had awarded \$1,000 in damages; to which defense counsel appealed on the grounds that the judge's instruction on contributory negligence had been in error.¹³⁷ Clark's opinion for an evenly divided court responded directly to defense counsel's argument that Ward's claim should be barred because of the boy's own negligence.¹³⁸

First, Clark criticized the practice of child labor, comparing child laborers to "little prisoners" who labored eleven to twelve hours per day in a "stifling atmosphere" filled with dangerous "machinery whirring at high-speed."¹³⁹ He also criticized the social

¹³⁴ *Ibid.*, 94-95.

¹³⁵ *Fitzgerald v. Alma Furniture Company*, 131 N.C. 636, 641 (1902).

¹³⁶ *Ebbirt Ward, by his Next Friend, S. P. Ward v. Odell Manufacturing*, 126 N.C. 946 (1900).

¹³⁷ *Ibid.*, 946; "A Boy Gets Damages," *Raleigh Morning Post*, June 12, 1900.

¹³⁸ *Ward v. Odell Manufacturing*, 126 N.C. 947-948 (1900).

¹³⁹ *Ibid.*, 948-49.

impact of child labor, as the “little prisoners” were “deprived...of [an] opportunity for education,” and adult wages were driven down by their competition.¹⁴⁰ While Clark acknowledged that these were “matters of public policy which must be addressed solely to the legislative department,” he found room to attempt to implement changes within the common law. “There is an aspect in which the matter is for the courts,” Clark argued, attempting to convince his fellow justices that “it is negligence *per se*” for an industrial employer to hire young children.¹⁴¹ Clark’s reasoning for setting a negligence *per se* standard followed social and political critiques:

The children without opportunity of education, without rest, their strength overtaxed, 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?...Every sentiment of justice forbids that the corporation should rely on the plea of contributory negligence.¹⁴²

Clark’s opinion served three purposes. First, it prodded the “legislative department” to act upon the issue of child labor. Second, it served as a harsh rebuke to mill owners who employed children in similar conditions. Third, it argued for the establishment of a negligence *per se* standard of liability for cases involving child laborers. However, this

¹⁴⁰ *Ibid.*, 949.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, 948-949.

last purpose was frustrated because Clark was writing for an evenly divided court. Under court practice, implemented by Clark seven years earlier, the decision of a divided court affirmed the judgment in the particular case but did not serve as legal precedent.¹⁴³ Ward was entitled to collect his \$1,000 judgment against Odell Manufacturing Inc., but the negligence *per se* standard would have to wait.

Two years later the court heard a similar case, this time involving an even younger laborer. Nine-year-old William A. Fitzgerald began working for the Alma Furniture Company of High Point on January 1, 1900.¹⁴⁴ He was put to work sweeping the saw dust on the floors into the furnace for twenty-five cents per day. Two days later the boy was told to work on a sanding machine. Left alone with the device, Fitzgerald leaned against the machine. As a result “his hand was mashed between the rollers.”¹⁴⁵ A Davidson County jury awarded Fitzgerald \$1,000 in damages. Defense counsel appealed, listing numerous exceptions, the majority of which were directed towards the judge’s jury instructions.¹⁴⁶ Justice Clark’s opinion, again written for a divided court, ventured beyond the boundaries of the case to issue a warning to factory owners. Despite the fact that the defendant’s exceptions had not raised the issue of contributory negligence by the plaintiff, Clark stated:

¹⁴³ See *Town of Durham v. Richmond and Danville Railroad Company, et al.*, 113 N.C. 240 (1893).

¹⁴⁴ *Fitzgerald v. Alma Furniture Company*, 131 N.C. 636 (1902); Testimony of William Fitzgerald, *Fitzgerald v. Alma Furniture Company*, Supreme Court Original Cases, 1800-1909, Box 1,036, SANC.

¹⁴⁵ *Fitzgerald v. Alma Furniture Company*, 131 N.C. 636, 637 (1902).

¹⁴⁶ Defendant’s Exceptions, *Fitzgerald v. Alma Furniture Company*, Supreme Court Original Cases, 1800-1909, Box 1,036, SANC.

It 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 had made it illegal, and therefore negligence *per se* and irrebuttable, to employ any child in a factory, at the close of the year 1901.¹⁴⁷

Clark followed with a carefully compiled list of the child labor laws of twenty-seven American states and twenty different foreign nations.¹⁴⁸ Given the “consensus of opinion in the nearly entire civilized world,” Clark wrote, “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.”¹⁴⁹ In 1914, when Clark testified before the Industrial Labor Congressional Commission, he recalled that plaintiff’s counsel had made no broad social arguments:

The whole matter originated with me. I argued with the court and presented the proposition; I said the world out to move, and that the decision ought to be as broad as the injury, and that it was time to take a broader view, and two of the judges [Justice Faircloth and Justice Douglas] concurred with me and two dissented.¹⁵⁰

¹⁴⁷ *Fitzgerald v. Alma Furniture Company*, 131 N.C. 636, 643 (1902).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, 644.

¹⁵⁰ Testimony of Justice Walter Clark, United States Commission on Industrial Relations, *Final Report and Testimony*, 10454.

Although dissenting Justices Montgomery and Furches in their dissent lamented the personal injuries, “which so often come to these little sufferers,” they held fast to the “duty of the court—to expound the laws, not to make them.”¹⁵¹

Whereas in *Ward* the evenly divided Supreme Court’s opinion negated the decision’s value as precedent, Clark’s opinion in *Fitzgerald* was also of limited value as precedent given that it was in *obiter dicta*. However, the language was carefully worded to put on notice employers that the court would likely apply a negligence *per se* standard in the next case involving an injured child laborer. Such a standard invalidated the defendant’s traditionally strong defenses of contributory negligence, assumption of risk, and fellow servant in personal injury cases involving infant laborers.

Clark’s opinion in *Fitzgerald* no doubt represents the increasing frustration of child labor reform advocates in North Carolina. When, in 1901, the state legislature was ready to pass its first child labor reform act, a signed agreement by cotton manufacturers agreeing not to employ children under ten or children under twelve during the school term suddenly appeared.¹⁵² The voluntary agreement was unsatisfactory to child labor reform advocates like Clark in numerous ways. First, it was limited to child laborers in the state’s cotton mills; child laborers like William Fitzgerald working in the state’s furniture factories and Carrie Sims in its steam laundries were not included. Second, the agreement’s voluntary nature left it entirely unenforceable against its signatories—which

¹⁵¹ *Fitzgerald v. Alma Furniture Company*, 131 N.C. 636, 651 (1902) (Montgomery, J., dissenting).

¹⁵² Orr, *Charles Brantley Aycock*, 243.

included less than half of the state's cotton mills (and none of its lumber mills, furniture factories, and other industrial enterprises).¹⁵³

The legislature's failure to act, according to Justice Clark, had left the door open to judicial modification of the common law.¹⁵⁴ While entirely hesitant to overturn the enactments of the legislature, he had few reservations about adjusting common law doctrines that he perceived as harmful to justice for the state's laboring class. Clark told a United States congressional committee, "I don't recognize the right of some unknown man, who lived in different surroundings and in a different state of society to tell me what I shall say as to what is just between "A" and "B" to-day."¹⁵⁵ The inaction of the state's legislature left room for a proactive judiciary to adjust the standards of negligence with regard to injured child laborers.

In addition, the child labor issue could not be divorced from adult labor issues. Clark's opinions made direct reference to mills and factories "using the competition of [children's] cheap wages to reduce those of maturer age."¹⁵⁶ Indeed, in *Fitzgerald H. B. Crouch*, an adult coworker, testified that at Alma Manufacturing "boys are generally employed to do such work as the plaintiff was doing." In response to cross examination, Crouch claimed children were used "because they are cheaper than men."¹⁵⁷ A State

¹⁵³ *Ibid.*

¹⁵⁴ Testimony of Walter Clark, United States Commission on Industrial Relations, *Final Report and Testimony*, 10454.

¹⁵⁵ *Ibid.*, 10460.

¹⁵⁶ *Ward v. Odell Manufacturing*, 126 N.C. 946, 948 (1900).

¹⁵⁷ Testimony of H. B. Crouch, *Ward v. Odell*, Supreme Court Original Cases, 1800-1909, Box 1,036, SANC.

Bureau of Labor Statistics report for 1900 recorded that the average daily wage for a child laboring in North Carolina's furniture factories, like Fitzgerald, was forty cents; unskilled adult male labor cost the employer 50 percent more and skilled adult male labor cost almost eight times that amount.¹⁵⁸ Progressive reformers routinely complained that the low wages paid to children drove down the wages of adult laborers.¹⁵⁹ By imposing a negligence *per se* standard for the employment of young children the court readjusted the cost of child labor. It discouraged the employment of children by increasing the likelihood that the employer could not avoid liability for the kinds of accidents children tended to cause due to their natural tendencies toward inattentiveness, distraction, and playfulness.

Clark's opinion in *Fitzgerald* suited the public mood of the day. The legislature had grown tired of the cotton mill owners' failure to live up to their voluntary agreement to limit child labor. Moreover, Clark's decision "encouraged some textile mill owners to accept regulatory legislation."¹⁶⁰ No doubt informed by their legal counsel that their recourse to common law defenses in infant personal injury suits was already clearly endangered by the North Carolina Supreme Court, there was less economic reason to

¹⁵⁸ North Carolina Bureau of Labor and Printing, *Fifteenth Annual Report of the Bureau of Labor and Printing* (Raleigh: Edwards & Broughton, 1901), 157.

¹⁵⁹ For contemporary complaints about child labor reducing wages, see Edwin Markham, Benjamin Lindsey, and George Creel, *Children in Bondage: A Complete and Careful Presentation of the Anxious Problems of Child Labor—its Causes, its Crimes, and its Cure* (New York: Hearst's International Library, 1914), 18, 117, 138, 304, 310, 333; Julia E. Johnsen, *Selected Articles on Child Labor*, comp. Julia E. Johnson (New York: H. W. Wilson Company, 1925), 65, 68.

¹⁶⁰ Grantham, *Southern Progressivism*, 186.

resist a limitation on the prohibition of child labor below a certain age. When Alexander McKelway, southern organizer for the National Child Labor Committee, requested Clark send him a copy of his opinion in *Fitzgerald*, McKelway praised the decision as contributing to the state's first child labor law.¹⁶¹

Soon after the enactment of the 1903 child labor law that prohibited the labor of all children under twelve years of age, the North Carolina Supreme Court officially instituted a negligence *per se* standard in child personal injury cases where failure to follow the statute led to the plaintiff's injury.¹⁶² Yet many employers continued to employ child laborers regardless of the inherent liability issues. For example, in 1911, an eleven-year-old boy working for the Atlantic Coast Line Railroad Company as a messenger boy was found dead on the tracks with one of his legs severed from his body. No one had seen the accident, although witnesses had seen the boy riding on the defendant's train earlier that morning. Over Chief Justice Clark's dissent the court held there was insufficient evidence of the defendant's negligence to go to the jury.¹⁶³

Chief Justice Clark's particularly harsh dissent, filled with references to the Civil War and condemnations to railroad employers, wedded the issues in *Greenlee* and *Troxler* with those of *Ward* and *Fitzgerald*. Clark, seemingly exasperated by the majority's decision that there was insufficient evidence of the defendant's negligence,

¹⁶¹ A. J. McKelway to Walter Clark, September 2, 1907, in *PWC*, Vol. II, 92-93.

¹⁶² *Gaines Leather v. Blackwell Durham Tobacco Company*, 144 N.C. 330 (1907).

¹⁶³ *Sallie Pettit, Administratrix, v. Atlantic Coast Line Railroad Company*, 156 N.C. 119 (1911).

wrote, “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.”¹⁶⁴ Clark lamented that it appeared the court was turning away from the principles expressed in *Ward v. Odell* and subsequent “humane decisions of this court.”¹⁶⁵ The infant Pettit was exposed “to an accumulation of perils greater to him...than that which met the charging column of brave men on Cemetery Ridge [Gettysburg]. Many soldiers survived four years of war. This child was slain on the fourth day of his employment.”¹⁶⁶ Clark simultaneously expanded his Civil War analogy to include all industrial laborers.

A conservative estimate of the number of workmen killed or maimed in this country every year in industrial accidents is about 500,000. It is said that the total number killed and wounded in the Union Army during the Civil War was 385,325. In other words, the whole Confederate Army was unable to kill and cripple as many Union men in four years as are now killed and crippled in industrial employment in a single year.¹⁶⁷

As he did in *Troxler* and *Greenlee*, Chief Justice Clark assailed the “avarice of the defendant.” He also criticized the reluctance of the court to intervene to ensure the fair distribution of the risks of employment in dangerous industries:

¹⁶⁴ *Ibid.*, 135 (Clark, C.J., dissenting).

¹⁶⁵ *Ibid.*, 136.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, 138.

We cannot expect this condition to improve if the courts can be induced to place the blame upon those killed and wounded, because, in order to make a livelihood and with a purpose of obeying those for whom they labor, they venture in dangerous pursuits, while under such conditions the same courts relieve the master, who created the condition and gave the orders, of all liability and blame whatsoever.¹⁶⁸

Despite the imposition of a negligence *per se* standard in cases involving railroad couplings for adults or violations of the child labor law by the state's employers, *Pettit* provides an example of how defendants still found ways around liability to injured workers and their families. Moreover, it should be noted that the plaintiff employee in most industrial enterprises still bore most of the risk of accidents and negligence—not his employer.

Chief Justice Clark's opinion in *Pettit*, and other child labor cases, was consistent with progressive reform movements of his era but different in that it sought to give the state's highest court a more active role in reform. Clark advocated a proactive judiciary in cases where the legislature had failed to enact reforms that shifted the economic risk of negligent injuries in the industrial workplace based "upon the principles of right and justice." While the majority were wary of the influence of "sentimentalism" and insistent that the court must decide the case with recourse only to the "the cold and unyielding facts of the case," Clark appealed to rebalancing liability in negligence cases in the plaintiff's favor.¹⁶⁹

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, 132-133 (Walker, J., concurring).

Infants, Idiots, Lunatics, Convicts and Married Women

Antebellum North Carolina courts embraced common law views of *femes covert* (married women) as “morally incapable of doing any act which is to bind themselves.”¹⁷⁰ Common law doctrine and North Carolina statutory law in the colonial and antebellum eras often made special provision for “the deeds of infants, feme coverts, of one non compos, a person under legal duress, & c.”¹⁷¹ As a class “the law deemed [them] incapable of taking care of themselves.”¹⁷² North Carolina’s Supreme Court attached such importance to common law doctrine that despite acknowledging the legislature’s power to modify the common law via statutory enactment, on some occasions the court modified “the true and grammatical construction” of a statute regarding the legal disabilities of married women to fit “the privileges and immunities possessed by persons at the common law.”¹⁷³ The Reconstruction state legislature in 1868 substantially changed married women’s property rights. Article X, Section 6 of the 1868 Constitution established a wife’s property as her “sole and separate estate and property,” which could be sold with her husband’s consent and, furthermore, protected from her husband’s “debts, obligations, or engagements.”¹⁷⁴

¹⁷⁰ *Den of the Several Demises of Robinson and others v. Barfield*, 6 N.C. 390, 417 (1818).

¹⁷¹ *Streator v. Jones*, 10 N.C. 423 (1824).

¹⁷² *Davis and Wife and others v. Cooke*, 10 N.C. 608, 612 (1825).

¹⁷³ *Ibid.*, 611-612.

¹⁷⁴ North Carolina Constitution (1868), art. 10, sec. 6.

Yet the hold of the common law could not be easily broken. North Carolina courts continued to apply common law to civil and criminal actions involving husbands and wives. In civil cases the courts employed the common law to limit married women's ability to make commercial transactions. In the area of criminal law the North Carolina Supreme Court refused to recognize the state's ability to intervene in "trivial complaints arising out of the domestic relations." In an 1868 case where a husband, without provocation, had assaulted his wife with a switch, the court refused to recognize the husband's assault as actionable because "the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government."¹⁷⁵ An 1870 case where a husband tried to stab his wife on a public street compelled the court to recognize an assault between husband and wife; after all, the public nature of the assault rendered concerns about publicizing marital troubles moot.¹⁷⁶ Even four years later, in 1874, while the Supreme Court was conflicted. While the court called the judicial doctrine that allowed domestic violence "barbarism," the court still insisted that "if no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."¹⁷⁷ This precedent was not entirely abrogated until 1921.¹⁷⁸

¹⁷⁵ *State v. A.B. Rhodes*, 61 N.C. 453, 454 (1868).

¹⁷⁶ *State v. Ridley Marbrey*, 64 N.C. 592, 592-593 (1870).

¹⁷⁷ *State v. Richard Oliver*, 70 N.C. 60, 61-62 (1874).

¹⁷⁸ *Lacy Crowell v. W. J. Crowell*, 181 N.C. 66 (1921).

Clark's early career in newspapers, law, and as a superior court judgeship provides little information on Clark's views of women's rights issues. The first indication of such appears in a dissenting opinion written by Justice Clark in 1892, three years after his appointment to the North Carolina Supreme Court. The case, *Williams v. Walker*, involved the obscure legal identity of the free trader.¹⁷⁹ Married women, lacking the ability to own or convey their own property at common law, were given via statutory enactment in North Carolina, a means to engage in commerce. A woman's husband could sign a legal form consenting to her buying, selling, and trading in real property. This legal instrument then had to be filed with the register of deeds in her principal place of business. In *William v. Walker*, a deceased married female property owner had executed a mortgage on her property that her husband agreed to and signed yet had not appropriately recorded the free trader certification at the register of deeds.¹⁸⁰

Based on these facts the court's majority voided the mortgage because the wife lacked free trader status due to her failure to file the requisite paperwork. The court's majority reasoned that to do otherwise would have "broken down all the protection now afforded to *femes covert*."¹⁸¹ Behind this justification rested the legal assumption that women required elaborate protections against fraud, undue inducements, and their own poor judgment. Yet Associate Justice Clark, in one of his first dissents on the court,

¹⁷⁹ *W.W. Williams, Trustee v. A.B. Walker, et al.*, 111 N.C. 604 (1892).

¹⁸⁰ *Ibid.*, 606.

¹⁸¹ *Ibid.*, 607.

argued, “The Constitution and the present statutes... were certainly intended to emancipate [women], not to assimilate them farther into the condition of infants in law, and incompetents.”¹⁸²

When a similar case arose a year later, in this case the wife’s free trader status was undisputed, and Justice Clark wrote for a unanimous court that the Constitution of North Carolina did not throw “additional shackles around women” in the management of their property and that the law—properly interpreted—was “in accordance with the free spirit of the age and the universal trend of legislation the world over.” The Constitution did nothing less than “emancipate [women] from most of the restrictions formerly existing.”¹⁸³ The themes of the “spirit of the age” and emancipation showed up often in Clark’s subsequent opinions, letters, and addresses.

In 1898 Clark developed a new line of argument against legal discriminations that targeted married women. In *McLeod v. Warren Williams and Wife* a married female debtor sought to evade a creditor’s judgment because, lacking free trader status, she could not have incurred the debt. While the court’s majority found that she was not a free trader and therefore could not bind herself or her property, Clark once again vigorously dissented. In addition repeating his past arguments regarding the state’s constitution, Clark introduced several new arguments. First, he argued that the classification of women “with ‘idiots, lunatics, and infants’” was “unjust and ungallant.”¹⁸⁴ It was the

¹⁸² *Ibid.*, 613 (Clark, J., dissenting).

¹⁸³ *Strouse, Loeb & co. v. W.H. Cohen and Wife*, 113 N.C. 349, 353 (1893).

¹⁸⁴ *A.H. McLeod v. Warren Williams and Wife*, 122 N.C. 451, 459 (1898) (Clark, J., dissenting).

beginning of arguments based on verbiage about chivalry and gallantry meant to appeal to a southern audience that valued such concepts in theory, if not in practice. Second, through historical allusions to Deborah (Judge of Israel), Queen Elizabeth, and Queen Victoria, Clark sought to establish the competency of women to exercise judgment without existing legal “protections.” Third, he argued pragmatically that these discriminations in law had been eliminated in numerous jurisdictions (American and foreign). Moreover, in numerous states married women were fit to serve as lawyers, doctors, bank presidents, postmasters, and even voters.¹⁸⁵ His decisions and speeches from 1899 through 1920 echoed and built on these arguments.

The North Carolina legislature acted in 1899 to remedy legal discriminations against women when it removed women from the legal classes (infants, idiots, lunatics, and convicts) “under disabilities” against whom the statute of limitations could not run.¹⁸⁶ Yet the court’s majority proved unwilling to change along the same lines. In *Weathers v. Borders*, the same year, a husband and wife verbally contracted with a builder to construct a home on the wife’s property. The couple failed to pay the full balance and the contractor sought a judgment against the husband and wife. While the lower court awarded a judgment against the husband, the court refused to award a judgment against the wife or place a mechanic’s lien on the wife’s house.¹⁸⁷

¹⁸⁵ *Ibid.*, 459-460.

¹⁸⁶ *Code of Civil Procedure of North Carolina*, 1900, Chap 4, Sec. 163.

¹⁸⁷ *Weathers & Crowder v. M. D. and J. S. Borders*, 124 N.C. 610, 620 (1899).

The court's majority held that the statutory requirements of Section 1826 of the North Carolina Code regarding free traders required explicit written consent for all transactions.¹⁸⁸ Seeking to inoculate himself from Clark's biting criticism, Republican Justice Robert Douglas wrote a concurrence that no doubt spoke for at least one other member of the court's majority—if not all. "I certainly did not intend the slightest reflection upon married women by continuing to give them the same protection afforded to 'infants, idiots, lunatics and convicts,'" the Republican justice pleaded.¹⁸⁹ Hers was a domestic sphere that required protection, and women recognized as much: "She feels no degradation in being upon an equality with that 'infant' in the love of a father and the protection of a husband."¹⁹⁰ Justice Douglas no doubt spoke for the majority, even if the majority was not willing to put into writing a sentiment against liberalizing the law: "I feel neither the desire nor the obligation to shoulder my judicial battle-axe in a crusade against the wisdom of the ages."¹⁹¹

While Justice Douglas was loath to lift his judicial battle axe, Justice Clark had no such reservations. Clark's dissent attacked the court's expansion of the law to include all contracts—not simply conveyances. It was a violation of the North Carolina Constitution and a legal reversion that placed married women "in medieval leading strings" created by

¹⁸⁸ *Ibid.*, 614.

¹⁸⁹ *Ibid.*, 619 (Douglas, J., concurring).

¹⁹⁰ *Ibid.*, 620.

¹⁹¹ *Ibid.*

the courts. Lastly, by way of a reference to the *American Law Review*, Clark introduced yet another argument that would become a staple of his speeches about women's rights. He claimed, "The law of the status of woman is the last vestige of slavery."¹⁹² In a generation not far removed from the antebellum era the argument assumed a distinctly southern (and controversial) aspect when employed by Clark.¹⁹³

These requirements remained an issue even in 1911, when Justice Clark wrote the majority opinion for a divided court in the case of *Rea v. Rea*.¹⁹⁴ A widow sought to undo a transfer of stock in a cotton mill to her deceased husband, which had been caught up in his estate, by pleading that her husband had not agreed to her transfer of the stock.¹⁹⁵ Clark used the case to speak for a court divided three-to-two that judicial limitations on married women's ability to contract and convey property were to be viewed as narrowly as possible. A new bare majority of the court composed of Chief Justice Clark and Associate Justices Platt Walker and Allen Brown established Clark's previous dissents as the new precedent. The change did not go unnoticed. The *News and Observer* ran a headline proclaiming, "Married Women are Emancipated."¹⁹⁶ An

¹⁹² *Ibid.*, 618 (1899) (Clark, J., dissenting).

¹⁹³ See Chapter 6, Walter Clark and Women's Suffrage: "Without Distinction by Sex or Birth" for further discussion of Clark's comparison of slavery and the legal treatment of women.

¹⁹⁴ *Martha C. Rea v. J.K. Rea, Administrator of C.W. Rea, Deceased*, 156 N.C. 529 (1911).

¹⁹⁵ *Ibid.*, 530.

¹⁹⁶ *News and Observer* quoted in *PWC*, Vol. II, 54.

editorial in the same paper praised the decision for “giv[ing] women absolute control over their property....[and] insuring a broader and more enlightened policy.”¹⁹⁷

Before Clark’s lauded opinion in *Rea v. Rea*, the Chief Justice had grown impatient with the glacial pace of change on the court with regards to women’s property rights. Consequently, in November 1910, Clark penned and distributed a letter to all the members of the North Carolina General Assembly. In that letter the Chief Justice requested the representatives to bring the statutory law pertaining to women’s property rights “into harmony with the best modern thought and conditions.”¹⁹⁸ Several legislators responded, some with requests for the Chief Justice to draw up specific bills for them to introduce at the upcoming session.¹⁹⁹ The period from 1910-1920 saw an activist Clark, who fully embraced women’s suffrage and promoted the expansion of women’s rights by opinion, letter, and speech.

After 1910 Clark’s correspondence with suffragists exploded, as he suddenly began exchanging letters with Anna Shaw and Carrie Catt (National American Woman Suffrage Association presidents), Jeannette Rankin (U.S. Representative from Montana), Alice Paul (National Woman’s Party), and a host of other local and state suffrage leaders. Most of these exchanges concerned requests for Clark to speak at conventions, draft pieces of legislation, or write letters in support of the legality of suffrage for distribution

¹⁹⁷ Ibid.; “Married Women in Control of Their Property,” Winston-Salem *Western Sentinel*, November 14, 1911.

¹⁹⁸ Walter Clark to each Member of the General Assembly, November 12, 1910, in *PWC*, Vol. II, 106-107.

¹⁹⁹ Walter Clark to Robert Martin Douglas, November 25, 1910, *PWC*, Vol. II, 108-109.

to prominent, but reluctant, state officials.²⁰⁰ The Chief Justice responded: he wrote at least half a dozen legislative bills concerning women's property rights and suffrage; delivered at least one public speech on women's suffrage every year between 1912 and 1919; and he actively petitioned the North Carolina legislature and the state's senators to push for significant changes in the law. Yet Clark still advocated from the bench, and his judicial advocacy often overlapped with his public advocacy (even going so far as to use the exact same language in his opinions and speeches).

Femes Covert: Judgments, Petitions, Privy Examinations

Ten days after the 1912 election Clark sent a letter to several prominent women's suffrage leaders in North Carolina. He sought to bring their attention to a "case argued before our court... yesterday."²⁰¹ In the case, a married woman, Louisa Price, was riding through Charlotte in a horse and buggy when an electric railway train collided with her carriage and dragged her some distance. The collision, and subsequent dragging, caused significant injuries, including an amputated foot, a crippled arm, and a severe gash to her face. Mrs. Price and her husband brought suit against the Charlotte Electric Railway Company seeking damages for the wife's pain and suffering and diminished capacity to labor.²⁰² The jury found for the plaintiff and awarded her \$5,000 in damages.²⁰³ While

²⁰⁰ See Sara Weil to Walter Clark, May 30, 1913, Correspondence, 1912-1915, Walter Clark Papers, SANC; Sallie S. Cotton to Walter Clark, November 19, 1912, in *PWC*, Vol. II, 180-181.

²⁰¹ Clark to Various Women Leaders, November 15, 1912, in *PWC*, Vol. II, 179.

²⁰² *Price v. Charlotte Electric Railway Company*, 160 N.C. 450 (1912).

²⁰³ *Ibid.*, 453 (Clark, C.J., concurring).

there was sufficient evidence to prove the engineer's negligence in exceeding the speed limit and failing to issue a warning or signal, the company challenged the ruling on the ground that a *feme covert* could not recover damages for diminished capacity—such belonged to her husband alone.²⁰⁴ While the outcome of the case had already been decided, though not published, Clark suggested the suffrage leaders pre-emptively strike against the common law rule that barred recovery to a married woman by pressing the legislature for a statute overturning the common law principle. Clark included a bill of his own drafting that “if introduced and properly championed” would pass the North Carolina legislature. Sallie Southall Cotton, president of the North Carolina Federation of Women's Clubs, responded affirmatively with promises to “try to have it enacted into law.”²⁰⁵

Shortly after Mrs. Cotton's response, the North Carolina Supreme Court's decision in *Price v. Charlotte Electric Railway Company* was published. While the court's majority sidestepped the issue of the discrimination at common law against married women by noting the husband's role as co-plaintiff was sufficient remedy, Clark issued a concurrence to directly address the issue. In language almost word-for-word with his earlier letter to women's suffrage leaders, Clark skewered the common law rule: “[it] cannot be maintained except upon the principle that the earnings of a slave and

²⁰⁴ *Ibid.*, 454.

