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# THE JURISPRUDENCE OF MR. JUSTICE CLARKE\*

DAVID M. LEVITAN\*\*

This is not a biography of John Hessin Clarke; only that minimum biographical data thought essential to an understanding of his work is here included. A thorough study of John H. Clarke, in the Swisher, Mason, Fairman and Pusey<sup>1</sup> tradition would be a welcome addition to the growing literature on the Supreme Court.

The purpose of this study on Mr. Justice Clarke is to analyze and evaluate his jurisprudence as it is developed primarily in his public law opinions in the Supreme Court; to determine the consistency of those views with those expressed in his opinions in the federal district court, in his practice, in his writings and in his activities generally; and to evaluate Mr. Justice Clarke's influence while on the Court and his contribution to constitutional law.<sup>2</sup>

## I. BIOGRAPHICAL MATERIAL

John Hessin Clarke was born on September 18, 1858, in (New) Lisbon, Ohio. He went to college at Western Reserve, received his A.B. in 1877, his M.A. in 1880, and was honored with an LL.D. by Western Reserve in 1916 and by Brown University in 1924. Upon young Clarke's admission to the bar in 1878 he joined his father's firm, Clarke and McVicker. (His father was a leading member of the Ohio bar). But in 1880 he left the firm and moved to Youngstown, Ohio, where he practiced law and, together with Judge Leroy D. Thomas, he purchased the *Youngstown Vindicator*. Although Clark retained his interest in the *Vindicator* for only two years, during this brief period he made a notable contribution toward better government in the United States through a series of editorials strongly supporting Senator Pendelton's proposals for the establishment of a non-political

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1. MASON, BRANDEIS, *A FREE MAN'S LIFE* (1946); SWISHER, ROGER B. *TANEY* (1935) and STEPHEN J. *FIELDS CRAFTSMAN OF THE LAW* (1930); FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* (1939); PUSEY, CHARLES EVANS *HUGHES* (1952). See also Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 367 (1946) and *Mr. Justice Rutledge*, 34 *VA. L. REV.* 393, 526 (1948). For the influence of personality on decisions see CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1932) and FRANK, *LAW AND THE MODERN MIND* (1930). See also Levitan, *The Responsibility of Administration Officials in A Democratic Society*, 61 *POL. SCI. Q.* 562 (1946), *Political Ends and Administration Means*, 3 *PUB. ADM. REV.* 353 (1943) and *The Neutrality of the Public Service* 2 *PUB. ADM. REV.* 317 (1942).

2. To avoid controversy as to the definition of Public Law, this paper will make only incidental references to Clarke's position in property, contract or tort cases.

The term "constitutional law" is here used in a general sense and includes Clarke's decisions in the trade regulation, administrative law and conflict of laws cases.

federal civil service. It is appropriate to note that the *Vindicator* was the only Ohio Democratic paper to support Senator Pendelton's reforms and that when the Pendelton Act<sup>3</sup> was passed, Judge Thomas was appointed by President Arthur as one of the original commissioners. Clarke remained in private practice in Youngstown until 1897 when he moved to Cleveland.<sup>4</sup> In view of his position on the bench in anti-trust cases it is of interest that, "In Youngstown his firm had charge of the business of the chief manufacturing concerns and banks of the city and of the New York, Lake Erie and Western Railroad Company."<sup>5</sup>

Upon moving to Cleveland he joined, as the trial lawyer, the firm of Williamson and Cushing. The firm specialized in corporate and railroad practice. Clarke was very effective in the protection of his clients' interests, winning a notable decision in behalf of the Lake Shore and Southern Michigan Railroad and the Cleveland, Cincinnati, Chicago and St. Louis Railroad Companies in their fight with the city (Cleveland) over the title to important lake front property. In 1898 Clarke, while continuing in the firm, became General Counsel for the New York, Chicago and St. Louis Railroad Company.<sup>6</sup> In 1907 his partnership with Cushing was dissolved and from then until 1914, when he was appointed by President Wilson to the district court for the Northern District of Ohio (Cleveland), Clarke's main clients were the Nickel Plate and Pullman companies.

