

other American cases in support, held in 1936 that such taxation is unconstitutional. Even the factual situations of leading cases have been similar in the United States and Argentina. The case which might be considered the Argentine counterpart of *Marbury v. Madison* was concerned with a federal statute which attempted to confer upon the Supreme Court original jurisdiction not mentioned in the constitution. And the principle of intergovernmental immunity originated in connection with the power of the Argentine provinces to tax notes issued by the national bank.

The principal criticism of the book derives from its limitation to the purely legal aspects of constitutional doctrine. While the judicial interpretations of the topics discussed by the author seem to have been treated exhaustively,⁷ the author fails to go beyond the opinions of the Argentine Supreme Court and does not examine what protection has actually been afforded by the Argentine constitution. Dr. Amadeo's book thus will be disappointing to the political scientists. To them it will serve only as a further corroboration of the insight, gained by experience, that similarity of constitutional provisions in different countries, and even of judicial decisions under similar constitutional texts, is no assurance whatever that in actual fact the rights of individuals and the other aspects of constitutional government will be the same or even remotely similar in such countries. Dr. Amadeo's book is strictly a legal treatise on constitutional provisions and on the decisions of the Argentine Supreme Court, and the great value of the book lies in the vast amount of material which it makes available to the student of comparative law.

SIDNEY B. JACOBY*

Walter Clark, Fighting Judge. By Aubrey Lee Brooks. Chapel Hill: University of North Carolina Press, 1944. Pp. x, 278. \$3.00.

Walter Clark was appointed to the North Carolina Supreme Court bench in 1889. Thereafter, he was associate and chief justice for thirty-five years. His opinions appear in the published reports of that state, beginning with the 104th and ending with the 187th volume. The book under review, written by Mr. A. L. Brooks, of the Greensboro (N.C.) bar, is an able presentation of the man from a state, but hardly from a national, viewpoint.

Unlike many mediocre Southern judges, Mr. Justice Clark rose above the level of a mere political hack and achieved national eminence as a progressive jurist. His legal philosophy, based upon some study of economics, antedated similar views later expressed by Justices Brandeis and Holmes. He anticipated Mr. Justice Brandeis in utilizing government documents and economic reports to fortify his legal opinions. And, like Brandeis and Holmes, he was a fruitful dissenter against *laissez faire*. For example, in his published writings, he advocated government ownership of our telegraph and

⁷ The only topic in which rather important Argentine opinions have not been mentioned by the author seems to be the subject of equal protection of the laws. For example, cases such as the case of *Sociedad Anónima Compañía de Tierras Santa Fé v. la Provincia de Santa Fé*, 170 S.C.N. 62 (1933), upholding special taxes upon corporations, and some instances in which certain provincial laws were declared unconstitutional as violations of the equality principle (*Don Juan Hannah Drysdale v. Provincia de Buenos Aires*, 149 S.C.N. 417 [1927] involving an inheritance tax law, and *Viñedos y Bodegas "Anizu" v. la Provincia de Mendoza*, 157 S.C.N. 359 [1930], involving a social security law) might have deserved mentioning.

* Office of the Solicitor, Department of the Interior, Washington, D.C.

telephone systems as part of the postal service. These views were expressed in both legal and lay periodicals, the *American Law Review* and the *Arena*.

His condemnations of monopoly were classic. Nowhere will one find better New Deal legal philosophy better expressed than in the following words of this now forgotten Southern judge:

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.¹

Here was a judge radical enough to earn the praises of former Governor Altgeld, of Illinois, "the Eagle Forgotten," who, with Clark, was a common spirit in stirring times, now historic.

On the subject of judicial review of social legislation, Mr. Justice Clark was a warrior for liberalism when Franklin D. Roosevelt was in knee pants. He was of the school of the elder La Follette (and some reputable historians, as well), in believing that the power exercised originally in *Marbury v. Madison* was power judicially usurped. This belief was expressed in an address to the Law School of the University of Pennsylvania on April 27, 1906.² That address was reprinted as Senate Document 87, of the 1st session of the 62d Congress. It was the starting-point of the discussion by Charles A. Beard in his book, *The Supreme Court and the Constitution*.³

Other social interests of this unique judge of the Taft era were the betterment of the conditions of women and children in industry, often expressed in his decisions.