²⁰⁵ Sallie S. Cotton to Walter Clark, November 12, 1912, in *PWC*, Vol. II, 177; “Clark to Various Women Leaders,” November 15, 1912, in *PWC*, Vol. II, 179-180; Cyrus Watson's Letter to the Newspapers on Behalf of Clark, May 4, 1912, *PWC*, Vol. II, 152-155; Sallie Cotton to Clark, November 19, 1912, in *PWC*, Vol. II, 181; *Ibid.*, 180-181.

damages for injuries to the slave's person are the property of the master.”²⁰⁶ Clark concluded with a broad view of the relationship between the courts, women, and statutory law:

Every 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 us by the dead hand of the Past. The decisions of the courts should always be in accord with the spirit of the legislation of to-day, which should not be misconstrued to conform to the views of dead and forgotten judges of centuries long over past, who were not always learned and able, and who, if wise, were rarely wise beyond the narrow vision of their own age.²⁰⁷

In a postscript forever etched into the North Carolina Law Reports, which Justice Clark edited, Clark noted: “The General Assembly of 1913 enacted that a married woman can recover her earnings and damages for personal injuries for her own use, and without joinder of her husband in the action.”²⁰⁸ Notably Clark did not acknowledge that it was likely his bill that was enacted in 1913.²⁰⁹

Less than one year after the passage of this act, meant to remedy the majority decision in *Price*, the Supreme Court considered a similar case in *Josephine Floyd and Husband v. Atlantic Coast Line Railway Company*.²¹⁰ Grady O’Berry Floyd, an

²⁰⁶ *Price v. Charlotte Electric Railway Company*, 160 N.C. 450, 454 (1912).

²⁰⁷ *Ibid.*, 457 (Clark, C.J., concurring).

²⁰⁸ *Ibid.*

²⁰⁹ Jeanne B. Stearne to Walter Clark, April 4, 1913, Correspondence, 1912-1915, Walter Clark, SANC.

²¹⁰ *Josephine Floyd and Husband v. Atlantic Coast Line Railway Company*, 167 N.C. 55 (1914).

eighteen-year-old boy, was struck and killed by an Atlantic Coast Line Railway train. The boy's mother filed suit for mental anguish due to the mutilation of her son's body that occurred post-death.²¹¹ The boy's father joined as a nominal party and disclaimed any right to recover on his behalf. The trial court nonsuited the plaintiff mother, holding that the father was the only party who could bring suit.²¹² While the Supreme Court's majority held that the claim for mental anguish was actionable, it joined the trial court in holding the wife could not bring the claim, as such a right belonged to her husband. The court's holding rested on statutory law regarding the property of deceased children reverting to a hierarchy of next of kin, with the father given the first position.²¹³ Yet this decision meant the court was treating the body of Grady Floyd as a piece of quasi-property so that it might fall within the statute concerning intestate individuals.

Clark's dissent argued that the court should not consider this case one of distributing an estate, but as a straightforward tort for mental anguish.²¹⁴ The injury rested not in the damage to the son's body but in the emotional trauma suffered by the mother in seeing her son's mangled corpse. As a tort it fell within the statute, passed the previous year, to allow married women the right of recovery even when suing alone. Once again a conservative majority on the court had interpreted statutory law in such a

²¹¹ *Ibid.*, 57.

²¹² *Ibid.*

²¹³ *Ibid.*, 61-62.

²¹⁴ *Ibid.*, 62 (Clark, C.J., dissenting).

way to defeat a statutory enactment that had sought to broaden women's legal rights to recover.²¹⁵

In the same year the court's majority issued its decision in *Price* limiting women's right to recover, it also issued an opinion indirectly related to women's suffrage that elicited another Clark dissent. In *Gill v. Board of Commissioners of Wake County* the court was asked to decide if a woman was a freeholder for the purposes of a statute that required one-fourth of freeholders to sign a petition requesting the creation of a special school district. At issue was a tax levied to finance the new school district in Wake Forest. Opponents sought to block the new tax by claiming that the statutory requirements had not been met since female freeholders were not included in the tally of Wake Forest freeholders.²¹⁶ If women counted as freeholders it would dilute the number of petitioners and thereby bring the petition beneath the required statutory bar of one-fourth.

The case turned upon the fairly technical matter of the legal definition of a freeholder. The court's majority held that for the purposes of the statute a freeholder had to both own property and meet the qualifications of a voter.²¹⁷ The court's ruling in *Gill* upheld the creation of the special school district and the resulting tax, while limiting protections for female property holders who would bear the burdens of taxation. Clark's

²¹⁵ *Ibid.*, 62-63.

²¹⁶ *George E. Gill et al. v. Board of Commissioners of Wake County*, 160 N.C. 176 (1912).

²¹⁷ *Ibid.*

dissent stressed the gender neutral definition of freeholders. Clark lamented that once again the “debris of a rejected and barbarous legal system [had] destroy[ed] an act...in accord with the spirit of an advancing civilization.”²¹⁸ He concluded by reprimanding the majority, “It is not for us to bivouac always by the abandoned campfires of more progressive communities. The courts should construe legislation from the standpoint of this age and of the men who enact it.”²¹⁹ It was the first of several cases where the court’s majority relied upon common law and women’s disfranchisement to place obstacles in the way of women seeking greater autonomy.

Two examples of such cases are *State Ex Rel. Attorney General v. Noland Knight* and *Bank of Union v. R. B. Redwine, et al.*²²⁰ As mentioned earlier, the *Knight* case arose to test the legality of appointing a woman to fill the role of notary public under a new state statute. The case turned upon the legislature’s declaration that notary publics were “a place of trust and profit, not an office.”²²¹ The court’s majority held the statute unconstitutional, as notary public was a public office that, under the 1868 Constitution, could only be filled by one eligible to vote. As women lacked suffrage in the state, they could not be appointed to fill the office of notary. Chief Justice Clark’s dissent argued that “the entire experience and recognition of the rest of the world is against the

²¹⁸ *Ibid.*, 196 (Clark, C.J., dissenting).

²¹⁹ *Ibid.*

²²⁰ *State Ex. Rel. Attorney General v. Noland Knight*, 169 N.C. 333 (1915); *The Bank of Union v. R. B. Redwine, John C. Sikes, et al.*, 171 N.C. 559 (1916).

²²¹ *State Ex. Rel. Attorney General v. Noland Knight*, 169 N.C. 333, 354 (1915) (Clark, C.J., dissenting).

[majority's] position.”²²² Clark construed the statute as a piece of social legislation to address “changing conditions...[that] forced [women] to seek new and wider employment.” Such legislation was within the recognized authority of the legislature. Moreover, the court’s reading of the Constitution went beyond its wording, which merely protected the rights of eligible voters to hold office (a protection inserted to protect black officeholders). “If the plaintiff were a man,” Clark argued, “he would not be debarred from holding this appointment unless he were an idiot, a lunatic, or a convict.”²²³ Clark’s argument, refuting sex discrimination in office holding, concluded, “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. Will the Court hold that it is?”²²⁴

And again the following year the same question of female office holding arose in *Bank of Union v. R. B. Redwine, et al.* in a more roundabout manner. On its face the case adjudicated claims to stocks used as collateral to secure a loan between the estate of the deceased and the bank. Yet the facts of the case included the involvement of a female deputy clerk of the superior court who recorded one of the liens. While the court’s majority declined to consider the question of her involvement, as it was not necessary to the outcome of the case, it felt compelled to again make clear its decision against women

²²² *Ibid.*, 358-359 (Clark, C.J., dissenting).

²²³ *Ibid.*, 363.

²²⁴ *Ibid.*

as public office holders.²²⁵ Perhaps still smarting from the publication of Clark's *Knight* dissent in the *News and Observer*, the majority stated:

It is unnecessary to repeat the reasons given for the decision of the Court in the *Knight case*, but none of them were based on the inferiority of women or their unfitness for office. The propriety and wisdom of female suffrage, and of the eligibility of women to hold office are political questions, which must be settled by the people, and which we cannot discuss or consider in the determination of legal questions.²²⁶

Clark's dissent noted that the court's view of female office holding had grave implications. It had passed upon deciding directly if women could hold the office of deputy clerk—instead merely suggesting it in *dictum*—to avoid a disastrous outcome. If women were disqualified from holding the office, then their actions while in office carried no authority. And as Union County at the time had a female deputy clerk, and had previously had three other female deputy clerks, there existed a large number of titles and legal proceedings whose legitimacy could be questioned. Indeed, in the present case the plaintiff's brief argued the deed at issue void “because the deputy clerk was a woman, and, therefore, not qualified to administer an oath.”²²⁷ Moreover, Clark's dissent questioned why women, able to hold office at the federal level as well as abroad—including under the common law in England—were considered unqualified to hold the

²²⁵ *The Bank of Union v. R. B. Redwine, John C. Sikes, et al.*, 171 N.C. 559, 569 (1916).

²²⁶ *Ibid.*

²²⁷ *Ibid.*, 570 (1916) (Clark, C.J., dissenting).

position of notary in North Carolina. Clark's frustration then veered into sarcasm and attacked the court's construction of the state's constitution:

But it is urged that the duties of the deputy clerk, though not a very high position, are "judicial." It is perhaps natural that judges should think that "duties judicial" require a peculiar qualification of mind. They would not like to say, perhaps, "a mind superior to that possessed by women," but "a mind of a different cast from that of women," for though they have been able sovereigns, they might not make good judges, and might be "too emotional" to properly probate this deed in trust!²²⁸

Redwine was the last of the office holding cases that barred women from public office due to their disfranchisement. Within the next half decade North Carolina's women would gain the franchise and clear the obstacle placed in their way by the court's majority.

Segregation, Lynching, and the Common Man

Considering Clark's sympathy for the powerless and oppressed, one may wonder what sympathies Clark had for the most oppressed group of all—African Americans? Clark's career coincided with the rise of legal segregation in the South, along with the brutal wave of extra-legal terror toward blacks in the form of lynching. How did Clark respond to the subjugation of African Americans? During Clark's thirty-five-year tenure on the North Carolina Supreme Court, the court only dealt directly with the issue of segregation on two occasions.²²⁹ Clark's dissenting opinion in the case of *Merritt v.*

²²⁸ *Ibid.*, 575.

²²⁹ *State v. Darnell*, 166 N.C. 300 (1914); *W. M. Merritt v. Atlantic Coast Line Railroad*, 152 N.C. 281 (1910).

Atlantic Coastline Railroad, although regarding a substantially different subject than the rest of the cases discussed above, is framed along much the same lines as *Fitzgerald*, *Pettit*, *Greenlee*, and *Troxler*. The needs of the common (white) man and suspicions about foreign corporations abusing or neglecting to follow North Carolina statutory laws enacted in the interest of the white masses existed in the *Merritt* case.

It had been almost a decade since the conclusion of the White Supremacy Campaign of 1898 and the enactment of the railroad segregation statute by the Democratic legislature in 1899 when W. M. Merritt attempted to board the Atlantic Coast Line train at Ivanhoe, North Carolina.²³⁰ The year legal segregation began, the application of Jim Crow to North Carolina's railroads had been contested by both white and black citizens. The former were eager to ensure enforcement by reluctant railroads, the latter eager to overturn the recent enactment of racial separation in most common means of public travel.²³¹ The protests by both sides decreased as Jim Crow continued his strange career—only now riding North Carolina's railroad cars. Merritt, along with three of his coworkers, possessed twenty-five cent tickets to carry them home to Tomahawk, North Carolina. As the train slowed into the station, Merritt and his coworkers, all lumber workers dragging their gear behind them, were instructed by the conductor to enter the "other car." The men complied only to discover the conductor had directed them into the Jim Crow car. The testimony of Merritt and one of his

²³⁰ *Merritt v. Atlantic Coast Line Railroad*, 152 N.C. 281 (1910).

²³¹ "Jim Crow Car Law now to be Tested," *News and Observer*, August 9, 1899.

companions, J. H. Boney, both emphasized that their presence in the Jim Crow car was corrected by its black occupants, who instructed the white working men that they “were in the wrong car.” No sooner had they complied with the new request to leave the Jim Crow car, the conductor, seeing them walk into the car meant for whites, waved them off with his hand saying, “Go on back in the other car.” Once again they returned to the Jim Crow car, but this time they assumed their seats. When the conductor came through to collect the tickets for these white men sitting in a Jim Crow car, they protested being placed in the wrong portion of the train. The conductor informed them that if they wanted to keep their baggage, which consisted of the tools of their work in a tow sack, they would have to ride in the Jim Crow car as there wasn’t sufficient room in the white car.²³²

For Merritt and his companions, their treatment by the conductor was nothing less than demeaning and offensive. In his testimony, J. H. Boney said indignantly, “The railroad had provided separate cars for the two races, but we are white men, and the conductor ordered us to go into the colored car.”²³³ The plaintiff Merritt brought suit under the North Carolina statute that required “separate but equal accommodations for the white and colored races on all trains carrying passengers.”²³⁴ The Jim Crow statute provided a private right of action to “any passenger on any train...which is required to

²³² *Merritt v. Atlantic Coast Line Railroad*, 152 N.C. 281 (1910).

²³³ *Ibid.*

²³⁴ *Revisal of 1908 of North Carolina*, vol. I (Charleston, S.C.: Walker, Evans, & Cogswell Co. Publishers, 1908), chap. 61, sec. 2619, 1380.

furnish separate accommodations to the races.”²³⁵ Merritt sued the railroad for its failure to provide him separate accommodations under the act, and a Sampson County jury rendered judgment in the plaintiff’s favor for \$100.

Justice Brown, writing for the court’s majority held that the railroad had complied with the statute. It furnished two separate cars for their black and white customers. Even if the conductor erred in instructing white passengers to sit in the Jim Crow car, the railroad could not be held accountable for the improper conduct of its conductors in assigning passengers to the already provided separate cars.²³⁶ The jury’s verdict was reversed and the plaintiff’s case dismissed.²³⁷ Merritt was never compensated for his one-time Jim Crow experience on the Atlantic Coast Line Railroad.

Clark’s dissenting opinion focused on the legal liability of the railroads for disregarding the segregation statute when applied to these poor white men. After all, “an arbitrary conductor” had taken a statute intended “for *all* white men, not for *some* white men” and forced them to ride in the Jim Crow car.²³⁸ For Clark, the conductor’s action was a clear example of a corporate agent’s misdeeds. If the statute allowed the railroad to avoid liability for its agents’ violation of the segregation statute, as the court’s majority

²³⁵ *Revisal of 1908 of North Carolina*, Vol. I, chap. 61, sec. 2622, 1381.

²³⁶ *Merritt v. Atlantic Coast Line Railroad*, 152 N.C. 281, 283 (1910).

²³⁷ *Ibid.*

²³⁸ *Ibid.*, 283-284 (Clark, C.J., dissenting), emphasis in original.

ruled, then “the statute is a delusion...the company through its conductor, is supreme, and not the statute.”²³⁹

In another context, railroads had successfully avoided liability for injuries caused by fellow servants to their coworkers. In this instance, an agent of the railroad, the conductor, once more provided a shield from corporate liability. The conductor’s authority over passengers, his role as the “Alter Ego of the company,” its “only visible and, indeed, sole representative” led Clark to argue that the railroad should bear the responsibility of such errors of judgment—in this case discriminations against common white laborers.²⁴⁰ Moreover, in *Merritt* the conductor did not simply make an incorrect judgment about the race of a passenger, Clark complained, but the conductor (and by extension the corporation) assumed the power to nullify a public statute.²⁴¹

As Clark argued that the *Merritt* case presented a form of segregation that ignored the rights of common white men, he similarly argued that lynching was a problem bred of a lack of faith in democratic processes. Although Clark criticized the lynch mob’s actions, he spent far greater amounts of ink blaming legal delays, elitism, and legal privilege for leading lynch mobs to “protect themselves when the law does not.”²⁴² Clark attacked the state’s “slow and cumbersome” legal system as the primary cause of

²³⁹ *Ibid.*, 284.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² “Col. Langston in Reply to Criticism,” *News and Observer*, January 24, 1916; For Clark’s nuanced condemnation of lynching, see *State v. Cole*, 132 N.C. 1069, 1091 (1903) (Clark, C.J., dissenting).

lynching. Between State Supreme Court decisions that overturned jury verdicts on technicalities, a legal structure of criminal trial requirements that heavily benefitted the defendant, and elites who attempted to limit application of the death penalty in murder cases contrary to public will, Clark blamed all of these for undermining the will of the community to see criminals convicted by juries and punished soon thereafter. As a result, Clark perceived lynchings as “a protest of society against the utter inefficiency of the court.”²⁴³

Two things stand out about Clark’s arguments pertaining to lynching. First, he refused to acknowledge the racial nature of lynching as an extra-legal punishment. Second, instead of racial antipathy, the true culprits were the courts, lawyers, and the law. In a case that preceded *Merritt* by several years Clark’s views on lynching and segregation intersected in *State v. Cole*. In the fall of 1902, a group of black men—Joe Cole, Joe Cole Jr., John Jones, and three or four friends—boarded a train in Norlina, Virginia, bound for North Carolina. As Captain Clements moved through the second-class white compartment of the train, he came upon Joe Cole and his companions and claimed they were drunk and “singing boisterous songs.”²⁴⁴ After instructing them to quiet down and move to the Jim Crow car, some of the men resisted. One stated they would “go when we get ready,” another grumbled to the conductor, “We’ve got first-class tickets, and we are driven round this way?” The conductor apologetically told them

²⁴³ *Ibid.*; *State v. Alphonso*, 124 N.C. 847, 860 (1899).

²⁴⁴ *State v. Cole*, 132 N.C. 1069 (1903).

the men that “it was a State law, and the railroad had nothing to do with it.” Then Joe Cole came back into the second class white car “roaring” to the assembled group, “We are all friends, we are all brothers; we’ll all fight for one another, and we’ll all die for one another.” From there, the situation deteriorated rapidly. After a physical altercation between the train’s porter, the conductor, and several of the group of black men, the roadmaster, Fred Stevens, entered the fray to try to restore order.²⁴⁵ Joe Cole leveled his gun at the advancing Stevens and shot him in the head at close range immediately killing him. Joe Cole, Jr. then shot the porter, a wound that proved fatal days later.

The state’s newspapers presented the event as not only a murder but also an attack on the state’s recently enacted segregation statute. In a sub-headline *The Wilmington Messenger* proclaimed in bold type that those arrested, “Object to Jim Crow Law.”²⁴⁶ *The News and Observer* considered the actions of the black men before the shooting in its sub-headline, “Six Negroes Invade First Class Car.”²⁴⁷ Numerous papers reported sporadic rumors of lynching but noted that for now all seemed calm and doubted that such an event would occur.²⁴⁸

A trial court in Vance County convicted Joe Cole of first-degree murder and Cole appealed the decision. His counsel argued that the judge, in error, denied his requested

²⁴⁵ “Another Account,” *Wilmington Messenger*, August 20, 1902.

²⁴⁶ “Killed by Negro,” *Wilmington Messenger*, August 20, 1902.

²⁴⁷ “Shot Dead in Effort to Quell Riotous Negroes,” *News and Observer*, August 20, 1902.

²⁴⁸ “Another Account,” *Wilmington Messenger*, August 20, 1902.

jury instruction that there was insufficient evidence to prove premeditation. The Supreme Court’s majority opinion, written by Justice Connor, agreed. The trial judge should have given an instruction that insufficient time existed for the defendant to form the necessary premeditation to be convicted on a first-degree murder charge. Yet the court also addressed itself to Justice Clark’s polemic dissent that included references to statistics on lynchings, murder, and capital convictions in the United States and abroad. These things were a deviation from “the orbit assigned to [the courts] by the Constitution.”²⁴⁹ Clark’s dissent risked, by going “outside of the record,” inviting “counsel to address us with arguments fit for other forums than this, and ourselves embark into unknown and unsafe waters.”²⁵⁰ This approach, the majority warned, “is not the example or teaching of the elders.”²⁵¹

Clark’s dissent argued there was sufficient evidence for premeditation. Echoing the sentiments of the newspapers, he noted how the accused were “incensed at the legal requirement in this State for the separation of the races in cars,” and it could be sufficient evidence that the black men’s resistance to segregation, along with subsequent statements and actions, proved premeditation. Certainly, Clark reasoned, the evidence was at least sufficient to allow the jury to decide the matter.²⁵²

²⁴⁹ *State v. Cole*, 132 N.C. 1069, 1080 (1903).

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*, 1082 (Clark, C.J., dissenting).

Yet the bulk of Clark's dissent turned not on the definition of premeditation as it did on the "subversive" practice of lynching. For Clark, the tragedy of lynching was not the death of the victim, whom Clark seemingly presumed to be guilty, but the "conflict between the public desire for the repression of crime and the execution of that will through their properly constituted public officials and servants."²⁵³ With criminal statistics showing a significant increase in crime between 1890 and 1902, the only remedy was more certain punishment of criminals by the courts.²⁵⁴ After all, as Clark reasoned, London, a city with three times the population of North Carolina, suffered only twenty murders in contrast to North Carolina's one hundred and ninety one. The only explanation for this difference Clark could see was in "some defect in the execution of the laws."²⁵⁵ And until it was remedied, lynching would remain "but one form of public protest...one from which only evil can come."²⁵⁶ It was the white population, who paid taxes to sustain a court system that failed in its task of punishing criminals, which concerned Clark. The men lynched were criminals who should have suffered death at the hands of the state.

For Clark, it was decisions, like the majority opinion in *Cole*, which undermined public faith in the courts. A local jury had reviewed the evidence and convicted Cole, and now the Supreme Court had undermined that democratic process and decision by

²⁵³ *Ibid.*, 1085.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, 1087.

²⁵⁶ *Ibid.*

declaring a new trial and removing from the jury the judgment of whether there existed sufficient evidence of premeditation. Once again, as in *Merritt*, Clark saw agents of the state thwarting a valid expression of public opinion—the jury’s verdict. In this case the subversive villain was not a corporation, but instead, the state’s courts. Yet the railroad in *Merritt* and the Supreme Court’s majority in *Cole* both presented a common kind of villain, an elitism that thwarted the collective will of North Carolina’s common white population expressing themselves through their role as electors and jurors.

Conclusion

The conductor’s actions in *Merritt* and the majority’s opinion in *Cole*, although seemingly different from the other cases mentioned in this chapter, no doubt looked very similar from Clark’s perspective. In an era where many Americans were suspicious of courts that nullified or limited progressive legislation, or overturned jury verdicts in civil and criminal cases, Clark’s progressive jurisprudence provided a source of confidence for the working class in the state’s justice system. As Kansas governor, and later U.S. Senator, Arthur Capper, wrote to Clark, your “decisions...cannot fail to increase respect for our laws and courts.”²⁵⁷ At a time when many working-class Americans feared concentrations of wealth, corporate excess, and courts that often barred—or impeded—legal recovery for injury or death, Clark’s progressive jurisprudence shared their concerns and imputed them into the law. The Chief Justice’s decisions are consistent in the degree that they display a suspicion of concentrations of wealth and power and a tendency to keep a wary eye toward encroachments on the liberty of the common (white) man. His

²⁵⁷ Arthur Kapper to Walter Clark, May 2, 1923, in *PWC*, Vol. 2, 458.

views of the common law left him less bound by judicial traditions like formalism that limited the effectiveness of many judges during the Progressive Era. In addition, his willingness to fight in the public arena for the gains he made as a jurist, although they brought him great opprobrium from some during his lifetime, also helped to push North Carolina's progressive movement ahead on issues like workplace injuries and child labor.

CHAPTER IV
LEARNING, RELIGION, AND TOBACCO: THE BATTLE OVER PUBLIC AND
PRIVATE EDUCATION

There you have the “machine” disclosed. Trinity is to run North Carolina.
Dr. Kilgo is to run Trinity and the cigarette millions are to run him and to
aid him to maintain his supremacy.

—Walter Clark¹

In the summer of 1905 many of North Carolina’s leading figures sat in a crowded courtroom as legal counsel argued over a motion to non-suit a civil claim of libel.² The defendants included the charismatic president of Trinity College, John C. Kilgo, and the wealthiest Trinity College trustee, Ben Duke. The plaintiff, an elderly Methodist minister and book seller, Thomas Jefferson Gattis, sought \$100,000 in damages for libelous statements made by Kilgo and published by the Trinity College Board of Trustees.³ Up to this point the case had stretched over seven years, three trials, and four North Carolina Supreme Court decisions⁴. Two juries had awarded verdicts in Gattis’s favor along with five-figure damages, only to have their verdicts overturned by the Supreme Court. This trial was to be the last, as a fourth Supreme Court ruling sustained the Superior Court’s

¹ “Judge Clark’s Speech,” *News and Observer*, September 4, 1898.

² “Go Higher Up,” *Farmer and Mechanic*, June 20, 1905.

³ *Gattis v. Kilgo*, 128 N.C. 133 (1899).

⁴ “Nothing is Settled Until it is Settled Right,” *Farmer and Mechanic*, June 20, 1905; “Reverend John C. Kilgo for Bishop,” *Webster’s Weekly*, May 10, 1906.

declaration of non-suit, citing no evidence of malice on behalf of Kilgo and Duke.⁵

Justice Walter Clark was conspicuously absent from all four of the Supreme Court hearings, having recused himself due to personal involvement in the Trinity College Board of Trustees.⁶

The controversy became public in the summer of 1898, sharing space in the state's major newspapers with the Democratic Party's White Supremacy Campaign. The *Charlotte Observer* published news that Justice Clark had been asked to resign by Trinity's board of trustees. That request was based on an exchange of letters between Clark and Kilgo one year earlier, wherein Kilgo had accused the Associate Justice of spreading a "rumor" about him among the trustees. The ensuing contest, and the lawsuit it spawned, occupied the press and the courts, created religious and partisan divisions, and threatened to end the tenure of Kilgo and the philanthropic generosity of the Duke family. For both Clark and Kilgo the initial dispute quickly evolved into an act of political warfare from which neither dared back down. Moreover, those following the events related the contest between Clark, and later Gattis, against Kilgo and Duke to the White Supremacy Campaign, the struggle against plutocracy, and the public education policy of the state.⁷

⁵ *Gattis v. Kilgo*, 140 N.C. 106 (1905).

⁶ *Gattis v. Kilgo*, 128 N.C. 133 (1899).

⁷ "Gattis v. Kilgo," *Reidsville Webster's Weekly*, May 10, 1906; "Plaintiff Gattis Suffers Non-Suit," *Raleigh Farmer and Mechanic*, June 20, 1905; "Arguing Motion to Non-Suit," *Raleigh Morning Post*, June 16, 1905.

Clark's involvement in the entire affair allows us to further explore the sometimes complicated nature of his southern progressive worldview. Indeed, Clark's attack on Kilgo, and by extension Trinity, threatened to undermine an institution that would come to represent freedom of academic inquiry and the inclusion of women on an equal footing with men. Yet, Kilgo's rhetoric from the pulpit, stump, and president's desk at Trinity College threatened to significantly cut funding to state universities, further imperil the state's struggling tobacco farmers, and hamstring a host of local progressive legislation. Like many of Clark's public battles, this one came with mixed results. As Clark criticized the "machine" built by Kilgo and Duke, State Democratic Party Chair Furnifold Simmons used the White Supremacy Campaign to build a conservative political machine that would often frustrate Clark's attempts at reform for the rest of Clark's life. Regardless of the years of legal conflict, Trinity went on to prosper under Duke family patronage and Kilgo's academic leadership. Ultimately, Clark would use the accumulated political credibility as an anti-monopolist reformer to aid his 1902 campaign for the Chief Justiceship, as the enemies he acquired from his public conflict with Kilgo would unsuccessfully attempt to defeat his candidacy.

Trinity: An Institution in Need of an Endowment

Trinity College's roots go back to a community school founded in 1838 in the town of Trinity, Randolph County, North Carolina. Over the next six decades the college moved through many names: Brown's Schoolhouse, Union Institute, Normal College, and finally in 1859, Trinity College. The school served primarily poor and undereducated young men. Its 1849 incorporation papers with the state denoted the

school's role as a "people's college"—dedicated to "the education of 'poor boys.'"⁸ Given the economically precarious position of the college's students, and their parents, financial struggles were a consistent headache for leadership. Financial problems plagued the college as students were unable to pay their tuition charges. Methodist laymen were too impoverished to donate a sufficient sum, and the North Carolina Methodist conference, often as cash-strapped as its parishioners, failed to provide sufficient funding.⁹ In the ten years between 1875 and 1885 the college failed to pay its professors their annual salary of \$1,000—in its best year it managed to pay only a little over half that sum.¹⁰ Yet while North Carolina Methodists sent little money, they continued to send their children.¹¹ Trinity College as an institution desperately needed a wealthy patron and an endowment.