John Hessin Clarke also took part in the political life of Ohio and the nation. In 1892, for example, he was chairman of the Congressional Convention for the 18th Ohio District,<sup>7</sup> and in 1896, unable to swallow the "radicalism" of William Jennings Bryan, he led the Ohio (Gold) National Democrats.<sup>8</sup> But in 1903, as the Democratic candidate for the United States Senate, he joined Tom Johnson in a losing fight against Marcus Alonzo Hanna on the following platform: radical reforms in the national and state tax laws; a two-cent-per-mile fare on passenger railroads; overhauling of the legislation governing municipalities to provide for greater freedom

3. 22 STAT. 403 (1883), 5 U.S.C. § 632 (Supp. 1950).

4. Professor Mason states that Clarke was a railroad lawyer from Cincinnati. To the best of my knowledge Clarke never practiced a day in Cincinnati. The point is certainly insignificant—whether it was Cleveland or Cincinnati—but is indicative of the little that is known about the justice of a former day. MASON, *op. cit. supra* note 1.

5. NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY, VOL. A, p. 248 (1927). I am indebted to Paul Lamb, Esq., Cleveland, Ohio, for interesting and useful information about Justice Clarke's background and practice. Mr. Lamb joined the firm of Williamson, Cushing and Clarke after Clarke's withdrawal to become General Counsel of the Nickel Plate. Letter to writer, Feb. 19, 1948.

6. S. E. Williamson left the firm to become General Counsel for the New York Central. Mr. Lamb states that Clarke left the firm to become General Counsel of the Nickel Plate. See note 5 *supra*.

7. In 1893 he refused to become a candidate for governor but received a substantial vote at the Democratic convention nonetheless.

8. He was chairman of the Ohio Gold or Sound Money Democratic Convention and was a delegate to the Indianapolis Convention which nominated the Palmer-Bucker ticket and adopted a platform "in many respects more conservative than that of the Republicans." ODEGARD AND HELMS, AMERICAN POLITICS 101 (1938). He took an active part in the campaign, speaking throughout the state.

and municipal ownership of transportation and reform of the laws governing the compensation of county officers.<sup>9</sup> Although Hanna was not dislodged,<sup>10</sup> the campaign is revealing of Clarke's character and attitudes. It was perhaps an indication of his sympathies and of his personal integrity. It surely must have taken great courage to campaign on a platform which, at least in appearance, was antagonistic to the interest of his clients.<sup>11</sup> After this unsuccessful campaign John Clarke continued in the Johnson-Baker "flaming liberal" group and took an active part in civic affairs, participating especially in such organizations as the Short Ballot movement and the Anti-Imperialist League.

Jumping ahead of our story, we move on to Clarke's activities after leaving the bench—in fact the officially announced reason for his resignation.<sup>12</sup> In the summer of 1922 Mr. Justice Clarke resigned from the Supreme Court<sup>13</sup> stating: "I became convinced that it was my duty to devote what might remain to me of life and health and strength to doing what I could to cultivate public opinion in our country favorable to having our government take some share in the effort which many other nations are making to devise some rational substitute for irrational war as a means of settling international disputes."<sup>14</sup> Although Mr. Justice Clarke was to spend his remain-

9. It was Bryan's anti-imperialist stand in 1900 which brought Clarke back to the Democratic and Bryan fold. ". . . the Democrats had nominated Tom Johnson for Governor and an excellent man, although not a particularly strong candidate, named John H. Clarke for Senator. Their platform advocated municipal street railways and the equalization of taxation, and made a violent attack on the privilege and powers of incorporated wealth. Tom Johnson was responsible for the platform and was leading the anti-Hanna fight," CROLY, *MARCUS ALONZO HANNA* 430 (1912). For a discussion of the 1903 platform see also 6 LINDLEY, *THE HISTORY OF THE STATE OF OHIO* 67 (1942); *N. Y. Times*, March 23, 1914, p. 19.

10. Hanna won an overwhelming victory, although it was a hard fought campaign. CROLY, *op. cit. supra* note 9, at 430-433.