It is too bad that the work of Mr. Brooks does not sufficiently emphasize the true national stature of a great citizen. There is too much North Carolina state history, too much Civil War reminiscence (Clark was in the Confederate Army), and too localized a picture of the protagonist. Despite these criticisms lawyers and laymen should find this volume highly entertaining reading.

A minor, but real, criticism of this reviewer, concerns the author's historical bias in his discussion of the period following the Civil War—the period in which Clark was a young man. For example, we read that, while in Washington, Clark "called on numerous statesmen, including the *despised* Thaddeus Stevens."⁴ Also, we read in connection with discussion of the terms of Confederate General Johnston's surrender that these terms were later repudiated "under the pernicious influence of the *sadist* Thaddeus Stevens."⁵

An interesting debate between the author and a reviewer of this book, Robert W. Winston, can be found in Volume 22 of the *North Carolina Law Review*.⁶ Winston objects that Clark was too much of a social crusader and not a sufficiently detached, judi-

¹ Quoted on pp. 99-100.

² In this speech Mr. Justice Clark said: ". . . in *Marbury v. Madison*, in which case in an obiter opinion he [Marshall] had asserted the power to declare an act of Congress unconstitutional, for he wound up by refusing the logical result, the issuing of the mandamus sought, because Congress had not conferred jurisdiction upon the Supreme Court to issue it."

³ See pages 2-9 of that work, 1912 edition.

⁴ P. 40. The italics are the reviewer's.

⁵ P. 246. The italics are the reviewer's.

⁶ Pp. 181 et seq. and pp. 353 et seq.

cial personage. Brooks rebuts with the barb that many judges have been fighters—most of them on the wrong side—but that the subject of his book was a judge who was on the right side, sociologically. Mr. Brooks has the satisfaction of knowing that there were other judges who were contemporaries of Mr. Justice Clark who agreed with Clark. Among them were the late Gilbert Roe, law partner of the elder Senator La Follette, who expressed similar views in a book entitled *Our Judicial Oligarchy*. Another adherent of this group of judges was Mr. Justice Wannamaker of the Ohio bench.

The reviewer enters this discussion concerning the merits of Walter Clark as a judge with the observation that it was well that Judge Clark lived when he did. A man with his social philosophy, openly expressed as he expressed it, would be persona non grata to the political machines which control the poll-tax South today.⁷ Hence, if living a generation later it would have been "Lawyer" Clark rather than Judge Clark.

One of the most valuable features of the book is a bibliography of Clark's writings. The author had access to the late jurist's manuscripts in the University of North Carolina library and, hence, wrote from primary historical sources.

MALCOLM M. YOUNG*

A Rationale of Criminal Negligence. By Roy Moreland. Lexington, Kentucky: University of Kentucky Press, 1944. Pp. viii, 175. \$2.25.

Discussions of criminal negligence are still needed and this one, by a member of the faculty of the Law School of the University of Kentucky, is especially welcome because it deals in one handy volume¹ with the concept as it is used in the definitions of manslaughter, murder, and assault and battery, and in statutory modifications of those crimes. The references are not always up to date and some of the conclusions are not as precisely accurate as a more lengthy discussion could make them, but the problems are discerned, judicial methods of dealing with them described sufficiently, and solutions offered.

The author assumes that there is such a thing as criminal negligence; that courts know what it is, though they may not be able to articulate their knowledge; that it need not be discovered but only better described; and that he is not suggesting a substantive reform but only a better phraseology.

The fundamental difficulty is thought to be that "judges have not frankly faced the issue whether criminal negligence is objective or subjective."² Most of them have actually applied, except for murder, the objective standard, borrowed from tort law, saying that "civil and criminal negligence are the same in kind." But most of them have required for criminal liability a higher degree of negligence than for tort liability, thereby raising a second major problem, that of describing this higher degree. The courts have not been able to formulate a test for it. The author submits one for manslaughter and criminal battery; another (subjective) for murder. He doubts the wisdom or effectiveness of the "negligent homicide" statutes, and offers no formula for the lower degree of manslaughter that they attempt to define.

Assuming that a satisfactory formula has been provided for civil cases, the author

⁷ North Carolina abolished the poll tax as a requisite for voting during Clark's lifetime.

* Of the North Carolina Bar.

¹ Originally published as a series of articles in 32 Ky. L. J. 1, 127, 221 (1943-44).

² P. 27.