The College also needed a new location. Several factors facilitated this change of venue. First, in 1887 Trinity hired its first northern president—John F. Crowell.¹² Crowell, born in Pennsylvania, had studied for a year at Dartmouth College and received his B.A. from Yale. When he took over Trinity College it was the fourth largest college in the state.¹³ That ranking was largely the result of the state's relatively poor educational

⁸ Earl W. Porter, *Trinity and Duke, 1892-1924* (Durham: Duke University Press, 1964), 4.

⁹ *Ibid.*, 3-7.

¹⁰ Charles Lee Raper, *the Church and Private Schools of North Carolina: A Historical Study* (Greensboro, NC: Jos. J. Stone, Book and Job Printer, 1898), 185.

¹¹ Porter, *Trinity and Duke*, 18.

¹² *Ibid.*, 9.

¹³ *Ibid.*

resources both public and private. In 1887 Trinity had only one building, ten thousand uncatalogued volumes in its library, six professors, and barely over one hundred students taking classes. The institution seemed anemic compared with the University of North Carolina at Chapel Hill, which boasted ten buildings, more than double the number of students, professors, and bound volumes, and an annual appropriation of \$27,500 from the state legislature.¹⁴ It is little wonder that “Crowell toyed with the idea of giving it up and going home” on his first trip to Trinity’s campus that summer.¹⁵ Yet Crowell persisted and implemented numerous changes to improve the rigor of the college, including instituting entrance examinations, eliminating the preparatory program, and recruiting new faculty trained at leading colleges like Johns Hopkins.¹⁶

Second, Crowell promoted “‘leavening the lump’ of public affairs” through direct engagement by the college and its faculty with important public issues. Crowell himself directly urged the state’s legislature to enact progressive reforms ranging from greater funding for public schools to the establishment of credit banks for North Carolina’s struggling farmers. Students at Trinity were also encouraged to analyze the controversial issues of their day. The senior graduation theses of Trinity students increasingly dealt with current political issues, including those issues that would become important during the political controversies of the 1890s as the Populist Party influenced state and national

¹⁴ Ibid., 10.

¹⁵ Ibid., 9.

¹⁶ Ibid., 10-13.

politics. Yet such political involvement was complicated in rural Trinity, a town so far removed from main thoroughfares that “one could not buy a newspaper, get a haircut, or have a tooth pulled.” If the university sought to influence public affairs, it would need to relocate.¹⁷

Third, given the state’s poor allocation of resources to education, the pool of academically qualified students was small. Despite a population in excess of 1.6 million people the school year of 1886-1887 college enrollment “in all types of institutions was less than 2,800.” Consequently, institutions competed for students: jealously guarding their territory, keeping an eye on their competitors, and publishing hyperbolic claims about their curriculum. In the 1890s this rivalry for students led to attempts by Baptist and Methodist leaders to freeze, or cut, public funding for state colleges. For now, though, it helped to convince Crowell and the trustees that relocation of the college was essential to its vitality and growth.¹⁸

While the need to relocate seemed obvious to Crowell, the answer to the question of where to relocate to was less certain. Both Raleigh and Greensboro expressed interest in becoming the new home of Trinity College. The choice was made in fall of 1890 to relocate to Raleigh.¹⁹ In October President Crowell wrote Walter Clark, as a member of the relocation committee, to request aid in securing legislative authorization of the

¹⁷ Ibid., 3, 19; Helen G. Edmonds, *The Negro and Fusion Politics in North Carolina, 1894-1901* (Chapel Hill: The University of North Carolina Press, 1951), 11.

¹⁸ Porter, *Trinity and Duke*, 16-18.

¹⁹ Ibid., 19-20.

college's incorporation documents.²⁰ Yet within a matter of weeks Trinity's move to Raleigh came into doubt as Durham now eagerly competed for Trinity. While Raleigh offered land and enough money to replicate their campus, Durham matched the offer plus a \$50,000 endowment funded by Washington Duke. Washington Duke's son, Ben N. Duke, had joined the Trinity College Board of Trustees one year before Clark. Both father and son were staunch Methodists and seeking philanthropic ventures for their growing wealth. With the Duke family invested financially and personally the board of trustees presumed "still greater gifts for the College at Durham...[and] consider the financial prosperity of the College as good as guaranteed."²¹ Given the change Crowell wrote again to Clark in January, 1891, requesting Clark draw up a charter for the real property that would become the campus of Trinity College.²² The resulting act created the Trinity College Park municipality; an entity with its own governing officers and a legislative council composed of upper classmen and those over 21 years of age.²³

Although Clark never directly stated his sentiments toward the relocation to Durham, he likely would have preferred Raleigh. As early as 1881 Clark worried about the growing power of tobacco manufacturers over the political process. In the winter of 1881 prominent Durham residents, including Washington Duke, pushed for the creation

²⁰ John F. Crowell to Walter Clark, October 2, 1890, in *PWC*, Vol. II, 246-247.

²¹ *Proceedings of the Board of Trustees* quoted in Porter, *Trinity and Duke*, 23.

²² John F. Crowell to Walter Clark, January 28, 1892, in *PWC*, Vol. I, 248-249.

²³ Porter, *Trinity and Duke*, 47.

of Durham County out of the northern and eastern portions of Wake and Orange counties, respectively. Walter Clark was part of a group of prominent Wake County residents who organized a public rally in opposition to the creation of the new county.²⁴ Privately, he wrote Augustus W. Graham, advising him on collecting signatures for a petition against Durham County to seek out “those who don’t want Blackwell & Co. to have a little county in which they will virtually appoint the members of the legislature & all the county officers.”²⁵ The following week Clark wrote again, still optimistic about the chance of defeating the bill but worried that “Blackwell, Carr & Morgan are hard at work trying to change votes.”²⁶ Clark was referring to William Blackwell, Julian S. Carr, and Samuel T. Morgan; all three were wealthy industrialists. Blackwell owned W.T. Blackwell and Co. Tobacco (owner of the famous Bull Durham label tobacco), and Samuel Morgan owned the Durham Fertilizer Company; Julian Carr was heavily invested in both companies as well as textiles, banking, and railroads. W. Duke & Sons Tobacco Company was only just recently incorporated in 1881.²⁷

Clark’s concern about tobacco money corrupting local and state politics would soon transition to the Duke’s wealth and influence over Trinity. In a significant, but merely coincidental, development during the same weeks that Ben and Washington Duke

²⁴ Jean Bradley Anderson, *Durham County: A History of Durham County, North Carolina* (Durham, N.C., Duke University Press, 2011), 140-141.

²⁵ Walter Clark to A.W. Graham, February 15, 1881, in *PWC*, Vol. I, 213.

²⁶ Walter Clark to A.W. Graham, February 22, 1881, in *PWC*, Vol. I, 213.

²⁷ Anderson, *Durham County*, 124, 151-152.

offered Trinity a generous endowment in exchange for its relocation to Durham, James B. Duke chartered the American Tobacco Company in New Jersey—capitalized at \$25,000,000, with James B. Duke as president.²⁸ The Duke family had brought to Durham a new college and a new corporation. The College’s growth was nowhere near as impressive as that of the American Tobacco Company, which controlled over 90 percent of the country’s paper cigarette business. Yet, the combination wedded tobacco, Trinity, and the Dukes together in the public mind, setting the groundwork for future debates over the influence of the tobacco trust over education at Trinity.²⁹

For a while those debates slumbered with Crowell as president of the college. The faculty continued to expand with new additions from colleges like Johns Hopkins. The student body maintained its interest in political issues, with one student, Luther Hartsell, writing articles critical of trusts and even calling the American Tobacco Company a “large monster.”³⁰ Yet conflicts with some of the trustees and the Methodist Conferences plagued Crowell’s administration in Durham. In 1893, with a rumor circulating that the Dukes would withdraw their support unless Crowell voluntarily resigned, the infuriated president offered the board his resignation. The board refused to accept it and Crowell continued on through the next year.³¹ Yet his time was limited, as

²⁸ Robert F. Durden, *Bold Entrepreneur: A Life of James B. Duke* (Durham, N.C.: Carolina Academic Press, 2003), 36-37.

²⁹ *Ibid.*

³⁰ Porter, *Trinity and Duke*, 43-44, 46-47.

³¹ *Ibid.*, 44.

angry (and often unpaid) faculty, lukewarm students, and Methodist Conference meddling led Crowell to seek employment elsewhere. Crowell wrote Clark one month after he resigned the presidency and implored him to consider contending for the presidency of Trinity: “I want to know so I may have the assurance of the college’s being in the safest possible hands. I would like exceedingly to put your name in nomination.”³² Industrialist, and trustee, Julian S. Carr, also wrote Clark to similar ends, “I am for you first, last and all the time, if you will allow your name presented to the Board.”³³ With Clark’s interests almost always prioritizing political concerns, he declined the potential nomination. As it was, Clark was actively engaged in preparing for the 1894 election to renew his Associate Justiceship and was soon to be embroiled in a small controversy that summer, as his Democratic Party allegiance was questioned when he refused to disown his nomination to, and position on, the tickets of both the Republican and Populist parties.³⁴ With Clark and other local candidates turning down offers of nomination, the college’s board of trustees looked elsewhere. Whereas they had looked northward for Crowell, this time they looked south toward South Carolina’s John C. Kilgo. And in the summer of 1894, Kilgo took over as president of Trinity College. The financial problems and distractions of the Crowell era would soon be replaced by the political controversies of the Kilgo era.³⁵

³² John F. Crowell to Walter Clark, June 8, 1894, in *PWC*, Vol. I, 274.

³³ Julian S. Carr to Walter Clark, June 4, 1894, in *PWC*, Vol. I, 274.

³⁴ Brooks, *Fighting Judge*, 69-70.

³⁵ Porter, *Trinity and Duke*, 52-53.

The Clark-Kilgo Controversy

Kilgo arrived in North Carolina with a reputation as a Tillman-ite in his political sentiments—a pro-silver Jeffersonian. Clark likely expected the incoming president to share his belief in what Clark’s biographer described as “Jeffersonian democra[cy],” as well as his fervent faith in bimetallism.³⁶ Indeed, Clark remarked during a public speech at Kilgo’s inauguration that he believed Kilgo a worthy successor to Craven and Crowell. No doubt Clark applauded the sentiments expressed by Kilgo in the first year of his tenure that “society must be made more democratic...character and not money must be enthroned.”³⁷ President Kilgo and the Dukes soon found themselves closely aligned and, soon after, maligned together by the state’s anti-monopoly politicians and newspapers. Although the Dukes had already given a significant sum to the university, their giving during Kilgo’s presidency would dwarf past contributions. Robert Durden’s history of James B. Duke describes Washington Duke as “captivated by Kilgo.” Ben Duke, described Kilgo as “one of the greatest and best men in every way I have ever know.” For his part, Kilgo shared the sentiments of the Methodist Conference paper, *The Advocate*, as it “prais[ed] ‘consecrated wealth’ and...Andrew Carnegie’s new Gospel of Wealth.”³⁸ And since the college still sought to build a substantial endowment to put a permanent end to the scramble for money that had defined its existence since the

³⁶ Brooks, *Fighting Judge*, 103; *PWC*, Vol. I, 361-363.

³⁷ Durden, *Bold Entrepreneur*, 90-91; Robert F. Durden, *The Dukes of Durham, 1865-1929* (Durham, N.C.: Duke University Press, 1975), 108-109.

³⁸ Porter, *Trinity and Duke*, 24.

beginning, the Dukes were the closest and wealthiest potential patrons. The new relationship between Kilgo and the Dukes paid off quickly. In 1895 Washington Duke pledged his first gift since the relocation: \$50,000 contingent on the conference raising \$75,000. And the following year Washington Duke made another donation, time of \$100,000, to the university on the condition it admit female students, “placing them on an equal footing with men.”³⁹

With a new president, more secure funding, and a steady stream of Methodist youth applying, there was reason for substantial optimism about prospects for Kilgo’s tenure at Trinity. Yet a series of events, beginning in 1897, would bring about a controversy that publicly distracted and undermined Kilgo for nearly a decade. Other scholars have presented the controversy between Justice Clark and President Kilgo as a battle over academic freedom for faculty. Kevin Walters argued in his article *Balancing Freedom and Unity: John Carlisle Kilgo and the Unification of Methodism in America* that it was “Kilgo’s advocacy for academic freedom [that] soon put him at odds with several prominent North Carolinians including Judge Walter Clark.”⁴⁰ Indeed, Kilgo’s supporters similarly argued that the controversy was an attempt to limit academic inquiry at Trinity College. The board measure in dispute, the rumor spread by Clark, and the letters subsequently exchanged between Kilgo, Clark, and members of the Trinity board

³⁹ Durden, *The Dukes of Durham*, 109-110; Brooks, *Fighting Judge*, 103-104.

⁴⁰ Kevin Walters, “Balancing Freedom and Unity: John Carlisle Kilgo and the Unification of Methodism in America,” *Methodist History* 48, no. 1 (October 2009): 46.

of trustees show that the fundamental issue was not academic freedom for faculty, but the undue influence of great wealth in social institutions.

The controversy began in June 1897, when John Kilgo sent a terse note to Clark—a note pregnant with potential controversy. Earlier that month the Trinity trustees had met and a special committee, which included Clark, was appointed to consider a proposal to offer faculty four-year contracts instead of the traditional one-year contract. Clark thwarted the proposal by warning of potential “legal entanglements.”⁴¹ Kilgo’s letter questioned the veracity of that statement and indirectly accused Clark of suggesting Kilgo sought “the presidency of Trinity of College for a longer term.”⁴² The letter betrayed Kilgo’s sensitivity about the security of his position at Trinity. Clark’s response only exacerbated the situation as, over the course of several letters that summer, Clark refused to admit his statement while demanding to know the informer’s identity. Finally, in July, Kilgo released the name of his informant, J.G. Brown (a trustee and Clark’s personal banker), and Clark conceded he said essentially what Kilgo had accused him of in the first letter.⁴³ Clark bristled at the intrusion into presumably privileged board member discussions, and his comments betrayed Clark’s growing opposition to Kilgo’s presidency:

The growing opposition to you, which has become intense with many, in the tobacco section especially; your reported speeches attacking the

⁴¹ Porter, *Trinity and Duke*, 80.

⁴² John C. Kilgo to Walter Clark, June 1897, in *PWC*, Vol. I, 363.

⁴³ See “The Clark-Kilgo Controversy,” in *PWC*, Vol. I, 360-418.

honesty of silver men (who constitute nine-tenths of the white men of North Carolina); the attacks you have made on the State University; the quarrels you have managed to get up and keep up...have created antagonism which must shorten your stay, unless you are protected by a four years' term or some influence not based on public esteem.⁴⁴

Clark continued in the next paragraph, now including the Dukes in his attack:

The charges in public prints, however, intimating that the consideration of the gift by members of the Tobacco Trust to Trinity was that the youth were to be proselyted and taught political heresy foreign to the faith of their fathers, would have had small effect with so just a people as ours, if, by your parade of your gold standard views (which must have an untoward effect on the minds of the young men in your care), and your reiterated...assertions of your superiority to public opinion had not given color to their charge. If [you] persever[e]...wealthy syndicates may give you money, but the public will not send you boys.⁴⁵

Although Clark's letters do not mention any plan to move against Kilgo, it is likely that his conversation with fellow trustee, J.G. Brown, was an early effort by Clark to test the waters for action against Kilgo. It was an action that backfired badly. Not only did the conversation reach Kilgo, but also when the Trinity College president brought up the accusation to the board of trustees in June 1898, the trustees adopted a resolution requesting that Clark voluntarily resign from the board. Clark was not present at the meeting and only received notification thereafter in a short letter from the secretary that enclosed the board's resolution.⁴⁶

⁴⁴ Walter Clark to John Kilgo, July 14, 1897, in *PWC*, Vol. I, 366-367.

⁴⁵ *Ibid.*, 367.

⁴⁶ V. Ballard to Walter Clark, June 15, 1898, in *PWC*, Vol. I, 367.

As the argument between Clark and Kilgo escalated, North Carolina descended into the throes of the virulently racist White Supremacy Campaign. The Democratic Party had organized a host of speakers to spread throughout the state “the cry of Negro domination.” That group included future education governor Charles B. Aycock and *News and Observer* editor Josephus Daniels. In addition, state Democratic Party Chair Furnifold Simmons sought to capture the vote of business interests and religious interests (primarily Baptists and Methodists) who were not as easily moved by emotional appeals to fears of Negro domination. Simmons promised two years of no new taxes for businesses and no new appropriations for the state college at Chapel Hill.⁴⁷ Trinity found itself caught in the middle of the turbulent campaign. Its chief patrons, the Duke family members, were longtime Republicans, carriers of the pejorative “scalawag” since Reconstruction. The Dukes themselves were caught up in the complicated politics of the Fusion Era. The Dukes were part of a disliked Republican minority in central North Carolina. Many of their managers, business partners, and neighbors were Democrats; despite the unseemly politics implications for both sides, the Dukes invested in the newspaper stock of *The Caucasian* (a Populist Party paper owned by Populist Sen. Marion Butler) and still maintained support for the Republican Party and its candidates. Unlike its contributions to *The Caucasian*, the Dukes status as Republicans was common knowledge. And although Kilgo declared non-affiliation with any party, his pro-

⁴⁷ Edmonds, *The Negro and Fusion Politics in North Carolina*, 138-140.

corporation, gold bug views were anathema to the anti-corporation elements in the Democratic and Populist parties.⁴⁸

In the contentious atmosphere of Fusion Era North Carolina, Kilgo's comments were deliberately provocative and divisive. Yet given the chance to repudiate Kilgo, the board of trustees voted to support Kilgo and ask for Clark's resignation. Moreover, one of the trustees leaked the board's decision to the *Charlotte Observer*—a conservative paper that was an old political adversary of Clark.⁴⁹ Clark saw in the board's decision and the disclosure to the press a plan to stigmatize him and placate the Dukes:

As there were expressions in my letter not gratifying to those who make their millions by illegal trusts (at the expense of the toiling masses) there were doubtless some who felt it was necessary to propitiate them by condemning, unheard, the man who had been bold enough to let it be seen he did not fear "injustice though wrapped in gold."⁵⁰

As Clark's resentment of the Duke family's contributions to Trinity, and his suspicions of its effects, surfaced, Clark charged the board's action was done "to soothe Dr. Kilgo's vanity and to please the Trust that more money might be obtained from it."⁵¹

His letter to trustee James H. Southgate Clark established a series of charges that would echo through the state's courts and newspapers for nearly a decade. First, as noted

⁴⁸ James M. Beeby, *Revolt of the Tarheels: The North Carolina Populist Movement, 1890-1901* (Jackson: University Press of Mississippi, 2008), 107.

⁴⁹ Walter Clark to James H. Southgate, June 25, 1898, in *PWC*, Vol. I, 372-373.

⁵⁰ *Ibid.*, 370.

⁵¹ *Ibid.*

above, Clark appealed to anti-corporatism and decried Kilgo's alleged "affluence of sycophancy" and "deification of wealth."⁵² Second, he appealed to progressive concerns regarding corruption, he accused Kilgo of being a "wire-puller" and a "ward politician type."⁵³ Lastly, that Kilgo was complicit in making Trinity "an annex of the Duke's cigarette factory—an asset of the trust."⁵⁴ Clark also bristled at how the politically conservative views of fellow trustees never served as a reason for removal from the board. He reminded Southgate of a meeting one year before when the board passed a resolution endorsing the common school system; a resolution that trustee Southgate vocally opposed and labeled "socialism." Clark chided, "Such language coming from the President of the Board of Trustees of Trinity College is more calculated to damage the College than my views of Kilgo."⁵⁵

Clark's letter to Southgate followed his usual predilection for writing judicial opinions, telegrams, and letters as documents meant for public consumption, intended to appeal to the anti-corporate sentiment strong among many poor and middling white farmers and anti-ring public sentiment to appeal to progressive professionals in the state. Clark skillfully manipulated public opinion as he labeled the Duke Tobacco Trust a "cow" that "makes her milk by eating up the collard patch of other people," and Kilgo

⁵² *Ibid.*, 371.

⁵³ *Ibid.*, 372.

⁵⁴ *Ibid.*

⁵⁵ Walter Clark to James H. Southgate, June 25, 1898, in *PWC*, Vol. I, 370-372.

Trinity's "artist in milking" that cow.⁵⁶ He appealed to Methodists to remember when the university "stood broad-based on popular support....Such sentiments as we now hear did not then echo from the President's chair."⁵⁷

It was an appeal to majoritarian sentiment against a seemingly elitist, and corrupt, combination of a few powerful men controlling Trinity College. His appeal was well suited to the politics of the fusion era. It elicited letters from some who lamented there was no way "to run that [tobacco] trust out of N.C."; others simply said "thank God for our judge Clark"; and even from a former Trinity faculty member that called the trustees' actions "inquisition methods."⁵⁸ B.B. Nicholson, successful Democratic candidate in the 1898 North Carolina House election, wrote Clark "they are averse to you greatly... because they seem to think you are too anti-corporation [of a] Justice; that you are too populistic in politics; that you write too much on subjects other than law."⁵⁹

For his part Kilgo was equally forceful and eager to cross swords in the public eye. Despite asking Clark to resign because his private words to Brown might damage Kilgo "personally and, if true, the institution," Kilgo further escalated the controversy by demanding the college's board of trustees hold a trial to examine the veracity of Clark's

⁵⁶ Walter Clark to James H. Southgate, June 30, 1898, in *PWC*, Vol. I, 380.

⁵⁷ *Ibid.*

⁵⁸ Thomas L. Lea to Walter Clark, July 7, 1898, in *PWC*, Vol. I, 383; O. H. Blocker to Walter Clark, July 4, 1898, in *PWC*, Vol. I, 383; Professor Stephen B. Weeks to Walter Clark, July 3, 1898, in *PWC*, Vol. I, 382.

⁵⁹ B.B. Nicholson to Walter Clark, July 1, 1898, Correspondence, 1894-1901, Walter Clark Papers, SANC, emphasis in original.

charges against him.⁶⁰ Clark had already begun collecting evidence against Kilgo. In August Clark sent A.W. Graham to track down witnesses in North Carolina who could testify to Kilgo's character, sent letters to inquire about Kilgo's reputation in South Carolina, and sought evidence of Kilgo using his power at Trinity to suppress academic inquiry. Sometimes these requests came back bearing fruit—a witness. Other times they revealed a witness allegedly bought off or intimidated, leading Clark to complain, “I had rather fight a dog with a spade than an unprincipled preacher-demagog [sic].”⁶¹ And other times, the search led to hearsay evidence. For instance, in August 1898, Charles McIver, President of the State Normal and Industrial School (now UNCG), wrote Clark, “Prof. C. L. Raper...told Prof. Claxton that on one occasion he knew of a certain subject to be proposed for a debate among the students of Trinity College, and that the faculty prohibited them from debating the subject...it either touched the labor question or trusts or some such modern topic.”⁶²

Clark and Kilgo's similar personalities fueled the contest. Both men were accustomed to being right, skilled in leading public opinion, and saw themselves as champions of their respective causes. Kilgo came into the state in 1894 promoting an agenda of Christian education. He defined Christian education as “that education that assumes Christ's estimate of all things and seek to develop manhood in the light of His

⁶⁰ James H. Southgate to Walter Clark, June 28, 1898, in *PWC*, Vol. I, 374.

⁶¹ Walter Clark to A.W. Graham, August 27, 1898, in *PWC*, Vol. I, 385.

⁶² Charles D. McIver to Walter Clark, August 23, 1898, in *PWC*, Vol. I, 383-384.

ideals and by His methods and inculcates His truths as the fundamental truths of personal and social character.”⁶³ Kilgo found a receptive audience among many Methodists, Baptists, and Presbyterians. Since the early 1880s these denominations have maneuvered behind the scenes in the legislature and in the editorial space of North Carolina’s newspapers against “unfair competition” of the state university which provided free tuition at taxpayer expense.⁶⁴ Kilgo’s tenure coincided with a revival of these efforts by the state’s Baptist Conference and spearheaded by Josiah W. Bailey’s *Biblical Recorder*. By 1896 Kilgo had aligned himself with Bailey in a campaign to end free college education provided at state expense. Yet Kilgo’s rhetoric went even further as he toured the state from 1896-1898.⁶⁵

John Webster, a Democratic newspaper editor, and former Speaker of the North Carolina House, recounted that in a public speech Kilgo had referred to the state’s public schools as “baby ranches into which parents, careless of their children, pitched them” and stated that were he “looking for vice and immorality he would...[look] into the [state’s] graded schools.”⁶⁶ On other occasions Kilgo warned North Carolina crowds of the dangers of public universities in Europe that had “atheism in state education,” and consequently, “produced a crop of infidels and anarchists in France and Germany.” And

⁶³ Porter, *Trinity and Duke*, 69.

⁶⁴ J.B. Craven et al. “A Memorial in Behalf of the Denominational Colleges of the State,” *Salisbury Carolina Watchman*, February 10, 1881.

⁶⁵ Porter, *Trinity and Duke*, 68-70.

⁶⁶ “Kilgo the Martyr,” *Reidsville Webster’s Weekly*, August 5, 1897.

as the race became the central issue of the 1898 campaign, that summer Kilgo chided a crowd “the blackest negro in the State could walk up to the young man who accepted [free tuition at the state college] and say, ‘I helped pay for your education.’”⁶⁷ In Kilgo’s summation parents who used public schools were careless, and students who attended the state universities were to be inculcated in socialism and anarchism, and even their claims of white superiority would be tarnished by the contribution of black taxes toward their children’s education. In addition, Kilgo continued to accuse North Carolina’s farmers, gripped in the final years of the panic of 1893, of “laziness” and “trifling.” Clark even produced an affidavit that Kilgo had told a crowd that the “average woman can be led anywhere by a diamond ring.”⁶⁸ Colonel E. J. Holt wrote Clark, “His slander of the women of N.C. is meaner and worse than that of the negro editor, Manly.”⁶⁹ Although few North Carolinians likely shared Holt’s opinion, it is a sign of the degree to which the White Supremacy Campaign become a touchstone for all things political in the state.

Gattis v. Kilgo: A Series of Trials

In September 1898, Trinity College Board of Trustees met to conduct a trial of President John C. Kilgo. Kilgo himself requested the unusual proceeding as a means to clear his name. The board offered Justice Clark the opportunity to serve as prosecution, but Clark declined the opportunity. Instead, Dr. Oglesby, a board member and the pastor

⁶⁷ “Rev. Dr. Kilgo Slobbering Again,” *Webster’s Weekly*, June 16, 1898.

⁶⁸ “Judge Clark’s Speech,” *News and Observer*, September 4, 1898, in *PWC*, Vol. I, 399.

⁶⁹ E.J. Holt to Walter Clark, September 9, 1898, in *PWC*, Vol. I, 415.

of the Duke family's church, was selected as prosecutor. Several weeks were allotted for all parties to collect evidence before the trial. The allotted time was insufficient, as Clark complained that without compulsory process to obtain testimony, "Kilgo's machine & Duke's money has frightened off *all* they could."⁷⁰ Heading into the week-long trial before the board of trustees, Clark lamented "the jury is packed, the witnesses are bulldozed."⁷¹

The trial began with a host of requests by Clark that were quickly overruled. First, Clark claimed that the board had already passed on these matters earlier in July when they requested Clark's resignation and so could not be considered an impartial jury of the charges at hand. Moreover, certain members of the board had already made public statements that showed they had already reached a conclusion on the charges. For example, Rev. N.M. Journey publicly stated to friends, "I [will] stand by Dr. Kilgo and Trinity College and fight for them until they knock my teeth out, and then I [will] chew for them with my gums." Clark also challenged the involvement of Ben Duke, given his interest in the outcome of the proceedings. Second, Clark objected to the use of Kilgo's private secretary as reporter. When that objection was overruled, Clark requested the reporter be sworn in, which was also overruled. Lastly, Kilgo moved to have the fifth of the five counts against him (his reputation in North Carolina) excluded. Despite being overruled by Chairman Southgate, on appeal the board sustained Kilgo's motion.⁷² With

⁷⁰ Walter Clark to A.W. Graham, August 27, 1898, in *PWC*, Vol. I, 385, emphasis in original.

⁷¹ Walter Clark to A.W. Graham, August 29, 1898, in *PWC*, Vol. I, 385.

⁷² Brooks, *Fighting Judge*, 113-114.

the board already set against convictions and the bulk of Clark's evidence excluded, the outcome seemed predetermined. At the conclusion of the hearing Clark asked to present a closing argument he had written for the occasion. Kilgo proposed that it only be allowed provided Clark agreed not to publish it in any outside forum. The board sustained Kilgo and Clark's argument went unheard, although it would subsequently be published in several North Carolina newspapers.⁷³ With a favorable outcome seemingly in hand President Kilgo shifted his attention away from Clark toward Clark's most crucial witness—Thomas J. Gattis. Kilgo presented Justice Clark as “falsely dealt with by some common gossiper.” He insisted, “You cannot make...[me] believe, you never will do it...[that] Judge Clark...would have made a charge like without believing he had just grounds upon which to make it.”⁷⁴ Kilgo blamed Gattis, an elderly Methodist minister and bookseller, and labeled him “the original gossiper.”⁷⁵

The verdict that cleared Kilgo only began a new, even more public, phase in the controversy that lasted from 1899-1905. Promptly, both Clark and Kilgo published their respective closing statements in multiple newspapers.⁷⁶ Moreover, the board, with Ben Duke's authorization, published ten thousand copies of a blue book of the hearings.⁷⁷ The blue book contained Kilgo's statements against T.J. Gattis and formed the primary

⁷³ Ibid., 115.

⁷⁴ Quoted in Ibid., 114.

⁷⁵ Ibid., 115.

⁷⁶ Ibid., 115, 119.

⁷⁷ “Arguing Motion to Non-Suit,” *Raleigh Morning Post*, June 16, 1905.

evidence in the subsequent libel trials against Kilgo and Duke. The libel trials would possess three features lacking from the trial before the board: a local jury drawn from primarily rural communities; the necessary legal mechanisms to compel testimony; and a forum open to the public and the press. The difference in forum and jury produced verdicts in the first two trials of \$20,000 and \$15,000, respectively.⁷⁸ Yet in both cases the North Carolina Supreme Court ordered new trials on evidentiary issues. Clark recused himself from both cases due to his personal involvement, yet Clark remained involved in the case. Lead counsel for Gattis included Cyrus “Cy” Watson, one of Clark’s closest friends and supporters, and A.W. Graham, Clark’s brother-in-law. Kilgo and Clark’s defense included some of the state’s leading counsel, even Governor Charles B. Aycock who argued three of the four cases for the defense.⁷⁹ In the end Gattis’s attempts at recovery for libel ultimately failed.⁸⁰

Conclusion: From Kilgo to Simmons

The controversy between Clark and Kilgo, although publicly replaced by that between Gattis and Kilgo, continued. As Clark sought the nomination for the Chief Justiceship in 1902 the 1898 confrontation remained relevant. Foremost, the conflict added to Clark’s reputation as a popular hero of democratic and anti-monopoly

⁷⁸ Brooks, *Fighting Judge*, 120.

⁷⁹ *Ibid.*, 121; “Arguing Motion to Non-Suit,” *Raleigh Morning Post*, June 16, 1905.

⁸⁰ *Gattis v. Kilgo*, 128 N.C. 133 (1899); *Gattis v. Kilgo*, 128 N.C. 402 (1901); *Gattis v. Kilgo*, 131 N.C. 199 (1902); *Gattis v. Kilgo*, 140 N.C. 106 (1905).

sentiment. Clark's supporters echoed the sentiments of the *Farmer's Friend* published during the trial of Kilgo before the board:

The banks and the railroads and the Cigarette Trust...do not like Judge Clark, and they have good reason for not liking him. On the bench and off, with tongue and pen, through magazine and newspaper, he has sought to make them bow their proud necks to the yoke of law—the law which yokes you and me so readily. This is his true offence and for this he has received such punishment.⁸¹

It was a public image that Justice Clark himself relished and his friends cultivated. In a private letter, later published, Clark compared his adversaries to “enemies of the people” and himself to “the patriot orator of Athens [Demosthenes].”⁸² Cy Watson, lead counsel for T.J. Gattis in all four of his libel suits, stated during the trial (and repeated during Clark's 1912 senatorial campaign) that “the people of North Carolina can lie down in security while Judge Walter Clark guards their interests.”⁸³

Of course, increasing credibility as an opponent of the plutocracy came with redoubled efforts to defeat Clark's political aspirations. In spring 1902 Clark saw his primary opposition as a combination of “[Western Union], the ‘Southern [Railway Co.]’ & the ‘Cigarette Trust’ (all Republican concerned).” Moreover, he worried about men at the county nominating conventions being on “retainer from [the] Duke-Kilgo crowd.”

⁸¹ “Clark-Kilgo Again,” Morganton *Farmer's Friend*, September 8, 1898.

⁸² “Clark to Colonel E. J. Holt,” *News and Observer*, May 11, 1902.

⁸³ E.F. Watson to Walter Clark, December 28, 1922, in *PWC*, Vol. II, 450.

Substantiating these fears were reports of “Three Kilgo preachers...[in] the crowd distributing Wilson’s [anti-Clark] pamphlets.”⁸⁴

Despite the opposition, Clark emerged with the nomination and, with the opposition virtually eliminated by the outcome of the 1900 election and the disfranchisement amendment, the office was nearly guaranteed. Yet Clark did not take notice of an important development, the growth of a conservative Simmons political machine. Formed at the height of the White Supremacy Campaign by an agreement with denominational and business interests in 1898, this agreement was detrimental to the state university, the state’s recipients of public programs, and its poor and middling taxpayers. The Simmons machine would go on to block reform legislation at the local level and the national level—via Simmons’s terms as U.S. Senator. And perhaps of greatest importance to Clark, the same machine would halt his aspirations in the 1912 election when Simmons’s machine held Clark to approximately 10 percent of the vote in a three-way race.⁸⁵ When Clark protested the Simmons machine in 1912, it was too late. Clark’s battle with Kilgo distracted him, and kept him from pushing (as he had in 1896) for Democrat-Populist Fusion. Moreover, with Republicans sidelined by the outcome of the 1900 election, Clark’s perception of a dangerous Kilgo political ring, financed by the Duke family, to control educational, political, and ecclesiastical matters in the state could hardly be taken seriously. Yet, as discussed in Chapter 7, the Duke family’s considerable

⁸⁴ Walter Clark to A.W. Graham, May 8, 1902, in *PWC*, Vol. II, 15; Walter Clark to A.W. Graham, June 5, 1902, in *PWC*, Vol. II, 36.

⁸⁵ Brooks, *Fighting Judge*, 185-187.

wealth would still buy access to power and influence. The Clark-Kilgo controversy would be just one of two major conflicts between Clark and the interests of the Duke family.

Almost two decades after the last of the Kilgo-Gattis trials, Upton Sinclair wrote Clark inquiring about the influence of the plutocracy on North Carolina's denominational colleges. Sinclair discovered in his research that, "Professors are frequently afraid to put their troubles into writing, but I am sure they would be willing to talk to you...and [you could] pass it along to me confidentially."⁸⁶ Although there is no record of Clark's reply Sinclair's *The Goose-Step: A Study of American Education* concisely told a story of Duke and Kilgo as if it had come directly from Clark's pen. In *Goose-Step* Sinclair summed up the Duke Machine: Duke "brought in a South Carolina minister of pliant principles, and made him president of the university, and this president never lost an occasion to chant the praises of his grand Duke. The grand Duke had this chief chanter made a director of his Southern railroad, and wanted to have him made also a bishop of the church."⁸⁷

This book was part of Sinclair's critique of the role of religious institutions and plutocrats on education in the United States. This critique, at least as it concerned the undue influence of wealth on social institutions, mirrored Clark's views of the potential corruption of education by close ties between the Duke family and Trinity. Regardless, by 1924 that connection was completed, as Trinity College changed its name to Duke

⁸⁶ Upton Sinclair to Walter Clark, September 22, 1922, in *PWC*, Vol. II, 443-444.

⁸⁷ Upton Sinclair, *The Goose-Step: A Study of American Education* (Pasadena: Self-published, 1923), 351.

University after James B. Duke's creation of a \$40,000,000 endowment that supported numerous charitable institutions in the Carolinas and the newly named Duke University.⁸⁸

⁸⁸ Earl Porter, *Trinity and Duke*, 232.

CHAPTER V
RECONSTRUCTION AND REDEMPTION REDUX

The *real issue* is shall his [J.P. Morgan's] combination of London and N.Y. bankers who own our railroads *continue* to control N.C., select its governors, judges & legislatures or shall we control *them*.

—Walter Clark¹

I have read [the Democratic Hand-book] through...Is there anything about free silver and the dangers of monopolies and trusts? No. What is on [the] first page?...On the first page there is but one thing. What is it? "Nigger."

—Marion Butler²

In March 1900 the galleries of the North Carolina Capitol building in Raleigh were filled with eager spectators.³ From the second-story gallery that encircled the lower floor of the North Carolina Senate, they witnessed a busy commotion of representatives, senators, lawyers, and witnesses (North Carolina's political elites). Both the participants and spectators were there for a rare and consequential event—the impeachment of two justices of the North Carolina Supreme Court. While the events served as entertainment

¹ Walter Clark to Marion Butler, April 14, 1898, in *PWC*, Vol. I, 331, emphasis in original.

² James L. Hunter, *Marion Butler and American Populism* (Chapel Hill: University of North Carolina Press, 2003), 152.

³ "Impeachment Trial—Other News of Interest," *Richmond Dispatch*, March 22, 1901; "The Senators Gone," *Raleigh Morning Post*, March 30, 1901.

for many in the crowd who gasped, cheered, laughed, and hissed at the lawyers' questions and the witnesses' testimony, the events were of great political importance in North Carolina and the United States.⁴ The events were orchestrated to ensure success in the final act in overturning Reconstruction and the recent White Supremacy Campaign. The outcome would determine the fate of two-party politics and the civil rights of African Americans in North Carolina for over half a century to come.

The goal of the Democrats supporting impeachment was complete political supremacy in North Carolina. Seeking to implement their legislative agenda and official appointments, the Democratic legislature encountered opposition from a majority of the State Supreme Court. The Republican and Populist judges, elected in 1894 and serving eight-year terms on the court, would serve until 1902—too long to wait for many newly elected Democrats. Eager to ensure perpetual one-party rule in North Carolina Democrats in the State House impeached Justices Furches and Douglas. The State Senate was to determine their fate—acquittal or removal from office. Democratic supporters of impeachment were certain that the removal of the justices from the court would clear a path for new Democratic official appointments, and more important, keep the planned disfranchisement law and its grandfather clause safe from judicial review.

While the White Supremacy Campaign of 1898 has been well and often chronicled by numerous historians, the narrative of that campaign remains incomplete. Histories of Fusion victories in 1894 and 1896, as well as histories of the White Supremacy campaigns of 1898 and 1900 have focused almost exclusively on the

⁴ Ibid.

legislature and the executive—ignoring the judicial branch. While Helen Edmonds’s *The Negro and Fusion Politics in North Carolina* did an admirable job of addressing the State Supreme Court’s role in thwarting Democratic legislation, subsequent histories have ignored the role played by the State Supreme Court in the fallout from the Democratic victories in 1898 and 1900.⁵ The racist rhetoric of the summer of 1898 and the violent happenings during the Wilmington Coup have captured the overwhelming share of attention from historians researching the 1898 election in North Carolina. The Democratic victory at the polls—secured through fraud, violence, and appeals to popular prejudice—is treated as the final event of the Reconstruction era; the tragic fall of the last successful biracial political movement in the South until the final decades of the twentieth century. The Wilmington Coup often serves as an epilogue to the White Supremacy Campaign; further confirmation of the finality of Democratic victory by means fair and foul. Yet there is a substantial element often left out of the narrative. The Fusion majority on the North Carolina Supreme Court brought the struggle to preserve the gains of Reconstruction into the twentieth century. Even if they ultimately failed, supplanted by a majority Democratic court in 1902, their struggle remains historically

⁵ Helen Edmonds, *The Negro and Fusion Politics in North Carolina, 1894-1901* (Chapel Hill: The University of North Carolina Press, 1951), 211-212; For examples of this general focus on the legislature in the historiography of progressivism, see Dewey W. Grantham, *Southern Progressivism: The Reconciliation of Progress and Tradition* (Knoxville: University of Tennessee Press, 1983), 75-78; Edward L. Ayers, *The Promise of the New South: Life After Reconstruction* (Oxford: Oxford University Press, 1992); Michael Honey, “Class, Race, and Power in the New South: Racial Violence and the Delusions of White Supremacy,” in *Democracy Betrayed: The Wilmington Race Riot of 1898 and Its Legacy*, ed., David S. Cecelski and Timothy B. Tyson (Chapel Hill: The University of North Carolina Press, 1998), 168.

significant to our understanding of the decline and fall of the last biracial state and local governments in the South until well into the twentieth century.

Clark's role in this drama both reinforces and complicates Clark's image and legacy as a progressive, reform-minded judicial statesman. Clark's cooperation with Fusion office holders (including the despised Gov. Russell and Sen. Butler) and both private and public criticisms of the Democratic Party provide an alternative path toward Democratic victory that focused on genuine progressive reforms instead of appeals to racial prejudice. However, Clark's dissenting opinions not only laid the groundwork for the impeachment trial but brought about a change in jurisprudence that would benefit a Democratic legislature eager to implement a slate of reforms harmful to local democratic control, free and fair elections, women's rights, and agricultural and labor reforms—all positions Clark sympathized with or actively supported in editorials and public speeches.

The struggle between the new Democratic legislature and the Fusion Supreme Court naturally entangled outspoken Associate Justice Walter Clark. His dissenting opinions in several controversial office holding cases, along with his testimony at the impeachment trial, were central to the case against the Fusion justices.⁶ Yet the victory of Democratic forces in the battle between coordinate branches of government would mark a setback for Clark's vision of radical progressive reform in North Carolina. Moreover Clark's cooperation with Fusion government officials (1894-1898) would test his lifelong ties with the Democratic Party, while his cooperation with Democrats seeking

⁶ Edmonds, *The Negro and Fusion Politics*, 211.

to impeach the Fusion justices would return to haunt him in 1902 when he campaigned for the Chief Justiceship.

Walter Clark, Fusion, and the White Supremacy Campaign

The Democratic White Supremacy Campaign, with its connection to conservative elements of the Democratic party and compromised by its connection to the railroads and other business interests, posed a moral problem for Clark. As a lifelong Democrat, the justice publicly lauded his allegiance to both the Democratic Party specifically, and more broadly, majoritarian white democratic government. Between 1894 and 1898 Clark would sometimes privately sacrifice the former to expand the latter. And when the Democratic Party attempted to reclaim control of the legislature in 1898, under cover of confidential communication, Clark sought to undermine Democratic victory in the 1898 campaign. Yet, Clark's judicial philosophy would ease the path to absolute rule by the Democratic Party after the election.

For a man as public and outspoken as Clark, the justice was uncharacteristically silent about the White Supremacy Campaign. He did not pen any editorials in support of the campaign, delivered no speeches on behalf of the campaign (as did many prominent North Carolinians), and had little correspondence with those running the campaign. No doubt some of Clark's time was diverted by his struggles with Dr. Kilgo and the Trinity College Board of Trustees. Yet previously, Clark's energy and work ethic had allowed him to manage a hectic schedule, so the Trinity controversy cannot totally explain Clark's public silence.

The answer can be found in Clark's complicated relationship with the state's often conservative Democratic Party. In June 1894 rumors started to circulate that Clark might be selected as the Populist's United States senate candidate and, a more widespread rumor, that the Populists would endorse Justice Clark as part of a non-partisan slate of Supreme Court candidates.⁷ In July Marion Butler confirmed the rumors and mentioned Clark's planned endorsement by the Populist Party. One judicial nominee, H.G. Connor, confronted with multi-party support, turned down the Populist endorsement.⁸ Clark, with the endorsement of all three major parties, remained in the race. As a result, some questioned his party loyalty. A letter to the *Charlotte Observer* labeled Clark a "doubting Thomas" and questioned his allegiance to the Democratic Party.⁹ Clark defended himself in a letter to the *Observer* the following day. Employing an unusual defense for a judge as political as Clark, the justice cited judicial propriety as the reason why he stayed silent in the face of his multiple endorsements. He pled his Democratic Party bona fides and protested, "I am not and have not ever been at any time a candidate for any nomination other than the democratic nomination."¹⁰ Nevertheless, his letter also did not repudiate the endorsement; it only claimed that he had not deliberately sought it out. Indeed, Clark admitted in his correspondence that the Populist endorsement caused him "genuine

⁷ "Populists in Session," *Tarborough Southerner*, July 5, 1894; *Asheville Semi-Weekly Citizen*, June 7, 1894.

⁸ Edmonds, *The Negro and Fusion Politics*, 36.

⁹ "Armfield for Supreme Court," *Charlotte Observer*, July 27, 1894.

¹⁰ Walter Clark to the Editor of the *Charlotte Observer*, July 28, 1894, in *PWC*, Vol. I, 274.

surprise.” Clark insisted that upon being endorsed he “immediately consulted... party leaders,” and his letter to the *Observer* reflected their counsel and their blessing.¹¹

During the Populist-Republican legislative majority of 1894-1898, Clark often assisted Fusionist political ends—both openly and secretly. On the eve of the 1892 election, Clark penned a dissent, joined by only one other justice on a Supreme Court composed entirely of Democrats, to provide a more democratic interpretation—and Republican and Populist Party friendly—reading of the state’s election law. At issue was an election law the Democratic legislature had passed in 1889 as a first attempt at disfranchising black voters. The legislature copied a South Carolina law that required voters to supply place and date of birth information for voter registration. Many black voters lacked sufficient knowledge of such details and could thereby be disqualified from voting, as Democratic registrars saw fit.¹² And as with subsequent election laws aimed indirectly at black voters, often some white voters similarly found themselves disfranchised.

In one case, Travis Harris, Republican, contested the outcome of the election of George Scarborough, the Democratic incumbent, as register of deeds of Montgomery County. Harris sued when he discovered that the Democratic registrar had disqualified and thrown away ballots from voters who did not specifically identify their place of birth

¹¹ Walter Clark to R.L. Leatherwood, August 2, 1894, in *PWC*, Vol. I, 275.

¹² Joseph McElrath Jr. and Robert C. Leitz III, *“To be an Author”*: Letters of Charles Chesnutt, 1889-1905 (Princeton: Princeton University Press, 1997), 43 fn6.

or residence.¹³ The crucial question was whether the court could consider the registrar's actions in failing to ask voters to clarify answers that he believed insufficient under the voting law he was employed to enforce. The court's three-justice majority upheld the lower court's ruling and presumed the registrar had performed his duties. Justice Clark dissented from the court's reasoning and employed a more liberal, and democratic, reading of the election law. Clark reasoned the registrar, whose job consisted of enforcing the law, knowing the answers insufficient, should have sought clarification at the time instead of later disqualifying the ballots. Clark worried that the majority's reasoning provided registrars the opportunity to "deprive [voters] of their constitutional right of exercising the right of voting."¹⁴

Seven years later, in *Quinn v. Lattimore*, the Supreme Court—with three Republicans, one Populist, and Justice Clark in the majority—unanimously overturned a lower court's ruling and reinstated voters disqualified because they voted outside of their district or were not sworn before voting. Justice Furches's opinion held that voters acting in good faith should have their votes counted, and it was the registrar's duty to ensure that voters not be unnecessarily disqualified.¹⁵ Clark's construction of the Democratic voting law in 1892 and 1897 in both cases placed a Republican and Populist,

¹³ *State Ex Rel. Travis N. Harris v. George N. Scarborough*, 110 N.C. 232, 244 (1892).

¹⁴ *Ibid.*, 244 (Clark, J., concurring).

¹⁵ *State on the Relation of J. H. Quinn v. T. D. Lattimore*, 120 N.C. 426 (1897).

respectively, in office and placed a more democratic construction on the law passed by the Democratic legislature in 1889.

Most of Clark's collaboration with elected officials outside of the Democratic Party did not share the public nature of the court's decisions. Not wanting to risk his position within the Democratic Party, Clark provided confidential assistance to prominent Republican and Populist officeholders. He corresponded with both Republican governor Daniel Russell and Populist U.S. Sen. Marion Butler to advance progressive legislation in the state. Clark and Russell had a great deal in common. Both descended from the state's small plantation aristocracy, growing up on eastern North Carolina plantations with over two hundred slaves employed thereon. Their fathers had opposed secession only to be caught up in the wave of secession that swept the Upper South in 1861, and both boys enlisted at a young age in the Confederate Army eager to fight for the cause.¹⁶ By the 1890s Clark and Russell shared a similar political vocabulary. Attacking federal injunctions and corrupt railroad practices, Russell claimed, similarly to Clark, to be "on the side of the 'producer and the toiler' and against the 'coupon clipper.'"¹⁷

By 1897 Russell, elected governor the preceding year, was locked into a political battle with the state's railroads. The state's Railroad Commission provided little assistance, as two of its three members sided with the railroads in tax and fare issues proposed by the governor. Clark's perennial dislike for the railroads made Russell and

¹⁶ Jeffrey Crow and Robert Durden, *Maverick Republican in the Old North State: A Political Biography of Daniel L. Russell* (Baton Rouge: Louisiana State University Press, 1977), xiii-xiv.

¹⁷ *Ibid.*, 101.

Clark natural allies in the fight. By early 1897 Clark acted as a go-between, attempting to talk his Democratic brother-in-law into accepting a nomination to the state railroad's board of directors as part of Russell's plan to create a "strong Board of Directors, irrespective of party."¹⁸ Russell also sought to remove two of the three railroad commission's members. Citing a conflict of interest, Russell suspended commissioners James Wilson and S. Otho Wilson. Years later Russell would allege the idea of suspending the commissioners originated with Clark as its "most active prosecutor."¹⁹

Meanwhile Clark also wrote frequently to Populist U.S. Sen. Marion Butler, seeking his help in influencing both state and national progressive legislation. In national affairs he sought Butler's aid with a host of progressive measures: government ownership of telegraphs; direct election of U.S. Senators; and Clark's most earnest cause, the direct election of federal judges. Clark and Butler exchanged drafted bills on such topics, with Clark pushing for action and Butler seeking advice on drafted legislation. On the state level Clark implored Sen. Butler to return to North Carolina more frequently to push rate reduction and anti-free pass bills as, "My position on the court and the jealousy & criticism of a judge taking part in politics, prevent my getting round among the members." With votes on the anti-free pass and rate reduction bills closely split, Clark entreated the Senator, "Unless *you* are here there is no one who has the ability &

¹⁸ Walter Clark to A.W. Graham, March 10, 1897, in *PWC*, Vol. I, 305.

¹⁹ Crow and Durden, *Maverick Republican in the Old North State*, 106-107.

influence to save these bills....Unless you come & prevent it, the monopolies are in the saddle.”²⁰

By March of 1897, Clark began looking toward the upcoming election. Instead of focusing on white supremacy—an issue Simmons would make dominate the 1898 election—Clark believed the Democratic Party was doomed unless the election centered around the issue of railroad domination.²¹ Perceiving continued cooperation between the state Populist and Republican Parties as unlikely Clark hoped to see the Democratic Party carry the banner of anti-monopoly sentiment. Indeed, Justice Clark congratulated A.W. Graham on accepting Republican Gov. Russell’s nomination to the North Carolina Railroad Board. Having a Democrat on the board would benefit the party, as that way “the fight against R.R. domination shall not seem to exclude democrats from being on the people’s side.”²² Around this time Clark began to exchange letters with Gov. Russell mentioned above. The exchange was meant to be kept confidential and Clark took great pains to ensure it remained secret. In an undated letter, most likely penned in March or April, Clark wrote to Russell “there are spies watching your house and mine— is R.R. rule.” Clark was later forced to acknowledge his correspondence with Russell during his 1902 campaign for Chief Justice. On several occasions the *Charlotte Observer* went so far as to publish the names of those who visited Clark’s house and, according to Clark, a

²⁰ Walter Clark to Marion butler, February 11, 1897, in *PWC*, Vol. I, 303, emphasis in original.

²¹ Walter Clark to Marion Butler, April 14, 1898, in *PWC*, Vol. I, 331, emphasis in original.

²² Walter Clark to A.W. Graham, March 15, 1897, in *PWC*, Vol. I, 306.

railroad agent even accosted a messenger carrying his mail to the local post office to check on the recipients of his correspondence.²³

Clark's heightened desire for secrecy was not only due to his alliance with Governor Russell in pushing for the removal of the state's Railroad Commission, ending the lease, free pass prosecutions, or even rate reduction. In October 1897 the *Washington Post* reported that a conference was held at the North Carolina Governor's Mansion to discuss forming a new political party with both Sen. Butler and Justice Clark in attendance. The party would have its strongest base in the Populist Party voters but attract anti-railroad Democrats and Republicans. According to the *Post* the move was deliberately aimed at undercutting the Democrats talk of running a White Supremacy Campaign "to re-establish the 'white man's' party, and to make the color of a man's skin the badge of democracy."²⁴

While Clark never commented in his private letters on the meeting, Clark's disillusionment with the Democratic Party can be inferred from several instances in his correspondence. In December Clark wrote Sen. Butler about his plan to provide the Senator with a bill for the election of federal judges and appended a postscript: "If I were in the Senate, instead of the colleague you have, possibly I might help you in pushing these...reforms."²⁵ Clark's statement perhaps hinted at a hoped for Senate nomination

²³ Walter Clark to Governor Daniel Russell, undated, in *PWC*, Vol. II, 24.

²⁴ *Washington Post*, as quoted in Raleigh *Hayseeder*, October 21, 1897; See also Crow and Durden, *Maverick Republican in the Old North State*, 109-110.

²⁵ Walter Clark to Marion Butler, December 21, 1897, in *PWC*, Vol. I, 324.

should Populists emerge victorious in the 1898 election. Several months later, in April 1898, Clark again wrote Butler to complain that the upcoming election would be a “sham battle” because the railroads were already working to purchase the “nomination by *each* party of railroad judges, congressmen & legislators.”²⁶ Moreover, Clark lamented that at the Democratic Party convention, in May of that same year, “Andrews was supreme”—stacking the convention with Southern railroad lawyers.²⁷ And in September, with the election less than two months away, Clark’s despair for the Democratic Party deepened. He wrote A.W. Graham, “The R.R.’s in confidence—have so taken possession of our party & contemplate such *Revolutionary Measures*...”²⁸ Clark’s certainty that the Democratic Party, with its conservative agenda focused on white supremacy over economic issues, would lose the election proved wrong. Through a combination of fraud, intimidation, and violence the Democratic Party emerged victorious in the election. White supremacy had triumphed over anti-monopoly sentiment. Clark’s hope for an anti-railroad Democratic Party, or even a new party, appeared dashed in the electoral outcome.

Democrats Ascendant, Fusion in Decline

With the success of the Democratic Party’s White Supremacy Campaign at the polls in 1898, Democrats gained a significant majority in the state legislature. However, Republican Governor Russell remained in office as did Populist U.S. Sen. Marion Butler.

²⁶ Walter Clark to Marion Butler, April 2 1898, in *PWC*, Vol. I, 331.

²⁷ Walter Clark to A.W. Graham, May 26, 1898, in *PWC*, Vol. I, 333.

²⁸ Walter Clark to A.W. Graham, September 20, 1898, in *PWC*, Vol. I, 336.

Moreover, the Fusion majority on the State Supreme Court remained—and outnumbered Democratic Associate Justice Clark four-to-one. There also remained numerous appointed and elected Populist officials in state commissions and county boards with terms that did not expire until 1900 or later. Fusion may have been defeated at the polls, but there remained an infrastructure of Fusion officeholders to attempt to recreate the victories of 1894 and 1896. At the very least, these Fusion officeholders could serve as a stopgap until the political misfortunes of the Populist and Republican Parties could be reversed.²⁹

It was this remnant of earlier Fusion victories that would frustrate Democratic attempts to establish one-party political rule in North Carolina. Despite their ultimate lack of success, Republican and Populist officeholders pushed back against Democratic attempts to remove any and all political challenges to their dominance of North Carolina politics. This drama would play out in over a dozen cases brought before the North Carolina Supreme Court between 1898 and 1901. Populist and Republican railroad commissioners, board of education members, and even a shellfish commissioner resisted removal from office—and the loss of corresponding income and authority—through direct legal challenges to the actions of the state legislature. Consequently, the attention of the state and the fortunes of the state’s political parties would be decided in a Supreme Court with a Fusion majority. The struggles over these political offices would take on larger significance as Democrats in the state legislature worried that the politically

²⁹ Edmonds, *The Negro and Fusion Politics*, 210-211.

opposed court might frustrate their most significant legislative plan: their plan to disfranchise and segregate the state's African Americans population.³⁰

The struggle between the Democratic legislature and the Fusionist officials produced yet another conflicted outcome for Clark. Even as Clark bemoaned the railroads power over Democratic politics, his dissenting opinions between 1898 and 1901 established a means to undercut the last vestige of Fusionist power—the Supreme Court and various appointed public officials—and ultimately led to the attempted impeachment of two Supreme Court justices.³¹ Consequently the same Democratic Party that struck a bargain with businesses and railroads during the campaign, and sent the conservative Furnifold Simmons to the Senate, would be better able to implement its legislative agenda that was often at odds with Clark's progressive ideals. Yet consistently, throughout the litany of office-holding cases, it was Clark's progressive anti-corruption and (white) majoritarian sentiments that guided his decisions.

The membership of the court between 1898 and 1901 included Chief Justice William T. Faircloth and Associate Justices Robert M. Douglas, David M. Furches, Walter A. Montgomery, and Walter Clark. Chief Justice Faircloth, a pre-war Whig and post-war Republican, had made his name as a corporate lawyer and banker in Goldsboro.³² Faircloth was a relatively Conservative member of the court and his

³⁰ *Ibid.*, 211.

³¹ *Ibid.*

³² *Report of the Third Annual Meetings of the North Carolina Bar Association* (Durham: The Seeman Printer, 1901), 60-61.

decisions were known for their brevity—often less than a page in length. Justice Robert M. Douglas was the son of antebellum politician Stephen Douglas. Although born in Rockingham, North Carolina, Douglas frequently travelled between his father’s homes in Washington, D.C., and Chicago, Illinois, and his maternal grandparents’ home in Rockingham County, North Carolina. Too young to serve in the war, Douglas left his father’s Democratic Party to become active in Republican politics. Douglas spent four years, 1869-1873, serving as President Ulysses S. Grant’s personal secretary.³³ Justice David M. Furches, after a failed run for the governorship in 1892, was elected as Associate Justice in 1894. Justice Walter A. Montgomery, born on a Warrenton, North Carolina, plantation with over one hundred slaves was elected as to the Supreme Court as a Populist in 1894.³⁴ Since all of the justices were elected in either 1894 or 1896, their eight year terms were not set to expire until 1902 at the earliest—assuming they did not win reelection.

With the court’s four-to-one Fusion majority, the stage was set for a serious conflict between coordinate branches of the state government. The Democratic legislature was eager to act quickly to set in stone its recent victory at the polls, and both Republicans and Populists were planning to regain lost ground. The State Supreme Court would now have to mediate between the state legislature and Fusion officeholders. The

³³ William Powell, ed., *Dictionary of North Carolina Biography*, Vol. 2 (Chapel Hill: University of North Carolina Press, 1986), 98-99

³⁴ “My Day in Court,” in the Walter A. Montgomery Papers, #1996, Southern Historical Collection, The Wilson Library, University of North Carolina at Chapel Hill.

actions of the court led to conflict between the court and legislature that reached drastic proportions by 1901 when the House impeached two of the Fusion justices.

Of Precedent and Political Power

The chief savior of Fusion officeholders, and the cause of friction between the court and the Legislature, was the doctrine of *Hoke v. Henderson*.³⁵ The North Carolina State Legislature jealously guarded its role as representative of the public will. Indeed, North Carolina's legislature did not even create a State Supreme Court until 1818.³⁶ The case originated during a time in North Carolina political history when democratic forces were undermining the State's Supreme Court—salaries were cut and the court almost abolished. In one of its many attempts to democratize the court, the state legislature enacted a law in 1832 making the office of Clerk of Court elective. Before the act clerks of court had been appointed by the legislature, and provided they posted their annual bond, the office would continue indefinitely—a life office. Soon after the passage of the act, all but one of the state's clerks of court resigned from office.³⁷ The sole remaining clerk, Lawson Henderson of Lincoln County, refused to resign or stand for election. When the elected clerk, John D. Hoke, attempted to claim his office, Henderson brought suit to maintain his office.³⁸

³⁵ For a full discussion of *Hoke v. Henderson*, see Timothy Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness* (Athens: University of Georgia Press, 1999), 135-146.

³⁶ *Ibid.*, 135.

³⁷ *Ibid.*

³⁸ *Ibid.*, 135-136.

Justice Thomas Ruffin, wary of further legislative intervention to weaken the courts, cautiously worded his opinion. Wary that the exercise of judicial review to invalidate the 1832 Act might provoke the wrath of a hostile legislature Ruffin grounded his opinion in the sacred ground of contract and property rights. The ruling was based on two fundamental arguments. First, that public office is a form of property. The legislature was free to discontinue an office or reasonably decrease the pay of the office—but it could not transfer the office between men. Second, the taking of an office from one man and giving it to another constitutes a violation of property rights; a breach of contract between the state and the officeholder.³⁹

The *Hoke* decision remained valid precedent when the new Democratic majority began enacting its legislative agenda in 1899. Shortly after the Legislature convened in January 1899, it set about ousting Fusion officeholders and installing party loyalists. African-American North Carolina State Sen. Thomas Fuller noted that “Fusionist officeholders were made to resign by extraordinary pressure.”⁴⁰ Fusion officeholders who remained despite the pressure saw their offices abolished by the State Legislature. Some, like the City Alderman of New Bern, were even threatened by statute with up to a \$1,000 fine and one year’s imprisonment if they attempted to maintain their offices by any means—including legal action.⁴¹

³⁹ *Hoke v. Henderson*, 15 N.C. 1, 26 (1833). See also *John H. King v. C.L. Hunter, et al.*, 65 N.C. 603 (1871).

⁴⁰ Edmonds, *The Negro and Fusion Politics*, 191.

⁴¹ *Ibid.*, 188.

Between January and February 1899 the state legislature acted to remove reluctant Fusion officeholders whose terms had not yet expired. In some instances, they transferred the duties of office from a single superintendent to a board of directors. In other instances, they merely abolished the existing board and appointed a new board. The offices affected included county boards of education, solicitors of the criminal courts, the shellfish commissioner, and the directors of the state hospital, penitentiary, and railroad. The offices varied in the source and amount of their emoluments. The office of superintendent of the state's prisons paid \$2,500. However, most offices paid considerably less. Indeed, the office of director of the state's railroad board paid only \$3 per year.⁴²

Since all of the offices mentioned above were essential to the management or regulation of state and private resources, these offices could not be abolished permanently—thus avoiding the application of the Court's decision in *Hoke*. Instead, the legislature abolished the office and/or commission and subsequently resurrected each of them by a separate piece of legislation. Often the abolition of a commission—and the related office(s)—and the statutory rebirth of the commission occurred on the same day.⁴³

⁴² *Gattis v. Griffin*, 125 N.C. 332 (1899); *State Prison v. Day*, 124 N.C. 362 (1899); *Bryan v. Patrick*, 124 N.C. 651 (1899); *Atlantic and North Carolina Railroad Company v. H.P. Dortch, et al.*, 124 N.C. 663 (1899); *Theophilus White, Chief Inspector v George Hill and others*, 124 N.C. 194 (1899); *Abbott v. Beddingfield*, 125 N.C. 256 (1899); *Dalby v. Hancock*, 125 N.C. 325 (1899); *McCall v. Webb*, 125 N.C. 243 (1899). For a complete list of the officeholding cases, see Edmonds, *The Negro and Fusion Politics*, 238.

⁴³ Edmonds, *The Negro and Fusion Politics in North Carolina*, 191, 211.

The earliest of the officeholding cases resulted from an attempt to remove Fusionist Captain William Day from the position of superintendent of the state prison and replace him with a Democratic board of directors. By February the *News and Observer* published a half-page article titled, “Capt. Bill Day Refuses To Go,” lamenting that Day “does not propose to give up his grip on the superintendency of the State’s Prison until he is thrust out by the courts.”⁴⁴ On February 15, the legislature passed a special act authorizing the new Democratic board to “test in the courts the claims of any claimant or claimants to the possession, custody and control of the property of the State’s Prison.” The Wake County Superior Court ruled for the new board, and the case was appealed by Captain Day to the State Supreme Court.⁴⁵

Populist Justice Walter A. Montgomery wrote the court’s opinion, reversing the lower court and reinstating Captain Day as Superintendent of the State’s Prisons. After examining the 1897 Prison Act side-by-side with the 1899 Act the court found the Legislature had created “no new duties or powers” for the newly created board. Montgomery, citing *Hoke* as precedent, declared that “where the duties are continued the office is continued.”⁴⁶ However, the political implications were significant and worried Associate Justice Furches who wrote a concurring opinion to stress the non-political nature of the majority’s decision making process. Despite noting that “it seems to me

⁴⁴ “Capt. Bill Day Refuses To Go,” *News and Observer*, February 11, 1899.

⁴⁵ *State Prison v. Day*, 124 N.C. 362, 364 (1899).

⁴⁶ *Ibid.*, 375.

that the defendant’s claim is looked upon with disfavor as resting upon an act passed by the legislature of 1897,” Justice Furches spent most of his concurrence protesting that his motives were apolitical and his legal reasoning untainted by party bias. Justice Furches insisted, “I propose to regard this Legislature just as I would any other Legislature, and to deal with its legislation just as I would any other legislation—just as I did the Legislature of 1895.”⁴⁷

With the court already on the defensive Justice Clark’s dissent declared that the majority’s opinion was an assault upon the “inalienable right of the state to control its own institutions.”⁴⁸ Reading *Hoke* narrowly Clark argued that the office of superintendent had been abolished, and with its abolition Day had lost any claim to the position. Moreover, Clark claimed *Hoke* limited Day to recovering only the compensation due him for the office—not his reinstatement as the majority had decided. According to Clark, the broad reading of *Hoke* advanced by the Fusionist majority of the court turned officeholders into the equivalent of Milton’s fallen angels who could “only by annihilation die.”⁴⁹ Subsequent office-holding cases would see Clark and the court’s Fusion majority drift further apart. The majority continued to broaden *Hoke*—protecting

⁴⁷ *Ibid.*, 373-378 (Furches, J., concurring).

⁴⁸ *Ibid.*, 378 (Clark, J., dissenting).

⁴⁹ *Ibid.*, 390.

Fusion officeholders—while Clark loudly advocated the repeal of *Hoke* as an outdated and unwarranted precedent.⁵⁰

The day after the court's opinion was released the *News and Observer* published a "synopsis of the Opinion of the Supreme Court" so the "lay reader could get a clear understanding of the whole question."⁵¹ The *News and Observer* was laying the groundwork for an attack upon the Fusion court in the same way it had rallied the attack against the Fusion Legislature in 1898. Moreover, the *News and Observer* was creating a "truly democratic and Jeffersonian" hero in Justice Clark, whose dissent was "a protest against the prevalent Republican tendency to exalt the executive and judiciary at the expense of the law making part of government."⁵² Clark, for the time being, would serve as the judicial standard bearer of the Democratic Party's drive to political domination. Time would show that both had radically different purposes, and those purposes would collide in the 1902 race for the Chief Justiceship. For now, however, the allied resistance to *Hoke* and the Fusion majority on the court served the purposes of both Justice Clark and the Democratic Legislature.

The next two cases, closely related, of *Bryan v. Patrick* and *Atlantic and North Carolina Railroad Comp. v. Dortch*, tested the ability of the North Carolina Legislature to abolish the board of directors of the state railroad and recreate the board with new

⁵⁰ See *State ex rel R. S. McCall v. Charles A. Webb*, 125 N.C. 243, 248-249 (Clark, J., dissenting); *Abbott v. Beddingfield*, 125 N.C. 256, 268-296 (Clark, J., dissenting).

⁵¹ "The Day Case Again," *News and Observer*, April 13, 1899.

⁵² "Judge Clark Praised," *News and Observer*, April 21, 1899.

membership.⁵³ The new Democratic board was similar to the old board except that it expanded membership from eight to nine members and removed appointment power from the Governor and placed it in the hands of the Legislature. In private conference Clark tried to impress upon the court the importance of scaling back *Hoke* and upholding the Legislature's appointment of the new board of directors. However, the Fusion majority once again decided to support the claims of Fusion office-holders against the newly appointed Democratic board.⁵⁴

Clark assailed the majority opinion as “defy[ing] the will of the people, as expressed by their representatives.”⁵⁵ It set the purposes of government at odds as it set “the salary of officers...[over] the right of the people to change the control of their state institutions.”⁵⁶ Next, Clark, for the first time, presented a controversial argument, that perhaps *Hoke v. Henderson* should be overruled. Even more controversial, at least to Clark's formalist colleagues on the bench, Clark presented historical arguments to explain why the notable court—composed of North Carolina judicial luminaries Thomas Ruffin, William Gaston, and Joseph Daniel—had issued such a problematic precedent. Justice Clark noted the tenuous position of the State Supreme Court in the 1830s, “of legislative origin and without the present constitutional guarantees.”⁵⁷ Its error was made

⁵³ *Bryan v. Patrick*, 124 N.C. 651 (1899); *Atlantic and North Carolina Railroad Company v. H.P. Dortch, et al.*, 124 N.C. 663 (1899).

⁵⁴ *Atlantic and North Carolina Railroad Company v. H.P. Dortch, et al.*, 124 N.C. 663, 680 (1899).

⁵⁵ *Ibid.*, 670 (Clark, J., dissenting).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 673.

more apparent by the fact that “nowhere else has it ever been held by any court, in any country, at any time that there was or could be private property in a public office.”⁵⁸ Yet the court’s majority did not agree and lamented that anyone would question the motives of the Ruffin court.⁵⁹ Yet at the same time, Clark’s blistering dissents were already fueling public questions about the motives of the Fusion justices.⁶⁰

Two more important cases remained to be heard by the court on the issue of officeholding. The first, *Theophilus White v. George Hill*, concerned the office of shellfish commissioner for southeastern North Carolina.⁶¹ Republican appointee Theophilus White refused to abandon his office when the state legislature abolished the 1897 *Act to Promote the Oyster Industry in North Carolina* and replaced it with the *Act to provide for the General Supervision of the Shell-fish Industry of the State of North Carolina* during its 1899 session. The new act replaced White as Chief Inspector with a board of three commissioners. On March 13 the new board arrived at the steamer *Lillie*, the mobile offices of the shellfish commissioner, to take possession of the ship. Their demand for the ship’s logs was denied twice, before they finally returned with a local policeman who cleared the decks of the “stubborn crew.” The *News and Observer* charged that “instructions...were left by [White] with the captain to resist.”⁶² Such a

⁵⁸ *Ibid.*, 674.

⁵⁹ *Ibid.*, 680 (Furches,, J. dissenting).

⁶⁰ “Decisions of Supreme Court,” *Raleigh Morning Post*, May 10, 1899.

⁶¹ *Theophilus White, Chief Inspector v. George Hill and Others*, 125 N.C. 194 (1899).

⁶² “Shell Fish Commissioners,” *News and Observer*, March 15, 1899.

charge was most likely accurate, as White continued to resist the efforts of the new board to supplant his role as chief inspector of shellfish. Chief Inspector White brought suit against the new board seeking reinstatement. The court's majority, as they had done in the previous cases, compared the legislative acts side-by-side and determined that the "same general object [can] be found in both acts."⁶³ Once again, Clark wrote the sole dissent, calling the court's attention to the anti-democratic nature of the *Hoke* decision.

The same day as the *White* case the court issued its ruling in another officeholding case—*Abbott v. Beddingfield*.⁶⁴ The case concerned the state's Railroad Commission. The Fusion commissioners had been appointed in April 1, 1897, by Republican Governor Daniel Russell. The commissioners' terms were meant to last six years, setting the end of their terms in April of 1903. To remove these Fusion railroad commissioners the Democratic Legislature passed *An Act to abolish the Railroad Commission* and enacted *An Act to establish the North Carolina Corporation Commission*. After another side-by-side comparison of the repealed Railroad Commission Act and the Corporation Commission Act the court's majority ruled that the Legislature had "re-enacted the Act of 1891 in almost the very words in which it was originally enacted."⁶⁵ Then, in response to Justice Clark's stinging dissent, Justice Furches ventured into dangerous territory. Justice Furches insisted in the majority opinion that the Legislature incorrectly "thought they had

⁶³ *Theophilus White, Chief Inspector v. George Hill and others*, 125 N.C. 194, 196 (1899).

⁶⁴ *Abbott v. Beddingfield*, 125 N.C. 256 (1899).

⁶⁵ *Ibid.*, 260.

the right to...put the office...held [by Abbott] in the hands of a party in harmony with the political sentiment of that party which controlled the Legislature.”⁶⁶ Justice Montgomery was so worried about this tact that he filed a one sentence concurrence to state that he did not “wish to be bound by that part of the opinion in which is discussed the motives of the members of the General Assembly.”⁶⁷

Clark’s dissent in the *Beddingfield Case* was a scathing indictment of *Hoke* and the court’s Fusion majority.⁶⁸ Clark’s dissent, almost three times the length of the court’s majority opinion, began by condemning attempts by the executive and judiciary to interfere with the Legislative branch going back to the English Bill of Rights of 1688. *Hoke* represented a part of this problematic trend and consequently needed to be discarded as bad precedent. Its long existence was no excuse to continue to perpetuate an error. Despite the majority’s hesitancy to question established precedent, Clark, quoting Lincoln, noted that “such matters are never settled, till they are settled right.” Overruling *Hoke* would end the “continuous struggle between the people acting through their Legislature and the courts.”⁶⁹

As Clark’s thirty-plus page dissent continued, his political objections to *Hoke* began to emerge:

⁶⁶ *Ibid.*, 259.

⁶⁷ *Ibid.*, 268 (Montgomery, J., concurring).

⁶⁸ *Ibid.*, 268 (Clark, J., dissenting).

⁶⁹ *Ibid.*, 280.

Nay, more, if some vast trust, some powerful combination of capital shall elect one Legislature, it can fill the offices for life, and a generation of men must pass away without any voice in, or control of, the government they created; for even a constitutional convention can not vacate offices, if office is a contract. Or if the same oppressive combination shall succeed in nominating and electing three members of this bench, it can, through them, for eight years at least, nullify and set aside any act of legislation which they may deem proper to hold unconstitutional.⁷⁰

Clark didn't just fear the power of *Hoke* to preserve Fusion office holders—and thereby thwart the will of the state's new Democratic majority—he also feared that *Hoke* might become the tool of corporate interests seeking to stifle reform movements through lengthy appointments or control of a majority of the court. Indeed, Clark thought he was not just addressing a hypothetical, but a reality that was already taking place on the federal judiciary that had recently held the income tax unconstitutional in *Pollock v. Farmer's Trust*. Both the Fusionist State Supreme Court and the Federal judiciary were “in conflict with the spirit and express letter of the organic law and opposed to the manifest movement of the age.”⁷¹ Their undemocratic spirit was further confirmed by reliance on the *Hoke* decision, over two-thirds of a century old, which was itself the product of “Judges, educated under the old system of distrust of the capacity of the people for self-government.” Clark directly criticized the court's majority; “Court...has acted unconstitutionally and exceeded the powers confided in it.”⁷²

⁷⁰ Ibid., 290.

⁷¹ Ibid., 291.

⁷² Ibid., 292.

Despite the differing goals of Justice Clark and the Democratic Legislature, Clark received numerous letters from prominent Democrats that congratulated him on his dissenting opinion in *Beddingfield*. John E. Woodward praised Clark as “unterrified by ‘antiquated precedents’”; Locke Craig declared the dissent a “powerful stand for democratic representative government...the finest opinion that has emanated from the bench of North Carolina”; Charles Aycock praised the dissent but worried it went too far in questioning judicial review.⁷³ The state’s Democratic press was also quick to condemn the court and praise Justice Clark. Under the heading of “Government by the Judiciary” the *Clinton Democrat* declared that “our non partisan judiciary has gone Republican.”⁷⁴ The *News and Observer* carried reports from the *Durham Sun*, *Charlotte News*, and *Winston Sentinel* that condemned the court.⁷⁵ The *Durham Sun* complained that “the ‘non-partizan (sic) judiciary’ disposes of all the political cases by turning the Democrats out and turning in Republicans and Populists.” The *Charlotte News* lamented that the court was “composed largely of partisans...[that] has never failed to decide every contest brought before it in favor of the Republican or Populist.” Praising Clark’s “vigorous” dissent the *Durham Sun* summarized the worries of Democrats after their repeated losses in the Supreme Court: “The question now is: Where are we ‘at.’”⁷⁶

⁷³ John Woodward to Justice Clark, November 22, 1899, in *PWC*, Vol. I, 347; Locke Craig to Justice Clark, November 23, 1899, in *PWC*, Vol. I, 348; Charles B. Aycock to Justice Clark, December 4, 1899, in *PWC*, Vol. I, 348-349.

⁷⁴ “Government by Judges,” *Fayetteville Observer*, December 7, 1899.

⁷⁵ “Spirit of the Press,” *News and Observer*, November 24, 1899.

⁷⁶ *Ibid.*

With tension continuing to build between the court and the legislature, it was the return of Theophilus White's case during the May 1900 term that brought conflict to a head.⁷⁷ As the court had previously sided with White in his attempt to regain his office as chief inspector, White had returned to seek a writ of *mandamus* compelling a reluctant state treasurer to pay his salary of \$75 per month plus travelling expenses. The state auditor and treasurer, both Democrats, refused to pay White's salary as they had received explicit instructions from the legislature against paying Chief Inspector White—perhaps hoping to use the power of the purse to starve White out of office.⁷⁸ The court, reluctant to use the full power of a writ of *mandamus*, instead issued a ruling that Theophilus White was entitled to his pay as the proper chief inspector. The court's majority expected, or at least hoped, that the legislature would authorize payment during its summer session.⁷⁹

White's attorney returned to the court during its next session and again requested a writ as the legislature took no action upon White's claim and the state treasurer still refused to pay White's salary. The arguments in chambers over White's request for a writ were extraordinarily uncivil and political; they were described by one justice as "political brawls."⁸⁰ The greatest detail about these meetings comes from Justice Montgomery's testimony before the Senate during the impeachment trial of Justices

⁷⁷ *Theophilus White v. H.W. Ayer, State Auditor, and W.H. Worth, State Treasurer*, 126 N.C. 570 (1900).

⁷⁸ *Ibid.*, 573-574.

⁷⁹ *Ibid.*, 578.

⁸⁰ "Bynum Experts' to Get Their Pay," *News and Observer*, March 21, 1901.

Douglas and Furches. In addition to the conflict between members of the court over their power to compel the treasurer to pay White's salary, the divide grew when Clark asked for permission to file a dissent in the case and to attach it to the court's writ. Justices Douglas, Furches, and Montgomery "declined to allow it." Montgomery, the most vocal of the three justices, upbraided Clark for filing "dissenting opinions...full of appeals to the people and of political learning." Montgomery went on to blame Clark for the court's infamy in the press; "You have been at the bottom of all the troubles of the court. These newspaper attacks have come from you, and I know it."⁸¹ When Clark pressed yet again for permission to file a dissent, Justice Douglas sarcastically stated that "he was willing for it to go into the obituary column." Clark prophetically retorted, "It may suit the obituary column, but it is not in my funeral."⁸²

The court then instructed the clerk to issue a writ upon the treasurer compelling payment. Wary of becoming entangled in the increasingly bitter conflict between the court and the legislature, the clerk returned several times to the judges in chambers to ask for instructions on his duty. Justices Douglas, Faircloth, and Furches instructed the clerk to issue the writ, while Justices Clark and Montgomery instructed the clerk not to issue the writ. The clerk issued the writ on October 17, but the struggle for White's pay continued as the state auditor and treasurer now questioned whether they had a duty to comply.⁸³ Shortly after receiving the court's order, Treasurer Worth was visited by

⁸¹ Ibid.

⁸² "How Another Case Comes to the Bat," *News and Observer*, March 25, 1901.

⁸³ Edmonds, *The Negro and Fusion Politics*, 211.

Justice Clark who instructed Worth that “he would be held responsible when the Legislature met and there would be three vacancies on the Supreme Court bench.”⁸⁴ In addition, Clark sent along a copy of his unofficial dissent to the state treasurer along with a letter instructing him not to issue the writ.⁸⁵ Faced with a court order, the state treasurer relented in late October and dispersed the funds to Theophilus White.⁸⁶

Calls for impeachment of Justices Douglas, Faircloth, and Furches began as early as December of 1899. The *News and Observer* republished an *Asheville Citizen* editorial that brought up the potential for impeachment, stating “it is as important that justice be meted out to a Supreme court [sic] as to a chicken thief or burglar.”⁸⁷ However, the increasing momentum toward impeachment was fueled not by the payment of a few hundred dollars to a shellfish inspector but to protect what Democrats referred to as “the amendment”—the disfranchisement amendment.⁸⁸

The new Democratic legislature had drawn up a constitutional amendment to disfranchise the state’s black voters. With an amendment ready, Democratic politicians worried how their Republican and Populist opponents might undermine “the amendment.” Editorials expressed worry that the Fusion majority planned to “defeat the

⁸⁴ “Bynum Experts’ to Get Their Pay,” *News and Observer*, March 21, 1901.

⁸⁵ Evidence in the Impeachment Proceedings, General Assembly Session Records, Judiciary Committee, 1901, SANC.

⁸⁶ Edmonds, *The Negro and Fusion Politics*, 211.

⁸⁷ “Impeachment?” *News and Observer*, December 20, 1899.

⁸⁸ Edmonds, *The Negro and Fusion Politics*, 211; “Southern Justice Wins,” *Philadelphia Christian Recorder*, April 4, 1901.

[disfranchisement] amendment by any means which they can command.”⁸⁹ The judiciary, both state and federal, was the most readily available means to challenge the disfranchisement amendment given the power already exercised by the court in the officeholding cases.⁹⁰ Despite infrequent calls for impeachment throughout 1900, it was not until February 1, 1901, that State Rep. Locke Craig introduced a resolution calling for the impeachment of Republican Justices Douglas and Furches for usurping the powers of the legislature by issuing a writ on the state treasurer.⁹¹ Justice Faircloth’s name, which was included in earlier calls for impeachment, was absent from the resolution because the Justice had passed away in December of 1900. The next two months were taken up with arguments over various ways to punish the Judiciary—censure or impeachment—and collecting evidence against the Justices. The rumblings over impeachment consumed much of the front page of the *News and Observer* from February through March. The February 24, 1901, edition of the *News and Observer* carried news of the passage of the impeachment resolution “nearly 2 to 1” by the General Assembly and the full text of “four great speeches in the House for Impeachment.”⁹²

After the justices’ impeachment by the House, the focus of the political drama shifted to the Senate. The prosecution would face a higher burden in the Senate, as

⁸⁹ “Supreme Court Legislation,” *News and Observer*, in *Statesville Carolina Landmark*, December 7, 1899.

⁹⁰ “The Amendment Finally Passes,” *News and Observer*, June 14, 1900.

⁹¹ “Resolution for Impeachment,” *News and Observer*, February 1, 1901.

⁹² “Vote of the House on Resolution,” *News and Observer*, February 24, 1901.

conviction required a two-thirds majority. The Democratic prosecutors failed to garner even a simple majority of votes on four of the five articles of impeachment, as a large number of senators in the Democratic majority broke away and refused to indict the judges. A handful of legislators who voted in the negative on impeachment explained their votes. Consistently they appealed to insufficient grounds for the impeachment.⁹³ Although none explicitly said so, there is little doubt that by the end of the trial in the Senate the Supreme Court was sufficiently intimidated and posed significantly less of a threat to Democratic rule in the state. There was little reason to add the infamy of a conviction to the state's history with the prosecutors' most important objective already obtained.⁹⁴

A Post-Massacre Murder & the Court

The entanglement of legal issues and politics was not limited to the officeholding cases. In the politically charged environment after the White Supremacy Campaign the case of *State v. Thomas Smith* required the North Carolina Supreme Court to confront the fallout of the Wilmington Massacre as it impacted the residents of Johnston County. On Christmas night in 1898 Thomas Smith killed Charles Cawthorne by slicing his jugular vein with a knife designed for butchering hogs. Smith, a middle-aged farm hand, was described by witnesses as “a yellow man”—a light skinned African-American—and

⁹³ “Why he Voted to Acquit the Judges,” *Raleigh Morning Post*, March 30, 1901.

⁹⁴ Edmonds, *The Negro and Fusion Politics*, 212; “Press on Impeachment,” *Raleigh Morning Post*, February 12, 1901.

Cawthorne was a local white teenager.⁹⁵ The events that led to Cawthorne's death and Smith's conviction flowed directly from the Wilmington Massacre.

The town of Selma in Johnston County was especially active on Christmas day. Amid the busy movement of the small town a group of about 40 white youths wearing "dough face" masks shot off fire crackers and roman candles. The revelry of the group turned malevolent later that afternoon as the group began firing roman candles toward several black men going about their business. The former Mayor of Selma testified for the defense that "I saw some fighting and shooting, fire crackers...the white men were beating negroes; They were using roman candles; a white man beat a negro with a stick; One man shot a negro with a rifle."⁹⁶ Smith, on his way home from a church function passed three young white men on the road out of Selma after dusk—Lewis Cawthorne, Thomas Winfrey, and Graham Garner. The men were wearing "dough face" masks, firing off fireworks and firearms, and drinking from a communal bottle of whiskey on the public road. One was wearing a women's skirt, while the other two were carrying, but not wearing, similar skirts. Smith and his wife politely but cautiously passed them and returned to their home a couple miles outside of Selma.

Later that night the same group of young men approached Smith's home as they continued down the public road shooting off both fireworks and firearms and singing. Smith, aware of the events that transpired in Selma earlier that day and the Wilmington

⁹⁵ *State v. Thomas Smith*, Supreme Court Case Files, Record 19,675, SANC.

⁹⁶ *Ibid.*, Testimony of J.H. Parks, 21.

Massacre the month before, began to worry for his family's safety. Smith testified that he was "scared" and "frightened" as he heard the gun shots not distant from his home.⁹⁷ Remembering that he had loaned his gun to a white neighbor Smith grabbed an eight inch long knife he intended to use to slaughter hogs the following day. As Smith looked for a weapon the young men stopped in front of Smith's house and began shooting roman candles in its direction. Peering at the masked men through his window Smith "thought they had come to kill him."⁹⁸ When Smith came out to confront the young men he heard one member of the group say "shoot the damn dog." Smith, claiming to have seen a gun drawn, used his knife and "commenced to cut" the masked men. His blade found the jugular of Cawthorne and likely killed him with one cut. Smith then turned to Thomas Winfrey who received multiple stab wounds before finally running away to safety at a neighbor's house.⁹⁹

Smith was immediately aware of the potential trouble that could come from his actions. Fearing a lynching Smith ran directly to Smithfield along the railroad tracks and sought out the Sheriff to turn himself in and explain what had transpired. Unable to locate the sheriff Smith spent the night at an apartment above prominent black businessman Ashley Smith's general store to await the Sheriff's return. The sheriff's arrival the next day was fortunate for Smith as local residents had been "organizing a

⁹⁷ Ibid., Testimony of Thomas Smith, 22.

⁹⁸ *State v. Thomas Smith*, 125 N.C. 615, 618 (1899).

⁹⁹ Ibid.

lynching bee.” The *News and Observer* joined the white residents of Johnston County, lamenting that they had been “cheated...[out] of the pleasure of a necktie party.”¹⁰⁰

Smith was tried at the August term of the Johnston County superior court and found guilty of first degree murder. His attorney appealed the ruling the state Supreme Court claiming the judge’s charge to the jury on premeditation was in err.¹⁰¹

On its face the primary issue in the case was the distinction between first and second degree murder and what constituted proof of premeditation by the defendant. However, the political aspects of the cases caused enough division within the court to inspire four different opinions by the court’s five justices.¹⁰² The Superior Court Judge’s instruction to the jury, excepted to by the prisoner, read, “If the assault was prompted by the occurrences of Wilmington, and the rioting at Selma, or either of them, this would be a circumstance from which the jury might infer premeditation on the part of the prisoner.”¹⁰³ The Fusionist majority of the court found the instruction “so great an error” that they granted Smith a new trial. The justices found that the totality of the evidence concerning the “riots” in Selma and Wilmington did not furnish evidence of “malice toward the white race,” but instead “directly established abject terror and fear... for [the

¹⁰⁰ “Lynching Party Foiled at Selma,” *News and Observer*, November 28, 1898.

¹⁰¹ *State v. Thomas Smith*, 125 N.C. 615 (1899).

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, 618.

prisoner's] personal safety." Moreover the court worried that "there was too much passion on the part of the prosecution for the state."¹⁰⁴

Justice Furches's concurrence dug deeper into the problem of premeditation for the state's case against Thomas Smith. Asked during oral arguments by Furches to "point out the evidence upon which it relied to prove *deliberation* and *premeditation*" the state's attorney referenced only "the fact there had been a riot in Wilmington last November, and...[that] the prisoner...had read about the Wilmington riot until he could not sleep."¹⁰⁵ Furches's questioning of the state's attorney then took a more personal turn:

Justice Furches: Have you read about the riot in Wilmington?

Attorney-General: Yes, I have.

Justice Furches: Suppose there had been a riot between negroes and whites in Lexington on December 26th, and you had been in Lexington at the time, but had nothing to do with it, and that at 10 or 11 o'clock at night three men had come to your house in the condition and manner that these three men went to the house of the prisoner, and a fight ensued between you and them, and one of them had been killed. Do you think you ought to be convicted of murder in the first degree because you were in Lexington that evening or because you had read about the Wilmington riot?

Attorney-General: No. I don't think so.¹⁰⁶

¹⁰⁴ *Ibid.*, 619.

¹⁰⁵ *Ibid.*, 623-624 (Furches, J., concurring).

¹⁰⁶ *Ibid.*, 624.

Justice Furches's introduction of a color-blind approach to the facts of the case attempted to expose the error, and bias, of the judge's instructions at trial. Upholding the case with such an error would mean "we should have one rule of law for the trial of a negro and another for the trial of a white man. This we can not have."¹⁰⁷

Remembering that the Smith case was heard at the same term as several of the officeholding cases, Justice Furches's concluding paragraph is especially enlightening. Regretting the "riots" at Selma and Wilmington, Furches stated (perhaps to the papers who he reasonably, and correctly, presumed would cover the case), "Let these riots be among the things of the past. Let the dead bury their dead, but do not bring their ghosts into court to bury the living."¹⁰⁸ His statement can be interpreted on two levels. First, it reads most directly as an attempt to appeal to those who would decide the fate of Thomas Smith in his next trial. Second, it can be viewed as an appeal to Democrats to temper the harsh rhetoric of the White Supremacy Campaign and the Wilmington Massacre.

The last concurrence was written by Justice Douglas, who like Justice Furches, proclaimed a desire to see the law administered "without fear or favor."¹⁰⁹ In a similar manner Justice Douglas asked the same rhetorical question as had Justice Furches: "Let us reverse the case, for the sake of argument: Suppose that three negroes, disguised and armed, had come to a white man's house...what would he probably do? I fear it would

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid., 625 (Douglas, J., concurring).

not require any premeditation for a ready weapon to meet a willing hand.”¹¹⁰ Justice Douglas then concluded his brief concurrence with an appeal to equality before the law: “No one is so rich and powerful as to be beyond the avenging arm of the law, and none so poor and humble as to be beneath its completest protection.”¹¹¹

While the Fusion Justices’ opinions displayed a willingness to understand the role played by race in Smith’s conviction, Justice Clark’s dissent provides insight into some negative aspects of Clark’s progressive jurisprudence. First, Clark’s fundamental belief in the process of democratic decision making—whether by the legislature or local juries—left African Americans exposed to the dangers of popular prejudice. Second, Clark presumed that most North Carolinians shared his paternalistic racial views. His errant assumption left him unable to grasp the potential bias inherent in Smith’s trial in the way that Justices Furches and Douglas had demonstrated in their questioning on the state’s attorney during oral arguments.

First, Clark saw little need for a new trial. “The prisoner has had a fair trial before Judge and jury. It is to the verdicts of juries that the people must look for protection of their lives and property.” Clark most likely, considering his avid reading of the *News and Observer*, had seen the news of the plan to lynch Smith on the day after the murder. A jury drawn from the same population hardly seems best suited “to judge of the reasonableness of the apprehension” Smith felt that night as he confronted Cawthorne, Graham, and Winfrey. However, Clark believed that “the sympathies of the jury and the

¹¹⁰ *Ibid.*, 626.

¹¹¹ *Ibid.*, 627.

judge are naturally with one charged with a capital offense.”¹¹² Clark’s faith in democratic means justified this end. And thus Clark’s crusade against the court’s interference in the unseating of Fusion officeholders reflected the same essential faith that would have denied Smith another trial. The court had no place interfering with the actions of democratic majorities.

Clark’s dissent, in all four opinions, most clearly linked the murder with the prisoner’s race. His dissent mentions the Wilmington Massacre over half a dozen times¹¹³ Clark spent considerable time discussing how the prisoner “brooded” over how he felt “his race maltreated,” or possessed a desire to “avenge his race,” while at the same time he described the actions of the three young white men as “harmless roisterer[s], or reveler[s], on a festive occasion.”¹¹⁴ Even the poignant questions asked by Justice Furches of the state’s attorney left Clark unmoved and elicited from Clark an uncharacteristically obtuse response: “The Attorney-General being a white man, it may be presumed, would not be so deeply impressed by occurrences not arousing feelings of either fear or revenge in his race, but which the prisoner said had not allowed him to sleep.”¹¹⁵

¹¹² *State v. Cole*, 132 N.C. 1069, 1090 (1903) (Clark, C.J., dissenting).

¹¹³ *State v. Thomas Smith*, 125 N.C. 615, 619 (1899) (Clark, J., dissenting).

¹¹⁴ *Ibid.*, 621.

¹¹⁵ *Ibid.*, 620-621.

Perhaps Clark was unable to empathize with the plight of Thomas Smith because Clark failed to see past his own paternalism in order to understand the depth of racial animosity in eastern North Carolina. Perhaps Clark grasped the antipathy of many eastern North Carolinians toward blacks and decided not to oppose the popular will. Yet if the former is correct and his actions arose from his faith in juries as composed of reasonable and unbiased men sympathetic to the defendant, his assumptions could not be further from the reality faced by Thomas Smith a little over a month after the terror at Wilmington. Smith's second trial, moved to an adjoining county also resulted in a capital conviction. If not for a last minute reprieve from Republican Governor Daniel Russell, the Wilmington Massacre might have claimed another life. Instead, Smith served out the remainder of his natural life at the State Prison in Raleigh.¹¹⁶

The Unequal Wages of Whiteness

Finally, at the end of the first decade of complete Democratic dominance of North Carolina politics, the Supreme Court would consider the subject of segregation. The White Supremacy Campaign's reliance on race baiting and the topic of "Negro domination" has overshadowed its anti-democratic intentions and the introduction of corporate domination that would seriously compromise efforts at reform within the state.¹¹⁷ The enactment of segregation in transportation by the Democratic legislature in

¹¹⁶ *Smithfield Herald*, October, 19, 1900.

¹¹⁷ "Class, Race, and Power in the New South: Racial Violence and the Delusions of White Supremacy," Michael Honey, in *Democracy Betrayed: The Wilmington Race Riot of 1898 and Its Legacy*, ed., David S. Cecelski and Timothy B. Tyson (Chapel Hill: The University of North Carolina Press, 1998), 170.

1899 can be viewed as part of the “public and psychological wage” that Du Bois noted purchased the support of poor whites. The historiography that has developed within labor history regarding the wages of whiteness accepts as fact that “the poorest illiterate white could claim a standing in society denied to the wealthiest and most intelligent and educated black.”¹¹⁸ The enactment of segregation in North Carolina is the sort of compromise whiteness scholars have catalogued. The manner in which the legislature enacted segregation and the unwillingness of government and corporate authorities to follow through on enforcement left some poor whites contesting their accommodations and seeking the unpaid wages of their whiteness.

It was no secret that some of North Carolina’s wealthiest men—mill owners, railroad executives, etc.—were heavily involved, both personally and financially, with the White Supremacy Campaign. Indeed, the *Charlotte Observer* noted shortly after the election that “the businessmen of the State are largely responsible for the victory.”¹¹⁹ Their support came in numerous forms: shutting down mills for Democratic rallies, purchasing the foods and materials for White Supremacy barbeques and parades, and funding Democratic Party propaganda pamphlets and papers. Justice Clark expressed concern to A.W. Graham that “the R.R.’s are *packing the nominations* & trying to elect a *railroad legislature*...and assum[e] untrammelled sovereignty of public affairs.”¹²⁰ Clark

¹¹⁸ Leon Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Vintage Books, 1999), 237.

¹¹⁹ *Charlotte Observer*, November 17, 1898.

¹²⁰ Walter Clark to A.W. Graham, September 12, 1898, in *PWC*, Vol. I, 336, emphasis in original.

showed no indication that he was aware of Democratic Party Campaign Chairman Furnifold Simmons's secret agreement with the state's wealthy business leaders that promised no tax increases in exchange for their complete support in the campaign.

When the new Democratic legislature set about passing a bill to segregate the state's railroads, business interests played an important role in determining how segregation would be enforced. Consequently, the Democrats final bill—*An act to promote the comfort of travelers on railroad trains*—created a system of separate cars based upon race that offered few real mechanisms for enforcement. Attempts to amend the bill to give the state's new Corporation Commission the power to punish failures to segregate as misdemeanors failed due to the opposition of railroad lobbyists. The bill however did include a provision that allowed “passengers on any ...railroad...which is required by this act to furnish separate accommodations...who have been furnished accommodations...with a person of a different race” the right to recover \$100 for each day in violation.¹²¹ This provision of the act created a limited mechanism for enforcement that placed responsibility not with the state's Corporation Commission but instead on the shoulders of those individual whites (and in theory blacks) that had been discriminated against.

W.M. Merritt's case against the Atlantic Coastline Railroad, discussed in Chapter 3, is useful to examining the commitment of White Supremacy Campaign leaders to enforcing segregation in a manner that benefitted common white men. In *Merritt* the

¹²¹ *Fifth Annual Report of the North Carolina Corporation Commission for the Year Ending December 31, 1903* (Raleigh: E.M. Uzzell & Co., 1904), 22-23.

plaintiff contested not only the railroad's refusal to seat him in the white compartment of the train but also the corresponding humiliation of being seated in a Jim Crow car.¹²² A local jury in Sampson County agreed and rendered a \$100 judgment in the plaintiff's favor.¹²³

However, the Supreme Court's construction of the statute nullified the only real mechanism for enforcing segregation on the state's railroads. The court, stacked entirely with Democratic judges, held that the railroad had complied with the statute. Since the railroad had furnished two separate cars for their black and white customers, it had met the requirements of the statute. Even if the conductor erred in instructing white passengers to sit in the Jim Crow car, the railroad could not be held accountable for the improper conduct of its conductors in assigning passengers so long as it provided separate cars.¹²⁴

Clark's dissenting opinion began by noting that while the segregation statute made distinctions based upon race it made no distinctions based on class. The four white laborers, possessed of twenty-five cent tickets, were entitled to separate accommodations under the statute. Indeed, according to Clark, the segregation statute was enacted "for *all* white men, not for *some* white men."¹²⁵ It was there humble position in life that

¹²² *Merritt v. Atlantic Coast Line Railroad*, 152 N.C. 281, 283 (1910).

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, (Clark, C.J., dissenting), emphasis in original.

mandated the court had to uphold the statute to protect them: “These were men in the humbler walks of life and laborers. But the statute is meant as much, if not more, for them than for others better dressed, perhaps, whom an arbitrary conductor would hardly dare, or might not be able, to force to ride with the colored people.”¹²⁶ The failure to provide a right of action for “only one white man thus humiliated by being forced to ride, against his will, in the car ‘provided’ for the other race,” constituted a violation of the separate but equal statute.¹²⁷ If the statute allowed the railroad to avoid liability for its violation by conductors, agents of the railroad, who assigned passengers to the wrong car then “the statute is a delusion...the company through its conductor, is supreme, and not the statute.”¹²⁸

In another context, railroads had successfully avoided liability for injuries caused by fellow servants to their coworkers. In this instance an agent of the railroad, the conductor, once more provided a shield from corporate liability. The conductor’s authority over passengers, his role as the “Alter Ego of the company,” its “only visible and, indeed, sole representative” led Clark to argue that the railroad should bear the responsibility of such errors of judgment—and in this case discriminations against common white laborers.¹²⁹ This was not a case of the conductor making an incorrect

¹²⁶ *Ibid.*, 284.

¹²⁷ *Ibid.*, 283-284.

¹²⁸ *Ibid.*, 284.

¹²⁹ *Ibid.*

judgment about the race of a passenger. This was an example, Clark complained, of the conductor (and by extension the corporation) assuming the power to nullify a public statute.¹³⁰ And with that undue power the railroad company had nullified the Democratic legislature's attempt to establish segregation as a boon to the white masses whose only significant property amounted to the benefits of their position as white men in a segregated South.

Conclusion

For Clark, the conductor's actions fit within the framework of democratic reforms opposed or compromised by railroad operatives. In the officeholding cases Clark had feared the use of *Hoke* by a "powerful combination of capital" to control either the legislature or the court.¹³¹ In the *Smith* case Clark criticized elites on the court as anti-democratic for second guessing the decisions of local juries in capital cases. Lastly, in *Merritt*, the railroad's actions (via the conductor) nullified a public law and displayed the railroad's unwillingness to enforce segregation to benefit all white men. All of Clark's dissenting opinions rest on a fear of corporate influence and a desire to ensure white democratic rule. Ironically, Clark's progressive jurisprudence in the officeholding cases helped to ensure Democratic domination by a legislature that was heavily influenced by the same business interests Clark assailed in his opinions and editorials. The segregation law crafted by the same legislature failed to effectively provide for a class-blind racial

¹³⁰ *Ibid.*

¹³¹ *Abbott v. Beddingfield*, 125N.C. 256, 290 (1899) (Clark, J., dissenting)

segregation of the state's railroads, and the Democratic court further limited the already ineffective private right to action contained in the statute.

Perhaps most conspicuous is that, despite Clark's frequent recurrence to arguments rooted in democratic majoritarianism, he paid little heed to the Wilmington coup d'état. He never spoke of it publicly and he did not write about it in any of his private letters. Unlike Aycock, Craig, and other notable Democrats, he did not tour the state speaking on behalf of the White Supremacy Campaign—a task he could avoid by pleading judicial propriety. When confronted with the legacy of the White Supremacy Campaign in the *Smith* case, he complained that the other justices' opinions smacked of anti-democratic sentiment because they undid the outcome of the jury's verdict. Clark's seeming silence and indifference exemplifies the familiar historiographical statement that southern progressivism was, like many public facilities after the Democratic victory in 1898, for whites only.

CHAPTER VI

“WITHOUT DISTINCTION OF SEX OR BIRTH”: WALTER CLARK AND WOMEN’S SUFFRAGE

I am in favor of giving [women] equality of rights before the law and equality of opportunity—in short, I favor “an avenue open to merit, without distinction of sex or birth.”

—Walter Clark.¹

In the fall of 1918 Walter Clark walked down the broad sidewalk of Pennsylvania Avenue toward the White House. Justice Clark was in Washington, D.C., serving as an umpire for the National War Labor Relations Board, appointed by President Wilson several months earlier. Yet Clark walked with purpose that day as he strode toward a group of twenty National Woman’s Party pickets lined up against the iron fence that separated the sidewalk from the White House lawn. He approached the “quiet and orderly” suffragettes whose banners waved in the autumn breeze and asked a “slender unassuming young lady” if she could point out their leader—Alice Paul. While Clark had spent the last few years reading of the exploits of the pickets in Washington papers that he had delivered to his Raleigh home, this encounter was his first face-to-face meeting with the radical suffragists face-to-face. After expressing his regrets at how the district’s courts had “persecuted” the pickets, Clark took off his hat to Ms. Paul and said, “If I have read history and the scriptures aright, on this spot where you have been

¹ Walter Clark to H.G. Connor, January 5, 1914, in *PWC*, Vol. II, 235.

mobbed and assaulted without cause, some day there shall stand a monument to you and those who have suffered with you.²

Clark later retold this story in a letter published by the North Carolina press. Some unknown editorialist had accused Justice Clark of giving too much credit to the radical methods of Alice Paul at the expense of the moderate efforts of Carrie Chapman Catt (president of the National American Woman Suffrage Association). Indeed, on the day that the national legislature approved the Susan B. Anthony suffrage amendment, which would go on to become the Nineteenth Amendment, Clark telegraphed (with permission to republish) Alice Paul the following:

Will you permit me to congratulate you upon the great triumph in which you have been so important a factor? Your place in history is assured. Some years ago when I first met you I predicted that your name would be written 'on the dusty roll the ages keep.' There were politicians, and a large degree of public sentiment, which could only be won by the methods you adopted...It is certain that, but for your, success would have been delayed for many years to come.³

Yet once again, this time in a public forum, Clark sang the praises of Alice Paul and her role in bringing about the ultimate success of the Nineteenth Amendment. He even went as far as to analogize Alice Paul to Paul the Apostle, Joan of Arc, and the Oxford Martyrs—all were “victims of the intolerance of their age.”⁴

² “Judge Clark Replies,” n.d., Miscellaneous Clippings, Walter Clark Papers, SANC.

³ Walter Clark to Alice Paul, n.d., Correspondence, 1919-1922, Walter Clark Papers, SANC.

⁴ *Ibid.*

Indeed, Clark's published letters and addresses offer significant insight into how Chief Justice Clark became one of the earliest, loudest, and most active male proponents of women's suffrage in North Carolina. His support for suffrage in general, and the pickets specifically, emerged from a nexus of beliefs that can be described as progressive and southern. Clark's progressive arguments emphasized "the spirit of the age," the Declaration of Independence, nefarious trusts, corrupt political machines, and a host of reforms whose implementation depended on women's votes to pass (chief among these labor reforms). Meanwhile, his southern arguments emphasized appeals to chivalry and gallantry, negative comparisons to slavery, women's service throughout southern history to the causes of independence and Confederate memory, and the preservation of white supremacy. Reduced to four fundamental issues, Clark's arguments in support of women's suffrage most often focused on issues of modernity, whiteness, Southernness, and support for the labor movement. Clark's description of his meeting with Alice Paul touches on all these issues. The Chief Justice noted with horror the civil authority's abuse of the suffragette. Arrested, wrongfully in Clark's opinion, on illegal anti-picketing laws—created to suppress the labor movement—the female protestors were imprisoned in "cells with lewd negro women."⁵

As was the case with Clark's activist politics, and perhaps in the case of women's rights more than any other, the Chief Justice blended appeals from both bench and platform to push for reforms. Often Clark's opinions overlapped with subsequent North Carolina legislation (some of which Clark wrote himself and passed along

⁵ "Judge Clark Replies," n.d., Miscellaneous Clippings, Walter Clark Papers, SANC.

confidentially) or public addresses Clark delivered at Women's Suffrage conventions in North Carolina and Virginia. His blending of judicial opinion and stump speech offers a rare insight into how the most conservative of governmental institutions, the courts, could become an important part of reform in Progressive Era North Carolina.

As discussed in Chapter 3 Clark's advocacy of women's voting rights connected directly to his advocacy of progressive legal reforms. His support for women's suffrage grew over a decade after his first decision that criticized conservative legal doctrines that limited the legal rights and responsibilities of North Carolina's married women. His advocacy of women's suffrage would build on earlier case law and his dissenting opinions. It would also serve as an abrupt transition from seeking only reforms to common law and statutory law to a vocal campaign for suffrage.

Walter Clark's Endorses Suffrage

In 1923 the National American Woman Suffrage Association, fresh from electoral victory, published a six-volume *History of Woman Suffrage*.⁶ The sixth volume extended thanks to those who had supported women's suffrage in North Carolina. In North Carolina, by 1919, the state league's communication could boast a letterhead that included such prominent names as three-time presidential nominee William Jennings Bryan, Secretary of the Navy Josephus Daniels, and Chief Justice Walter Clark. Clark

⁶ Ida Husted Harper, ed., *The History of Woman Suffrage, 1900-1920*, vol. VI (New York: J. J. Little & Ives Company, 1923).

was specifically thanked as one “who for years has been an unfailing champion of equal suffrage and real democracy.”⁷

Yet Clark was not always a vocal supporter of women’s suffrage. Clark’s first announcement of his support for women’s suffrage came during a summer 1911 commencement address at Elon College in Greensboro, North Carolina. In his “Gospel of Progress” speech Clark argued that “the qualifications for suffrage should be capacity and character.” Clark believed that “mental capacity and moral character...are the exclusive property of neither sex.” Nevertheless, Clark tempered his comments. The vote would only come “whenever the women...in any considerable numbers shall really desire the suffrage.” And while he acknowledged that government with suffrage was better than government without it, women’s suffrage “ha[d] not brought about the millennium.”⁸

The significance, and limited commitment, of Clark’s comments is most likely explained by a new turn in his political career. Just a few weeks earlier, he had announced his candidacy for the United States Senate. Clark’s platform represented the major focus of his public political activism from the first decade of the twentieth century—the plutocracy. Women Suffrage’s absence was conspicuous, especially to suffragists. Anna Howard Shaw, president of the National American Woman Suffrage Association, sent a harsh rebuke to Clark for his “fall[ing] into the attitude of utter

⁷ *Ibid.*, 494.

⁸ “Bitter Factions War is Opening,” *Asheville Gazette-News*, July 18, 1911.

forgetfulness of women.” His suffragist views were already known to Shaw and to her the absence of suffrage from his published platform was “humiliation unspeakable.”⁹ Yet despite the rebuke Clark’s campaign literature continued to talk primarily about the danger of the plutocracy, the election of judges and postmasters, protections for labor, and confederate pensions. In April of 1912, as the election neared, Clark had one hundred thousand pictures with the inscription, “The Man Whom the Tobacco Trust, the Lumber Trust, the Steel Trust and the Standard Oil Trust, do not wish to see in the U.S. Senate from North Carolina,” printed as campaign materials to be distributed throughout the state. The issue of women’s suffrage was nowhere to be seen in his speeches or campaign materials for the remainder of the election.¹⁰

Clark lost the Senate race, and disappointingly so, receiving only 10 percent of the vote. Worst of all for Clark he lost the race to Furnifold Simmons—a man he despised. For Clark Simmons represented everything loathsome about politics; acceptance of plutocratic endorsements and cash, reactionary views on labor legislation, and North Carolina’s machine politics. Three days after the race Clark wrote to his brother-in-law about Simmons campaign, clearly frustrated, “promises were freely used as well as whiskey and money.”¹¹ Still smarting over the loss the following May, Clark wrote to Clarence Poe, editor of the *Progressive Farmer*, expressing his disappointment

⁹ Anna Howard Shaw to Clark, November 28, 1911, in *PWC*, Vol. II, 139.

¹⁰ Walter Clark to A.W. Graham, April 13, 1912, in *PWC*, Vol. II, 147-148; Cyrus B. Watson’s Letter to the Newspapers on Behalf of Clark, May 4, 1912, in *PWC*, Vol. II, 152-155.

¹¹ Walter Clark to A.W. Graham, April 13, 1912, in *PWC*, Vol. II, 148.

that Poe, Daniels, and other prominent reformist editors had not publicly supported his campaign. He claimed they “had an opportunity last year to send a [progressive] man to the U.S. Senate...yet did not give him their support.”¹²

While it is unclear why Justice Clark chose to de-emphasize his support for women’s suffrage during his Senate campaign, it is not unreasonable to assume that he thought it too controversial in a race where he already had enough enemies in the railroad, cigarette, and lumbers trusts. Regardless of the reason, with the election decided Clark moved quickly to support women’s suffrage from the bench, the platform, and his writing desk. Most likely, the reason for this change can be found in Clark’s senatorial campaign’s failure. He had appealed to North Carolina’s male voters and they had rejected his calls for reform. Perhaps North Carolina’s women would prove more amenable to progressive reform? With the election over Clark’s attentions turned toward what Clark called “the emancipation of women.”

Clark’s Oratory of Women’s Suffrage

Women’s suffrage in North Carolina has a comically sad history. Republican legislator, Abraham Galloway, twice attempted, in 1868 and 1869, to amend the state’s constitution to include women’s suffrage.¹³ Then in the 1890s North Carolina State Sen. James L. Hyatt introduced a petition to enfranchise North Carolina’s women the State

¹² Walter Clark to Clarence Poe, May 7, 1913, in *PWC*, Vol. II, 200.

¹³ David S. Cecelski, “Abraham Galloway: Wilmington’s Lost Prophet and the Rise of Black Radicalism in the American South,” in *Democracy Betrayed: The Wilmington Race Riot of 1898 and Its Legacy*, ed., David S. Cecelski and Timothy B. Tyson (Chapel Hill: University of North Carolina Press, 1998), 64.

Senate referred his bill to the Committee on Insane Asylums. Then in 1920 North Carolina's Senate, evenly divided on the issue of suffrage, staged one of the most bizarre scenes in the history of its legislature. The Lt. Governor, O. Max Garner, expected to break a tie vote in favor of suffrage but the tie vote never happened because anti-suffrage forces had locked a single pro-suffrage senator in the restroom until the vote was concluded.¹⁴ Consequently North Carolina lost its chance to be the thirty-sixth state to ratify the amendment—that honor went to Tennessee—and ratification would lie dormant until 1971.¹⁵

At the beginning of the 1910s, North Carolina's newspapers were divided on the subject of suffrage, with most falling into the anti-suffrage camp. Editorials dismissed suffrage with condescending flattery and comical references to overbearing women and henpecked men. In 1910 the *East Carolina News* praised North Carolina's women for not petitioning Congress for the vote. Further down the same page an editorial ridiculed a women's suffrage convention's attendees as "women who desire to wear men's clothes." In an anti-suffrage article *The Wilmington Morning Star* condescendingly claimed, "Any time [women] take a notion to do so, they can force the men to let them vote if they want the right." Later that year the *Morning Star* ridiculed male voters in suffrage states in the West as "simply hacked." Even the papers that were more ambivalent about the suffrage issue expressed only conditional support. *The Charlotte*

¹⁴ Willis Whichard, "A Place for Walter Clark in the American Judicial Tradition," *North Carolina Law Review* 63 (1985): 312.

¹⁵ "Equal Rights Bill Faces Legislators," *Spartanburg Herald-Journal*, January 22, 1973.

News editorialized that men would only give women the vote when they proved that they “really want to vote,” “will do something with it,” and can do so “without taking the bloom off womanhood.”¹⁶

Chief Justice Clark is lauded as the first prominent male North Carolinian to speak publicly in favor of women’s suffrage.¹⁷ That speech, given in July 1911, was the first in a series of speeches. Each speech revolved around a combination of historical, moral, legal, political, and practical reasons that suffrage should be extended to women in municipal, state, and federal elections. Often his speeches borrowed heavily from his recent judicial opinions, other times his opinions borrowed from his speeches. And often women’s suffrage advocates borrowed his judicial opinions—in pamphlet form—to advocate for suffrage. Eventually, Clark’s addresses and opinions reached a point where it became difficult to disentangle the forums of judge’s bench and speaker’s podium. Yet taken together they provide an insight into how and why a southern jurist could, and did, come out in support of suffrage at a time it when it was politically unpopular.

Unlike Clark’s attack on trusts, there was little to be gained politically from promoting women’s suffrage. The laboring classes who grumbled about the railroads, the mill owners, and J.B. Duke took pleasure in Clark’s attacks on the plutocracy. Yet when it came to women’s suffrage Clark’s friend Aubrey Brooks complained, “The country

¹⁶ Kenansville *Eastern Carolina News*, April 20, 1910; *Wilmington Morning Star*, March 25, 1911; *Wilmington Morning Star*, October 17, 1911; *Charlotte News*, December 18, 1910.

¹⁷ Aubrey Brooks to Walter Clark, November 17, 1916, in *PWC*, Vol. II, 321.

people so far are either opposed to it or indifferent.”¹⁸ Nevertheless, Chief Justice Clark threw himself into campaigning for suffrage with aplomb. His embrace of women’s suffrage was rooted in a realization that did not leave Clark’s pen until after the 1912 election. It was after that election that the Chief Justice came to believe that suffrage was an essential part of advancing progressive measures to safeguard children and workers and reign in the trusts.

Chief Justice Clark saw his old foes behind the anti-suffrage movement. He told a crowd of suffragists in 1919 that the true source of opposition to enfranchisement: “Passing by the fictitious terrors of State’s Rights and negro supremacy, we should mention the real causes of the opposition...liquor interests...large employers of labor... [and] the [political] machine.”¹⁹ Not only did Clark associate his old enemies with the opposition but he tried to make suffrage agitation palatable to southern working men by linking the anti-labor and anti-suffrage movement. Addressing an assembled, and no doubt predominantly male, crowd Clark asked, “Is not the Suffrage movement a wing of the Labor Army?”

Clark most forcefully made this point in 1914. Clark titled a speech, republished for a national audience shortly thereafter in Samuel Gompers’s *American Federationist*, “Suffrage a Labor Movement.”²⁰ In Clark’s usual fashion he began the speech defining history (both ancient and American) as an attempt “by...one class, to exploit and the

¹⁸ Ibid.

¹⁹ “Votes for Women, Why and Why Not,” *The Charlotte Observer*, March 4, 1919.

²⁰ Walter Clark, “Suffrage a Labor Movement,” *American Federationist* 26 (May 1919): 389-392.

other to prevent being exploited.” He listed the litany of critiques of United States history that had become staples of Clark speeches since the turn of the century: the democratic Declaration of Independence, the reactionary United States Constitution, the usurpation of the courts in *Marbury* to protect the “slavery trust,” and how that usurpation subtly changed from protecting slavery to protecting aggregated wealth via the Fourteenth Amendment. Then, as he had many times before, Clark addressed the increasing democratization of the state and federal governments. Yet this process was incomplete. Many pieces of labor legislation still sat in their embryonic phase because state legislatures refused to act on (or severely watered down) bills for equal pay for women, safety appliances, or an end to child labor. The best solution to all these problems and others was to enfranchise women, “The women of the working class being far more numerous than the other, their votes will double the power of the working element at the ballot box...and will thus increase the power of that class to influence legislation.” Enfranchised women would “be for temperance, and in favor of legislation to protect childhood, and sanitation; to procure better housing and against excessive hours of labor.”²¹

Race, Whiteness, and Southernness, and Slavery

Justice Clark talked about women’s suffrage as part of a history of emancipations that stretched from the Declaration of Independence to black voting rights, women’s property rights, child labor protections, and the legal protection of debtors. Women’s

²¹ Ibid.

suffrage was the next step in this chain of emancipations. It was the “logical outgrowth of this great democratic movement to place the Government in the hand of the people.”²² Nevertheless, there was one link in the chain that Clark spoke about with far less enthusiasm from the podium—the confirmation of voting rights on freedmen. Privately Clark admitted to preferring the repeal of the Fifteenth Amendment and joined with other Lost Cause orators in denouncing the horrors of Reconstruction.²³ Yet in his advocacy of suffrage Justice Clark couldn’t ignore black enfranchisement. After all, anti-suffrage forces routinely argued that the enfranchisement of women would mean all women—black women too. Yet Clark turned these arguments on their head to argue that the maintenance of white supremacy depended upon the enfranchisement of southern women.

Clark believed white supremacy was vulnerable to judicial and political attack in the 1910s. As early as 1913 Clark foresaw the inevitability of the United States Supreme Court overturning the South’s grandfather clauses. Such a circumstance would make white women’s votes “necessary to maintain white supremacy.” White women could be expected to vote “solid as one woman... [for] the right of their children to control this society”; black women could continue to be excluded by literacy tests, poll taxes, and the like. One year later Clark published “Ballots for Both” in pamphlet form. The lead quote on the cover heralded the role of white women’s votes in preserving white supremacy:

²² Equal Suffrage League Address, Greensboro, North Carolina, 1913, Walter Clark Papers, SANC.

²³ Walter Clark to E. Yates Webb, March 19, 1914, in *PWC*, Vol II, 240-241.

“In North Carolina the white population is 70% and the negro 30%, hence there are 50,000 more white women than all the negro men and negro women put together. The admission of the women to the suffrage therefore could not possibly jeopardize White Supremacy, but would make it more secure.”²⁴

By January of 1919 Clark worried that the number of black voters in North Carolina was destined to increase. The Chief Justice wrote to anti-suffrage North Carolina Sen. Lee Overman about the impending 1920 election. North Carolina sent eighty thousand troops off to war—twenty-five thousand of them black. Clark warned Sen. Lee Overman, “We will either have to admit these men to...the ballot box, or when it is flashed thru the country that we are refusing to register men who fought for Democracy in France and have done this in violation of our oath to support the Constitution...[it will defeat] the Democratic Presidential electors throughout the North and West.” With the potential growth of the black electorate, Clark saw “no other way to offset these votes than the votes of the white women of the state.”²⁵ Senator Overman remained unmoved and Clark grew increasingly frustrated. In front of a large crowd in Raleigh, the Chief Justice attacked those who resisted women’s suffrage with “the old cry always used to thwart any progressive measure in the South of ‘Nigger!’”²⁶ Ironically, Clark expressed frustration at the success of anti-suffrage advocates in employing the

²⁴ Walter Clark, *Ballots for Both: An Address* (Raleigh: Commercial Printing Co., 1917), accessed January 15, 2014, <http://docsouth.unc.edu/nc/ballots/clark.html>.

²⁵ Walter Clark to Lee S. Overman, January 13, 1919, in *PWC*, Vol. II, 388.

²⁶ Walter Clark, “Votes for Women, Why and Why Not,” *The Charlotte Observer*, March 4, 1919.

same strategy, even as he attempted to use the threat of black voting rights to gain the enfranchisement for women.

Through Clark's political career he benefitted from an unquestionably southern pedigree: son of a wealthy planter, slaveholder, Confederate officer, and Lost Cause devotee. In his oratory Clark emphasized his confederate past and southern roots. Before a crowd in Richmond, Virginia Justice Clark prefaced his support for suffrage by stating:

I am a native born southerner. I have spent my life beneath your sunny skies. I can therefore speak frankly to my own people. We have boasted of our chivalrous regard for women, and there are none who more deserve it than those of the South; but in honest truth, as respects [women's suffrage]...the South has been and still is a laggard.²⁷

His speeches were peppered with references to chivalry, gallantry, and womanhood in ways that undermined the traditional use of these words in the anti-suffrage vocabulary.

Another distinctly southern aspect of Clark's pro-suffrage rhetoric featured a comparison between the status of slaves in the antebellum era and women in the postbellum era. This rhetoric took two forms. First, he used language that mirrored the free state-slave state divide of the antebellum era. When Justice Clark wrote a letter to Jeanette Rankin—U.S. Representative from Montana—he expressed thankfulness that “the women of the free states [felt] an interest in this unemancipated part of the union.”²⁸ Several years earlier, addressing a pro-suffrage crowd in Richmond, Virginia, Clark

²⁷ Walter Clark, *Equal Suffrage Address at Richmond* (n.p., 1914), 2, accessed February 7, 2015, <https://digital.lib.ecu.edu/text/10353>.

²⁸ Walter Clark to Jeanette Rankin, April 26, 1917, in *PWC*, Vol. II, 345.

referenced Abraham Lincoln's pre-war claim that the nation "could not live half slave and half free." A statement that was, according to Clark, "equally true" in 1914 as it had been in 1861.²⁹

Second, direct comparisons between the legal status of slaves and women before and after the Civil War were common in Clark's oratory—as well as his judicial opinions. In 1918 Clark wrote to his friend, University of North Carolina at Chapel Hill historian, Kemp P. Battle. Clark respectfully took issue with Kemp's description of antebellum women as "practically in slavery."³⁰ Instead, Clark argued, their status was in one way worse than antebellum slavery—it lasted longer. In his frequent discussions of the subject, Clark rooted the status of women as chattel property in "a barbarous age"—Norman England—and extended elements of that "slavery" into the twentieth century. Whereas the master's power to physically chastise a slave laborer ended in 1865, until 1874, North Carolina court's held that a husband "had a right to whip his wife with a switch no larger than his thumb."³¹ While freedmen gained property rights even under the 1866 North Carolina Black Code, it was not until 1868 that the legal standard ceased to be that the "wife's property became the property of her husband." Clark concluded "there was no legal difference between the power of the master over his negro slave" and the power of the husband over his wife.

²⁹ Walter Clark, *Equal Suffrage Address at Richmond*, 2-3.

³⁰ Walter Clark to Kemp Battle, April 25, 1918, in *PWC*, Vol. II, 369-370.

³¹ *Ibid.*

Conclusion: Blurred Lines between the Judicial and the Political

Suffrage advocates found quoting the Chief Justice of a southern Supreme Court helpful in deflecting claims of radicalism. Consequently, Clark's arguments show up in several instances in women's suffrage pamphlets and magazines. Clark's face even graced the cover of the *Woman's Journal and Suffrage News*, which declared him a "suffrage judge in Dixie."³² In 1915, when the North Carolina Equal Suffrage Association met for their second annual meeting the president, Barbara Henderson, thanked Clark for his "usual great kindness and enthusiasm" in donating printed versions of his speeches for distribution. Later that day the Legislative Committee of the Association noted that in a year when the organization had advanced three major bills to the legislature—Notary Public, age of consent, and an equal suffrage bill—that the state Supreme Court had overturned their notary public bill in a three-two decision. The group's chairman, Mary Henderson, called attention to Clark's dissent in the *Knight* case and told attendees that his opinion was in pamphlet form and available to distribution on request.

When Justice Clark spoke in Salisbury, North Carolina, on women's suffrage State Representative Theodore F. Klutzz introduced Clark as a Chief Justice who had "never failed to speak out, from bench and forum and printed page, for...absolute equality before the law."³³ This combination of juridical and political made Clark a

³² Boston *Woman's Journal and Suffrage News*, October 14, 1916, quoted in *News and Observer*, October 24, 1916.

³³ "Suffrage in Salisbury," *Greensboro Everything*, February 12, 1916.

valuable ally to the women's suffrage movement and a unique judge within North Carolina. From the end of Clark's failed Senate campaign until the passage of the Nineteenth Amendment his speeches on suffrage, and his judicial opinions on women's rights, became important literature used to advance the causes of women's legal and political rights both in North Carolina and in the Nation.

CHAPTER VII

CLARK V. DUKE: THE STRUGGLE FOR WATER RIGHTS¹

Democracy in government is almost impossible until we have a democracy in industrialism to the extent of public ownership of all the great agencies such as transportation by rail, water power, coal mines, and oil wells . . . Public ownership of these utilities will insure democracy in government.

—Walter Clark²

Leading North Carolinians, among them James B. Duke, the man with the fortune behind the American Tobacco and Southern Power companies, crowded into a Raleigh courtroom in November 1920. The state's Corporation Commission was considering the Southern Power Company's application for a rate increase—the first application of its kind by a North Carolina public energy corporation, and the first decision by the Corporation Commission on electrical rates. That North Carolina's Corporation Commission would consider, and later exercise, regulatory control over the state's largest power company—owned by the South's wealthiest industrialist—would not have been possible less than a year earlier.³

In the first quarter of the twentieth century, the state's Democratic Party hindered numerous political reforms in North Carolina—from the enactment of women's suffrage

¹ Originally published as "Clark v. Duke: The Struggle for Water Rights and the Future of North Carolina's Public Energy Policy," *Southern Cultures* 20, no. 3 (Fall 2014): 123-136. This chapter is included in modified form with permission from *Southern Cultures*.

² Walter Clark, "Public Ownership of Water Power," *News and Observer*, September 16, 1923, in *PWC*, Vol. II, 481.

³ Robert F. Durden, *Electrifying the Piedmont Carolinas* (Durham: Carolina Academic Press, 2001), 47.

to the regulation of electrical rates charged by energy companies. Nevertheless, during the second decade of the twentieth century, North Carolina saw significant reform to its public energy policy, as the state's water power resources shifted from a laissez-faire public energy market to a corporate monopoly that was held in check—at least in theory—by the Corporation Commission. In 1898, the Democratic Party's White Supremacy Campaign crushed the half decade-long fusion of Populists and Republicans. With the Populists defeated, and many finding their way back into a conservative Democratic party, no significant grassroots movement stood in the way of the Southern Power Company's bid for electrical control of electrical power. Despite a 1913 grant of statutory authority to police regulatory rates, the state's Corporation Commission cautiously avoided conflict, reluctant to use its authoritative power. As a result, only the state's court system could prevent the company's dictation of the state's public energy policy. Clark had advocated for full public ownership of public resources in popular addresses and national journals. For Clark, mere regulatory control of a corporate monopoly of North Carolina's water resources, and the energy acquired through their use, was an unnecessary compromise that fell short of the ideal. To achieve his goals of public ownership, Clark pitted himself against Duke in editorials and courtrooms.

No Gas, No Soot, No Dirt

As the electrification of North Carolina progressed in the early twentieth century, water was regarded as a valuable energy source—something that was cheap, abundant, and renewable. Clark wrote on the potential of hydropower, “There will be no coal to go

in, no ashes to go out, no gas, no soot, no dirt.”⁴ Many local newspapers were similarly optimistic, reporting that electricity derived from hydropower would soon replace steam as the main energy source for railroads, mills, cities, and homes, and lauding water power investors. But as Raleigh’s *News and Observer* lamented, the nineteenth century had lacked “men of business sense with the necessary capital to establish large plants and fully utilize the water power that has so long swept unused into the sea.”⁵

Change seemed possible in 1899, when the North Carolina Department of Conservation and Development announced the results of the first large-scale analysis of the state’s ability to harness water power. The effort had been undertaken, in large part, due to “numerous and urgent” inquiries by potential developers “for information concerning waterpower” in North Carolina. Those inquirers were rewarded, as the state distributed copies of its geological survey, *Bulletin No. 8*, to “investors and those contemplating the development of water power in the near future.”⁶ Still, at the turn of the century, there was no clear plan in place for developing the state’s infrastructure for water power facilities. Instead, investments were primarily limited to small mill operations or local projects that often did not follow through on seeking legislative approval to construct power generation facilities. Securing riparian rights to properties along stretches of rivers and streams, which often were subdivided into small lots that

⁴ An Open Letter by Clark, *News and Observer*, September 16, 1923, in *PWC*, Vol. II, 478

⁵ Durden, *Electrifying the Piedmont Carolinas*, 47; “That they go Forward,” *News and Observer*, March 18, 1899.

⁶ North Carolina Geological Survey, *Bulletin No. 8: Papers on the Water Power in North Carolina*, by G.F. Swain, J.A. Holmes, and E.W. Myers (Raleigh, NC: Guy V. Barnes, 1899), 13; North Carolina Geological Survey, *Biennial Report of the State Geologist, 1899-1900* (Raleigh, NC: E.M. Uzzell & Co., 1900), 12.

belonged to numerous owners, also proved challenging and expensive. To ease this roadblock, North Carolina's legislature granted electric railways, as well as telephone, telegraph, and power companies, the ability to use eminent domain to seize the property of reluctant owners. In return, private corporations engaged in these industries acquired a valuable resource; the machinery of the state's courts to compel holdouts to convey their property.⁷

The situation changed considerably in 1904, when Dr. W. Gill Wylie, a New York surgeon and water power developer with South Carolina roots, had the good fortune to treat industrialist James B. Duke's infected foot. Given the undivided attention of the South's wealthiest man, Dr. Wylie evangelized about the potential of hydropower to fuel the Carolinas' industrial enterprises. Duke was already familiar with Wylie's ideas, particularly the proposal to invest in his corporation, the Catawba Power Company.⁸ The doctor had pitched the same idea to Ben Duke, J. B. Duke's older brother, just five years earlier, shortly after performing an appendectomy on him. Ben Duke was reluctant to invest more than \$25,000 in Wylie's energy company and remained cautious about future investments.⁹ But following the initial contribution, the Duke brothers established the American Development Company, Inc. to buy property bordering the Catawba River in North Carolina and even commissioned a map of potential water power sites in the

⁷ *Revisal of 1905 of North Carolina* (Raleigh, NC: E.M. Uzzell & Co., 1905), 770, section 2575.

⁸ Robert F. Durden, *The Dukes of Durham, 1865-1929* (Durham: Duke University Press, 1975), 177-179, 181.

⁹ *Ibid.*, 181.

Carolinas. Thus, when Dr. Wylie presented J. B. Duke with an opportunity to invest in the future of the Carolinas' water industry, Duke responded positively, inviting the doctor and his head engineer William S. Lee to discuss the matter at his estate. At that meeting, Lee presented "diagrams and preliminary plans . . . for extensive [water power] developments on the Catawba [River]" that would cost \$8,000,000. Lee later reflected that the large dollar figure "seemed to attract" Duke.¹⁰

In June 1905, the Dukes incorporated the Southern Power Company in New Jersey. Soon after, the Southern Power Company purchased the Catawba Power Company's outstanding stock, land, and water rights. Duke's power empire grew to include half of a dozen corporations with the ability to purchase water rights and property, to exercise eminent domain and build power stations, to supply electrical converters and machinery to textile mills, to retail generated electricity to customers in businesses and municipalities, and, through the Piedmont and Northern Railway Company, to provide electric rail service between Charlotte and Gastonia, North Carolina. Through their various corporate identities, the Dukes developed "a fully integrated hydroelectric system on the Catawba-Wateree River" and throughout the Carolina Piedmont. By 1920, their holdings in the Carolinas included half a dozen hydroelectric plants, which blanketed 335 miles of western South Carolina and central

¹⁰ *Ibid.*, 182.

North Carolina with electrical transmission lines. Over 70 percent of the electricity that traveled those lines was generated by hydropower.¹¹

But Duke's plans for power development were not universally well received. The interlocking boards that controlled half a dozen corporate entities organized in New Jersey, North Carolina, or South Carolina, were all too familiar to North Carolinians who had spent the last decade protesting the Duke-owned American Tobacco Company's monopoly on tobacco crops and cigarette production. In addition, the Duke's new investments in water power corresponded with their investments in an electric railway and textile mills. In 1917, Josephus Daniels addressed this in the *News and Observer*, saying, "We are in danger of a power and lighting trust in North Carolina and it ought to be regulated before it has a chance to exploit the people."¹² Earlier in 1916, Clark referenced a government publication that noted that the Southern Power Company and the Carolina Power and Light Company owned "75% of the water powers" of North Carolina. Clark lamented that the water trusts of the nation, including Duke's Southern Power Company, were "taking into their control the most vital sources of heat, power, and light, the water powers of the country."¹³

¹¹ Carl Horn Jr., *The Duke Power Story, 1904-1973* (New York, NY: Newcomen Society in North America, 1973), 7-9; John Moody, *Moody's Manual of Investments: Public Utilities and Industrials* (New York: Moody's Investors Service, 1919), 2156.

¹² *News and Observer*, January 16, 1913, quoted in Robert F. Durden, *Electrifying the Piedmont Carolinas*, 45.

¹³ *Blue Ridge Interurban Railway Company v. Hendersonville Light and Power Company et al.*, 171 N.C. 314, 326 (1916).

Across the South, private companies built an infrastructure of dams, reservoirs, and transmission wires to generate and transmit energy harnessed from water. As they had in North Carolina, such companies consolidated their control over water resources and power generation. Progressive reformers in the South objected to the development of water power trusts, but few offered viable alternatives to private development of public resources. The primary response built upon a familiar reformist model: regulatory commissions. By 1914, states had established some form of government oversight of private energy companies.¹⁴ North Carolina was among them. In 1913, the state granted its Corporation Commission the ability to regulate power companies upon a discretionary, not mandatory, basis. But by 1914, the commission began asking public utility companies to annually provide a copy of their rate schedule and corporate records. While the Southern Power Company partially complied with the request for materials, Duke's representative insisted that such compliance was "in deference to the request . . . [and] not because any legal obligation." As they saw it, rates were a matter of "reasonable rules and regulations of the company" and not a matter for state regulatory interference. The commission acquiesced to this view for several years, soliciting annual reports but refraining from exercising power over electric rates.¹⁵ This arrangement lasted only until America's entry into World War I.

¹⁴ Dr. Richard Hirsh, "Emergence of Electrical Utilities in America," from Smithsonian Institute exhibit "Powering a Generation of Change," accessed on March 20, 2014, <http://americanhistory.si.edu/powering/past/history1.htm>.

¹⁵ *North Carolina Public Service Company and Salisbury and Spencer Railway Company v. Southern Power Company*, 179 N.C. 18, 28 (1919).

Necessary Monopolies

In 1917, faced with wartime inflation, the Southern Power Company set out to renegotiate rates with some of its customers, including the North Carolina Public Service Company. Originally that firm had operated its own steam plants to generate power for businesses, homes, and street railways in Salisbury. But in 1907, when the Southern Power Company offered hydropower electricity at a much cheaper price, the company discontinued its own ability to generate power and converted its facilities to receive and retail electricity from Southern Power. According to their contract, Southern Power was to provide electricity at 1.1 cents per kilowatt hour. But with their contract soon expiring Southern proposed an increased rate of 1.5 cents per kilowatt-hour for no less than five years. The Public Service Company refused the new terms. In response, Southern Power provided one year's notice for the termination of electrical service to Salisbury. As Chief Justice Clark wrote in *Salisbury & Spencer Railway Company, et al. v. Southern Power Company*, that would mean that the residents of Salisbury would be left “without lights for their homes and places of business of their people, and without power for the operation of their industrial plants or any means of operating the street railway.”¹⁶ Knowing such, the Public Service Company contested the raise, first with the Corporation Commission and then in the state's courts. They argued that as a public service corporation, Southern Power could not hand pick the rates they offered to various groups.¹⁷

¹⁶ *Ibid.*, 20.

¹⁷ *Ibid.*, 18.

While pleading the need to raise rates for the Public Service Corporation, Southern Power remained under contract to provide electricity at 1.1 cents per kilowatt hour to a subsidiary, the Southern Public Utilities Company, until 1944. Unsurprisingly, the Public Service Company's managers reasoned that a difference of almost 50 percent in rates was discriminatory and impermissible. But North Carolina's Corporation Commission rebuffed complaints, stating they had no power to regulate rates between power distributors.¹⁸ On the advice of counselor Aubrey L. Brooks, the Public Service Company met with Duke about a potential buyout, but J.B. Duke insisted the company's stock was worthless.¹⁹ With no options left, the Public Service Company turned to the Guildford County Superior Court, seeking an order that would mandate Southern Power to continue to furnish power. The Public Service Company was granted a mandamus, which Southern Power appealed to the North Carolina Supreme Court.²⁰

This development was less than fortuitous for Duke's Southern Power Company. Clark and Duke had been involved in numerous personal and political conflicts since Clark's attempt to prevent Trinity College from becoming increasingly entangled with financial contributions from the Duke family in the 1890s. Afterward, Duke's American Tobacco Company was a regular target of Clark's criticism. Clark took great pride in his

¹⁸ *Ibid.*, 27.

¹⁹ Aubrey Lee Brooks, *A Southern Lawyer: Fifty Years at the Bar* (Chapel Hill: University of North Carolina Press, 1950), 115.

²⁰ *North Carolina Public Service Company and Salisbury and Spencer Railway Company v. Southern Power Company*, 179 N.C. 18, 28 (1919); Brooks, *A Southern Lawyer*, 116.

reputation as a “tribune of the people” and relished any and all attacks made upon him by corporate interests as confirmation of that title.²¹

In a speech to the Virginia State Bar Association shortly after his election to Chief Justiceship in 1903, Clark criticized Duke’s American Tobacco Company for destroying the “opportunity of livelihood” to thousands of farmers through its tobacco trust. Clark went on to state that should a planned boycott fail to break the trust, he would favor a government monopoly on tobacco sales as existed in France, Austria, and Italy at the time. It was part of Clark’s larger call for “necessary monopolies” in “lighting, water, and street transportation” that should be “operated by the government only and in the interest of all.”²²

Clark became more fiery and outspoken by 1919, following a failed Senate run in 1912, and being passed over twice for a U. S. Supreme Court nomination by President Woodrow Wilson. These slights seemingly emboldened Clark’s rhetoric and increased his calls for radical reforms like public ownership. Clark railed against trusts, private monopolies, and accumulations as a threat to the public and government, believing that oversized corporate salaries, lobbyists, and funding for legislative campaigns corrupted local, state, and federal government. Clark saw the cure in public (democratic) ownership of monopolies, declaring, “Democracy in government is almost impossible until we have a democracy in industrialism to the extent of public ownership of all the

²¹ Aubrey Brooks to Chief Justice Walter Clark, October 23, 1923, in *PWC*, Vol. II, 489-490.

²² “Old Foes with New Faces” in *PWC*, Vol. II, 549-550.

great agencies such as transportation by rail, water power, coal mines, and oil wells.”²³

The case between the Public Service Company and Southern Power provided an opportunity for Clark to establish a strong legal precedent for regulating power companies, while also lambasting Duke, his longtime adversary, who was synonymous with wealth and monopoly. When the court split three-to-two over whether to uphold the Superior Court’s rule, Clark wrote the majority opinion in favor.²⁴

Clark’s opinion, widely circulated in newspapers, was called “one of the most important in the previous hundred years.” Clark ruled that the public nature of the Southern Power Company, given the power of eminent domain by the state legislature, “subject[ed] [it] to public control not only in fixing and prescribing its rates, but . . . in the requirement that it shall furnish its facilities at the same rate to all receiving them under like conditions.”²⁵ Clark feared that the power to fix rates without regulatory control would result in rebates, price fixing, and manipulation—problems that railroad corporations had faced in the late nineteenth century. He also argued that if the Southern Power Company was granted discriminatory rights, then the Dukes would work to monopolize the state’s water power in the same manner that Standard Oil and American Tobacco had monopolized their respective industries. Clark described the situation, saying, “94 per cent of the water power of this State has been acquired by corporations which are either already owned or can soon be acquired by the Southern Power

²³ “An Open Letter by Clark, *News and Observer*,” Sept. 16, 1923, in *PWC*, Vol. II, 481.

²⁴ *Public Service Company v. Southern Power Company*, 179 N.C. 18, 28 (1919).

²⁵ Durden, *Electrifying the Piedmont Carolinas*, 47.

Company, or made subsidiary by use of the same method of underbidding, and afterwards acquiring competitive plants.”²⁶ He also predicted future monopolies, explaining that if Southern Power achieved a monopoly over the state’s water power and electrical service, then it could manipulate electrical rates to “acquire the ownership of all the other cotton mills and industrial plants in the State, and thus create a cotton monopoly where its [electrical] lines extend.”²⁷

Clark’s majority opinion envisioned a bleak future should Southern Power be given the right to charge discriminatory rates:

If the profits, which it clearly appears are taken out of the public by the defendant and its subsidiary companies, are possible now, what will be the result if this enormous and steadily growing aggregation of wealth were permitted to charge its own rates... without supervision by governmental authority, and has full power to discriminate against those municipal and industrial plants and factories which it may desire to crush out and buy? There must be considered, too, that with the constantly decreasing competition from the coal supply, which must be conserved to prevent exhaustion, and which is so frequently interrupted by strikes, the power the defendant claims of unrestricted rates and of absolute right to discriminate between purchasers would make it a despotism beyond a parallel in history.²⁸

Eventually, Clark argued, Southern Power might become “a menace to government by the people and face dissolution by judicial decree.” Clark’s opinion was meant to act as an initial check on the potential for economic despotism by ensuring that Southern Power

²⁶ *Public Service Company v. Southern Power Company*, 179 N.C. 18, 31 (1919).

²⁷ *Ibid.*

²⁸ *Ibid.*, 38.

(or any other energy producer) could not discriminate in the rates it charged in order to manipulate the energy market.²⁹

Clark's suspicion that Duke sought a power monopoly in North Carolina is supported by Aubrey Brooks, who was a close friend to Duke and served as counsel to the Public Service Company in its lawsuit against Southern Power. Brooks recalled from his involvement in the case that Southern Power sought a franchise to distribute power in the Public Service Company's territory (which was denied by popular vote) shortly after the Supreme Court's ruling. After Duke had insisted that the Public Service Company's stock "had no value," Barstow & Company of New York purchased the common stock of the Public Service Company for \$75 a share. Brooks was not surprised to hear that soon after the conclusion of the case, the Public Service Company appeared as an asset of the Southern Power Company.³⁰

The Beginning of a New Era

After appeals to the federal district court and the United States Supreme Court upheld Clark's ruling, the Southern Power Company was forced to yield to state regulation. Progressive-minded men like Brooks lamented that "it should never have been necessary to institute the suit in the first instance, if the State Corporation Commission had possessed the courage and disposition to regulate the service and rates of this defiant monopoly." Even if this new power came reluctantly to the conservative

²⁹ Ibid., 34.

³⁰ Aubrey L. Brooks, *A Southern Lawyer*, 117.

commission, nevertheless, disputes over power contracts had been shifted from the marketplace and the courts to the Corporation Commission's offices in Raleigh. The new importance of the commission was signified by Duke's public appearance at the initial hearings over rate increases.³¹

Duke also reluctantly embraced the importance of the state's Corporation Commission. Shortly after the U. S. Supreme Court's ruling, Southern Power moved to raise its rates with permission from the commission. As part of the new system of non-discriminatory rates, Southern Power insisted it had to abrogate all preexisting legal contracts to provide power at a set rate. Altogether, Southern Power would request several rate increases between 1920 and 1924. Each instance ignited public uproar from mill owners and towns eager to protect the low rates they had previously contracted.³²

Duke and Clark continued their political battle as Duke pushed for rate increases, arguing, without them "I am through."³³ Fortunately for Duke, he had plenty of supporters in North Carolina's newsrooms. They dreaded the thought of Duke's withdrawal from developing the state's water power industry and lauded his initial accomplishments. An article about Duke in the *News and Observer* stated:

What business is it of the employes [sic] of 282 cotton mills, mills made possible because James Buchanan Duke has built the Southern Power

³¹ Aubrey L. Brooks, *A Southern Lawyer*, 117-118.

³² "Legislature Should Act to Prevent Injustice," *News and Observer*, March 5, 1921; Durden, *Electrifying the Piedmont Carolinas*, 47-52.

³³ "Old Issues Revived as Power Co. Comes Before State Commission," *News and Observer*, November 18, 1922; "Will Build \$10,000,000 Hydro-Electric Plant if Power Rates Raised," *News and Observer*, October 12, 1923.

Company, whether he has grabbed all the water power in the State, and what business is it of theirs what he charges the cotton mills where they work for the power? Did he not make it possible for them to have jobs?...Why should these people . . . hound him about water power. Had not these streams tumbled down out of these mountains for centuries and none noticed them? Had he not invested his money in them when men called him foolish? They were here for hundreds of years before he bought them.³⁴

In response, Clark pushed harder to end Duke's monopoly. As he told Carl D. Thompson, president of the Public Ownership League, "The overwhelming combination managed by the water power company [Southern Power] controls to a large extent the press, the legislation and other officialdom. The people do not know the facts . . . [and] the effect upon themselves of political domination by this water power monopoly."³⁵ He then began to ardently and publicly advocate for public ownership of the state's water power resources. In July 1922, Clark privately responded to a letter from author and activist Upton Sinclair, writing, "The only possible solution that will work for permanent peace is Government Ownership of Rail Roads, Telegraphs, and Telephones, Coal Mines, Water Power and other Monopolies."³⁶ A year later Clark made similar arguments publicly in an editorial in the *News and Observer* that urged North Carolinians to follow the examples of California and South Dakota, which were voting on the issue of state financing for water power development, and Ontario, which, in Clark's view, had

³⁴ "How attack of Erysipelas Turned Thoughts of a Great Millionaire Toward Home and Living Monument," *News and Observer*, July 30, 1922.

³⁵ Walter Clark to Carl D. Thompson, October 2, 1923, in *PWC*, Vol. II, 484.

³⁶ Walter Clark to Upton Sinclair, July 18, 1922, in *PWC*, Vol. II, 437

financed and created “the greatest hydro-electric development in the world.” Clark extolled the virtues of cheap electricity “to light, cook, iron, wash and clean house” at a mere three cents per day. Similarly, he estimated that for twenty-three cents a day, a farmer could “light his house and barn, operate an electric range, washing machine, flat iron, toaster and other conveniences in the house; and pumps, grinding machines and other power implements outside.”³⁷

Indeed, Clark believed North Carolinians were living “at the beginning of a new era,” declaring:

Electricity at these rates will rapidly displace steam and oil in the industries and gas in the household especially in view of its greater efficiency, flexibility, and possibilities and cleanliness....At the touch of a child’s hand there will be at your service a delightful home. The dishes will be washed, the rugs cleaned, the floor swept, the clothes washed and ironed, the sewing machine operated, electric fans when you need them and a hundred burdens will be lifted from the shoulders of the housewife and the farmer and a thousand conveniences added to every home.³⁸

But the new era was heavily dependent upon Duke’s continued investment in building the state’s power infrastructure. When Ben MacNeill, a journalist from the *News and Observer*, interviewed J. B. Duke at his estate in Charlotte, Duke asked, “Do I look like a dangerous man to be let loose in the state?” Most influential North Carolinians would have responded “No.” Many either acquiesced in Duke’s control of the state’s energy resources or praised his generous investments. And with the development of state

³⁷ “An Open Letter by Clark to the News and Observer,” September 16, 1923, in *PWC*, Vol. II, 477-478.

³⁸ *Ibid.*, 478.

regulation of power rates, trusting that state commissioners would protect the interests of the public softened much of the existing resistance to Duke's monopoly.³⁹

Even Clark recognized the state's dependence on Duke thus far. In private correspondence, he expressed frustration to a colleague, admitting, "I do not know the best way to take over these properties." Clark suggested as a possibility purchasing water power and energy resources from Southern Power with one-hundred year, two-percent, non-transferable bonds subject to a graduated inheritance tax. Future developments would be funded from "heavy graduated income and inheritance taxes."⁴⁰ Yet such a plan, and the tax burden that would accompany it, was unlikely to gain popular support.

Perhaps most devastating to Clark's call for government ownership was when the great commotion over rate increases precipitously died down. The state commission approved a partial rate increase in 1924 and much of the heated debate faded away as North Carolina settled into non-discriminatory rate structure and regulation by commission.⁴¹ Clark died shortly thereafter in May 1924 at his desk in Raleigh. Duke followed him in October 1925.⁴² With the leading advocate for public ownership in North Carolina gone, and the often-despised industrialist behind Southern Power lionized following his death, the cause of public ownership in North Carolina faded into obscurity.

³⁹ "How Attack of Erysipelas Turned Thoughts of a Great Millionaire Toward Home and Living Monument," *News and Observer*, July 30, 1922.

⁴⁰ Walter Clark to H. B. Noyes, November 20, 1922, in *PWC*, Vol. II, 446.

⁴¹ Durden, *Electrifying the Carolinas*, 54.

⁴² Durden, *Dukes of Durham*, 246.

Public Power Lost

Ultimately, Duke's power company found greater acceptance among the public as the state's Corporation Commission granted partial rate increases that provided additional profits for Southern Power while convincing many that the commission was protecting their interests. The regulation that Duke had fought so vigorously against, and that Clark had fought so ardently for, became a bulwark of his power company. It shifted criticism of Southern Power's rates and policies to the commissioners whose vote would decide the future of rate increases after 1920.⁴³ As North Carolinians accepted the regulatory state's control over Southern Power, Clark's plans for public ownership appealed to an ever-smaller section of the public. In an arrangement that allowed Duke's company to earn a profit under the watchful eye of the commission, calls for public ownership seemed radical, and perhaps worse, entirely unnecessary. Indeed, as Christopher J. Mangianello has argued, by 1924, Duke's company was part of a "southeastern Super Power grid that relayed electric power over 3,000 miles of high voltage transmission lines and served some six million people in a 120,000-square-mile region encompassing a half dozen states."⁴⁴

The course of regulating public energy in North Carolina introduces a paradox. Liberal reformers often implemented, advocated, or enacted the same reforms that would undermine a significant portion of their own agenda. Consequently, as Clark pushed for

⁴³ See Durden, *Electrifying the Carolinas*, 47-54.

⁴⁴ Christopher J. Mangianello, "Hitching the New South to 'White Coal': Water and Power, 1890-1933," *Journal of Southern History* 78, no. 2 (May 2012): 283.

public ownership, his own success in ending price discrimination and strengthening the North Carolina Corporation Commission undermined his more radical plans for public ownership. The system of state regulation of private power corporations established by the legislature in 1913 and forced into action by the State Supreme Court's decision in 1919, and the foundation of the state's energy system since, obscures alternatives such as public ownership that existed in the early twentieth century. While North Carolina's current regulatory system that actively polices pricing to ensure "just and reasonable rates" to the state's energy consumers owes much to Clark, it falls far short of his vision of a state-controlled monopoly administered for the public welfare.⁴⁵ And while Duke initially abhorred North Carolina's current regulatory system, it helped to ensure the survival of his power company into the twenty-first century. In July 2012, Duke Energy finalized a merger with Progress Energy that, while retaining the Duke name, created the nation's biggest regulated utility, with 7.2 million electric customers in the Carolinas, Florida, Indiana, Ohio and Kentucky.⁴⁶ The continued success of Duke Energy shows that J. B. Duke's company has not only survived but thrived under the supervision of the regulatory state.

⁴⁵ "Mission Statement," North Carolina Utilities Commission, accessed April 28, 2014, <http://www.ncuc.net/>

⁴⁶ "About Us," Duke Energy, accessed April 28, 2014, <http://www.duke-energy.com/about-us>.

CHAPTER VIII

CONCLUSION: LEGACY OF A SOUTHERN PROGRESSIVE JURIST

This study of Justice Clark's life and jurisprudence intends to offer scholars a better understanding of the New South, southern progressivism, and American legal history. First, Clark's judicial and political career demonstrates how Southern courts could act as engines of progressive reform, not simply a rubber stamp of conservative rule. Second, this study shows that the familiar notion of separation of powers, learned by every grade school student, does not accurately describe the judicial and political actions of judges like Walter Clark. Third, this study has situated Clark's opinions in a national, and at times international, context and shown that legal reforms in North Carolina or the South did not occur in a vacuum but were part of a larger movement of the times. Fourth, Clark's inability to fit neatly into familiar historical molds of progressive or populist brings into question the usefulness of such labels and the distinctions made between them by historians.

While most historians are more familiar with courts as obstacles they could also act as engines of reform. As leading legal scholar Lawrence Friedman noted, during the last half of the nineteenth century (and continuing into the next), as farmers, laborers, and businesses offered competing visions for America, "in the economic struggle, law was an

essential weapon.”¹ And judges were tasked with hearing cases built upon flesh and blood claims—injuries to life and limb—into legal doctrines that affected the lives of working-class Americans by influencing workplace safety, hiring practices, etc. During his tenure on the North Carolina Supreme Court, Justice Clark moved to enact strict liability rules for injuries to railroad employees despite, or because of, the legislature’s failure to do the same. In a similar fashion, Clark’s opinions in *Ward v. Odell* and *Fitzgerald v. Furniture Company* created strict liability for employers who hired workers twelve years old or younger, despite the inability of the legislature to pass child labor legislation the previous year.² In both instances Clark’s opinions led to child labor legislation the following year that codified his opinions in the statutory law.

Clark’s active career off the bench would cause concern for many current members of the judiciary. Indeed, it led to a significant amount of criticism during his lifetime, although it never led to his losing an election or facing impeachment proceedings. Yet Clark was as much a politician as a judge. His campaign for the Chief Justiceship in 1902 played out as a drama that brought accusations against Clark tying him to Fusion rule, “ignorant” black voters, and the much-hated Republican Party. Sometimes his political pursuits were public (in articles, addresses, and editorials) and at other times they were private and secretive (hand-written bills forwarded along to state legislators in letters titled “CONFIDENTIAL”), but always Clark was pushing the veil of separation as he actively campaigned against railroad abuses, child labor, industrial

¹ Lawrence Friedmen, *A History of American Law* (New York, NY: Touchstone, 2007), 271-272.

² *Fitzgerald v. Alma Furniture Co.*, 131 N.C. 636 (1902).

malfesance, and in favor of women's property rights while deciding similar cases before the court.

Clark's judicial career consistently displayed the interconnectedness of law and politics. For example, during the 1902 campaign for the Chief Justiceship, an organization of North Carolinians organized to defeat Clark's nomination. One of the most prominent members of that group was cotton manufacturer J. M. Odell.³ Two years before Odell had been on the losing end of an appellate case before the North Carolina Supreme Court, in which Justice Clark's opinion upheld a \$1,000 jury award to a nine-year-old child who lost an eye in a cotton mill accident. Clark's ruling set the stage for a subsequent opinion, also authored by Clark, which held the employment of children under twelve years of age to be *per se* negligence.⁴ The group was also rumored to have received financing from Western Union Telegraph Company, whose involvement was likely related to Clark's earlier decision in *Young v. Western Union* (1890), in which Clark introduced recovery for mental anguish for negligent failure to deliver a telegram about a close relative's impending death or burial.⁵ In a line of cases over the next decade, Clark pushed the court to expand the mental anguish remedy, a line of cases which no doubt earned him the enmity of Western Union.⁶ Clark speculated in a letter to

³ "The Anti-Clark Forces Effect an Organization," *Raleigh Morning Post*, September 12, 1902.

⁴ *Ebbirt Ward v. Odell Manufacturing Company*, 126 N.C. 946 (1900).

⁵ *J. T. Young v. Western Union Telegraph Company*, 107 N.C. 370 (1890); Walter Clark to A.W. Graham, April 7, 1902, in *PWC*, Vol. II, 9-10.

⁶ *J. T. Young v. Western Union Telegraph Company*, 107 N.C. 370 (1890); *Meadows v. Western Union Telegraph Company*, 132 N.C. 40 (1903).

his brother-in-law that the 1902 election was an attempt by Western Union to “secure a reversal (by changing the court) of the Mental Anguish cases, so as to leave the monopoly free of any obligations as to prompt delivery of urgent messages concerning sickness or death.”⁷

Meanwhile, at the national level, Clark collaborated with senators, presidential candidates, and presidents to push national reforms to make the entire federal judiciary subject to election, to bring the telegraph and telephone under the authority of the federal government, to secure the rights of labor against federal injunctions, and even to push for a new constitutional convention to radically democratize the founding document for a new age. All the while his position as the Chief Justice of North Carolina provided grist for the political mill of organized farmers and laborers to parry attacks that they were uneducated, radical, or outside of the mainstream. An editorial in the *Railroad Worker* on “Labor and the Law,” reporting on testimony before the Federal Industrial Relations Commission in Washington, D.C., noted almost gleefully “The ‘rabble’ that led the ‘attack on the courts’ this time included the Chief Justice of a State Supreme Court.”⁸ Even Clark’s enemies acknowledged the importance of Clark’s position when combined with his advocacy of various democratic reforms. Rome Brown, a leading conservative defender of judicial review, assailed Clark at the North Carolina Bar Association Meeting in 1914. Describing calls for judicial recall, a movement Justice Clark was actively and vocally involved in, Rome harangued the Justice:

⁷ Walter Clark to A.W. Graham, April 7, 1902, in *PWC*, Vol. II, 9.

⁸ Walter Clark, “Labor and the Law,” *The Railroad Worker* 13 (August 1915): 29.

Consider the effect of such utterances, especially from such origin, upon masses of the people, untaught in science of government, many of whom are already incited to restlessness and even to open defiance of authority... Why thus feed the fire of unrest, of discontent and even of rebellion, which are even now threatening devastation?"⁹

Clark's position as the Chief Justice combined with his long tenure on the court provided gravitas to his arguments for reform. And that influence extended to others groups seeking reform (women voting rights advocates, public ownership supporters, union members, tobacco farmers, and others) as they capitalized on his role as a southern jurist to deflect claims of radicalism, while his enemies used the judge's position to establish his culpability for criticizing the social and legal order of American society.

Clark's opinions were a mixture of local, national, and international influences. Timothy Huebner's *Southern Judicial Tradition* makes the case for a distinctly southern (sectional) judicial tradition embedded within a culture of legal nationalism.¹⁰ Yet the tension between sectionalism and nationalism described by Huebner was complicated in the late nineteenth and early twentieth century by the migration of European (primarily English, French, and German) legal theory and experience across the Atlantic—and Clark was quick to embrace both early in his judicial career. Aubrey L. Brooks noted that Clark was inspired by German legal theorist Rudolf Von Jhering's lectures, so much so that he "gave [copies] to a number of his legal friends."¹¹ Clark read into Jhering's

⁹ Rome G. Brown, *Addresses, Discussions, Etc.* (Minneapolis: Self-published, 1917), 17, accessed December 21, 2014, <https://books.google.com/books?id=WQ40AQAAMAAJ>.

¹⁰ Timothy Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890* (Athens: University of Georgia Press, 2008), 1-9.

¹¹ Brooks, *Fighting Judge*, 81.

philosophy the late nineteenth century struggle between labor and capital. Even more importantly, Jhering's perception of the law as "not mere theory, but living force," likely appealed to Clark who saw the law as a weapon for promoting the common good.¹²

Jhering's writings, according to Brooks, reified Clark's decision "to challenge to mortal combat the god of the status quo"—the common law. Clark did indeed challenge the legitimacy of the common law. He stated before a congressional committee, "I don't recognize the right of a man who lived four hundred years ago and who knows nothing of present conditions, to say how I should decide between A and B in this day and generation."¹³ The common law was an obstacle to be overcome; an unnatural impediment in the way of progress. For example, Clark's opinion in *Price v. Electric Company* that contested the common law principal that a wife could only recover for an injury through her husband. Although in *Price* the court's majority upheld an award of damages to the injured woman, the court did not repudiate the common law precedent that barred recovery by a married woman suing alone. Discontented that the majority's opinion did not go far enough Clark concurred. Clark vigorously disagreed in his concurrence: "Every 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 us by the dead hand of the Past."¹⁴ Clark's repeated frustration with the common law led him to contemplate doing away with the common law system of legal precedent,

¹² Ibid., 81-82.

¹³ Walter Clark "Labor and the Law," 29.

¹⁴ *Louisa Price and Husband, R.S. Price v. Charlotte Electric Railway Company*, 160 N.C. 450, 457 (1912).

and—moving from German jurisprudence to French—speak of the majesties of the French Civil Code and its refusal to bow down to precedent.

Moreover, Clark’s opinions frequently included extra-legal materials: crime and labor statistics, corporate reports, and European legal trends. For example, in *State v. Cameron*, Clark’s opinion lamented the slowness of American courts in comparison to German and English courts; cited English court statistics on appeals and convictions; compared demographic data for the United States and England; and compared official North Carolina statistics of homicides, executions, and lynchings.¹⁵ While the remaining justices on the court agreed with the outcome, they joined Justice Allen’s concurrence, which bemoaned, “I do not think that statistics, not relevant to the decision of the cause, and which are often misleading, have a place in judicial opinion.”¹⁶ The decision sparked a controversy in the state as the governor, Locke Craig, weighed in, and Justices Allen and Clark exchanged angry letters—some published in the state’s newspapers.¹⁷ In earlier cases involving railroad negligence, Clark cited Interstate Commerce Commission reports alongside those of the North Carolina Railroad Commission.¹⁸ And in Clark’s testimony before the Industrial Labor Relations Board, in response to Chairman Walsh’s question whether counsel should be allowed to present “economic and social bearings on judicial decisions in arguments before the court,” Clark replied, “Yes, sir: I think they

¹⁵ *State v. Cameron*, 166 N.C. 379 (1914) (Clark, C.J., dissenting).

¹⁶ *State v. Cameron*, 166 N.C. 379 (1914) (Allen, J., concurring)

¹⁷ Brooks, *PWC*, Vol. II, 287-289.

¹⁸ *Greenlee v. Southern Railway Company*, 122 N.C. 977 (1898); *S.H. Troxler v. Southern Railway Company*, 124 N.C. 189 (1899).

should discuss them.” Clark went on to note that in his opinion in *Ward v. Odell* that he had, without any suggestions from counsel, considered the social and economic ramifications of the case.¹⁹ Indeed, in *Fitzgerald*, a subsequent child labor case, Clark’s opinion was based upon reviewing the statutes of twenty-nine states and fifteen foreign nations or provinces thereof (from California to Russia and from Quebec to Southern Australia).²⁰ Clark grounded his opinion not in statute but in the “consensus of opinion in nearly the entire civilized world.”²¹

Lastly, Justice Clark poses some problems for the traditional distinctions between populists and progressives. Indeed, Clark’s contemporaries applied both labels to him with a frustrating level of irregularity. While Populists are often associated with rural farmers, historians have long debated where to lay the wreath of praise for progressivism. In the decade immediately following World War II, Richard Hofstadter claimed that progressivism was an urban, middle-class phenomenon that resulted from fear over a loss in status to a rising industrial elite.²² Around the same time C. Vann Woodward’s *Origins of the New South* described southern progressives as a middle-class, urban movement that “lacked the agrarian cast and the radical edge” of the Populist

¹⁹ Testimony of Walter Clark, United States Commission on Industrial Relations, *Final Report and Testimony*, Vol. 11 (Washington, D.C.: U.S. Government Printing Office, 1916), 10453-10454.

²⁰ *Fitzgerald v. Alma Furniture Co.*, 131 N.C. 636, 643-644 (1902).

²¹ *Ibid.*, 636, 644.

²² Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Alfred A. Knopf, 1955).

movement.²³ Typically its leaders were city professionals and businessmen.”²⁴ Even further removed from the agrarian Populist tradition, Gabriel Kolko’s *The Triumph of Conservatism* argued that many of the leading victories of progressivism were victories won by railroads (and other industries) who sought protection from state legislation and new competition. Consequently, Kolko’s leading progressives were not so much progressives as conservatives acting to protect the interests of big business and private property.²⁵ The confusion over whom and what defined progressivism led Peter Filene to pen “An Obituary for ‘The Progressive Movement’” in the *American Quarterly*.²⁶ According to Filene, the term progressive was so broad it had become useless and the people it described so divergent that progressives were hard to distinguish from their opponents. Yet all was not lost, and progressivism survived its pallbearers. More recent scholarship has focused on the role of black and white women in the progressive movement.²⁷ Other scholars have shown a closer connection between rural farmers and urban reformers that survived the downfall of the People’s Party in the late 1890s.²⁸

²³ Woodward, *Origins of the New South*, 371.

²⁴ Ibid.

²⁵ Gabriel Kolko, *Railroads and Regulation, 1877-1916* (Princeton: Princeton University Press, 1965), 212.

²⁶ Peter Filene, “An Obituary for ‘The Progressive Movement,’” *American Quarterly* 22 (1970): 20-32.

²⁷ Glenda E. Gilmore, *Gender & Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920* (Chapel Hill: University of North Carolina Press, 1996); Elisabeth I. Perry, “Men Are from the Gilded Age, Women Are from the Progressive Era,” *Journal of the Gilded Age and Progressive Era* 1, no. 1 (January 2002): 25-48.

²⁸ Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999).

Justice Clark does not fit neatly into any of the above described categories. As an urban, middle-class professional, he does not fit the traditional Populist mold. Yet Clark was a man of many talents and many occupations. In addition to being a judge and activist, Clark was also a large property holder. After the Civil War, Clark's father passed along to Clark management of his two thousand plus acre Ventosa plantation, along with at least one other plantation. The plantation more often proved a burden than a source of income, and Clark frequently encountered troubles with incompetent managers, disgruntled sharecroppers, and the negligence of the railroads. Because of these issues, Clark frequently visited Ventosa throughout his life. Consequently, his interests were both urban and rural, agricultural and professional. Agricultural publications praised Justice Clark as someone who had "engaged in farming all his lifetime practically....He knows and feels the disadvantages under which farmers toil."²⁹ Moreover, Clark brings us back to Hofstadter's claim that progressivism arose from fear of loss of social and economic status within society. Such an explanation takes on special significance when speaking of former Confederates after the war. When Clark returned on horseback from High Point to his family's Ventosa plantation, he found the ground covered in weeds, the enslaved laborers absent, and the family's mansion burned to the ground.³⁰ In addition, the family's shipping business was lost, as both ships had been sold to the Confederate government early in the war and were subsequently confiscated

²⁹ "Judge Walter Clark, LL.D.," *Southern Cultivator* (April 1892).

³⁰ Brooks, *Fighting Judge*, 21-22.

by the Union Army.³¹ His family's social position, most of their wealth, their home, and even his father's health, were lost by the conclusion of the war.

Yet Clark's reformist beliefs were not so much forged from a new fear of losing social status. Instead, the loss of his family's wealth unbound Clark from the restrictions of plantation life and set him free to apply his Jeffersonian and Jacksonian beliefs about concentrations of power distant from the (white) voting public to a South that was profoundly changed. Clark's rhetoric, letters, and opinions fit well with Michael Kazin's description of a "Populist persuasion."³² Not so much an ideology as a worldview of a society divided between a virtuous, but exploited, class against "elite...self-serving and undemocratic" opponents.³³

With his status as a slaveholder stripped away by the Thirteenth Amendment, and his former enslaved workforce deserting him, Clark was free to argue against the error of slavery in the antebellum past, as well as attack the new class of industrial elites for their transgressions against the democratic order. Clark equated the rising industrialists, and the courts that abetted their large fortunes and monopolies, with the slave power, and the courts that abetted their disproportionate political and economic power—both systems benefited the few at the expense of many common whites.³⁴ Clark argued on many occasions that the odious power of judicial review was originally designed not to protect

³¹ Walter Clark to David Clark, October 23, 1865, in *PWC*, Vol. I, 153.

³² Michael Kazin, *The Populist Persuasion: An American History* (New York: Basic Books, 1995).

³³ *Ibid.*, 1-3.

³⁴ See Walter Clark, *Centennial of the Supreme Court of North Carolina: Response to Addresses*, January 4, 1919, Pamphlets and Addresses, Walter Clark Papers, SANC.

corporations, insignificant in size and number in the early republic, but to protect the slavocracy by a leading member of the southern slaveholding elite—Justice Marshall. Thus Clark intimately linked the antebellum undemocratic elites with the new class of industrial elites who were an equally undemocratic force in society.

What do we say to Walter Clark today? Perhaps the question should be asked, what does Walter Clark have to say to us? His legacy causes us to rethink connections between the antebellum era and the Progressive Era; the national and international connections of southern progressivism; the relative roles of the judicial and legislative branches and how distinctions between them could be considerably blurred; the distinctly southern aspects of progressivism in the South; and the degree to which a former Confederate officer blazed a trail of changes in the legal community that echoed those of the better remembered Holmes and Brandeis. Lastly, Clark's vision was not only progressive but optimistic. Despite his frequent conflicts with the railroad, telegraph, and tobacco trusts; the repeated failures of his runs for non-judicial office; and his inability to overcome the Simmons political machine, Clark remained optimistic.

We are travelling with increasing speed toward giving a greater and a more adequate share of the wealth they create to the labor that creates it. In the not distant future there will be no Rockefellers and Carnegies, no Kaisers or kings, but a higher standard of living and more enjoyment of life for those who 'make all things that are made and without whom nothing is made that is made.' Privilege will pass. Equality of opportunity will prevail. The miter and the musket will no longer have a controlling share in government when the hammer and the level, the brain and the hand shall 'rule in the realm which they have made.'³⁵

³⁵ Ibid.

Justice Clark, and his progressive vision of law and politics, deserves a place in the American historical and judicial tradition.

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