11. The fact that he continued as counsel for the railroads is not necessarily a reflection on his integrity. Many may perhaps find it difficult to compartmentalize their work and their general views, but there appears nothing immoral about taking the view that so long as the laws are what they are it is one's duty as counsel to plead his client's case as effectively as one can and yet to work on his own for a change in the law. The fact that one gives the best professional advice under an existing law does not commit him to the belief that the law ought to be what it is. In 1914 when his nomination for district judge was before the Senate he was attacked for his railroad associations; when his name was up in 1916 his "radicalism" was the source of concern. *N. Y. Times*, July 15, 1916, p. 4; *N. Y. Times*, March 23, 1945, p. 18, col. 2, p. 19, col. 1.

12. It appears that Mr. Justice Clarke may have had another reason for resigning—a progressively worsening condition of deafness. This reason is nowhere alluded to, but it appears that he was experiencing difficulty in following oral argument and conference discussion of cases. Correspondence with friends of Justice Clarke leads me to believe that his decision to resign was also motivated by personal relations with some members of the court. It is perhaps sufficient to draw attention to the failure of Justice McReynolds to sign the letter "of the brethren" upon Clarke's resignation, 260 U.S. vi (1922). His friends also suggest that the loss of his two sisters and his desire to avoid a pension contributed to his decision to resign. Friends of Mr. Justice Clarke believe that the limitations of his office on his freedom to speak out on the stirring issues of his time and his desire to strike out with his ideas on world peace prompted his decision. Letter of Edward Blythin, Vice President, Western University to writer, January 13, 1948.

13. The resignation was to be effective September 18, 1922—his 65th birthday.

14. Clarke, *The Present Status of the Relation of the United States to the World Court of Justice*, 30 *COLO. B. ASS'N* 97 (1927). Mr. Justice Clarke was a little more out-

ing years and energy urging American entrance into the League of Nations and participation in the World Court he was not to see his ambition realized—yet he could not have had any doubt but that the country and the world would have been benefited had his advice been heeded.<sup>15</sup> As a matter of fact, Mr. Justice Clarke showed remarkable insight and courage as to international affairs. "I have slowly but definitely come to the conviction that both the political and business welfare of our country require that the loans made by our government to the governments of our Allies during the late war should all be promptly and wholly cancelled."<sup>16</sup> It is significant that these were Mr. Justice Clarke's conclusions on December 27, 1921. He supported them with an acute analysis of the moral and business issues underlying the loans question—an analysis which proved so very correct.

Before turning to an analysis of Mr. Justice Clarke's decisions it is worth while to call attention to his attitude about the role of the Court and to his general approach in constitutional interpretation. Mention has already been made of his feeling of futility at spending his closing years "determining whether a drunken Indian has been deprived of his land before he died or whether the digging of a ditch in Iowa was constitutional or not."<sup>17</sup> This observation reflected Mr. Justice Clarke's very deep-felt conviction that the Supreme Court should and could only deal with "matters of the greatest public concern"<sup>18</sup> and that it had a most vital role to play in the operation of our constitutional system.<sup>19</sup> He made no secret of his concern over the tendency of lawyers to overload the Court by "carrying cases of trifling importance to it for decision."<sup>20</sup> This was a theme which he never tired of preaching even in the exchange of letters with the Chief Justice upon the occasion of his resignation—an occasion usually reserved for empty

spoken in a letter to Mr. Justice Brandeis. "I should die happier if I should do all that is possible to promote the entrance of our government into the League of Nations than if I continued to devote my time to determining whether a drunken Indian had been deprived of his land before he died or whether the digging of a ditch in Iowa was constitutional or not." Clarke to Brandeis, Sept. 13, 1922, quoted in MASON, *op. cit. supra* note 1, at 536. See also Clarke, AMERICA AND WORLD PEACE (1925) and THE WORLD COURT OF JUSTICE 2 No. 12 Mo. B.J. 36 (1931). He was president of the League of Nations Association from 1922 to 1928.

15. Mr. Justice Clarke died in California on March 22, 1945; N.Y. Times, March 23, 1945, p. 19, col. 1.

16. Clarke, "Should Our Government Cancel the War Loans to the Allies?" The Cleveland Chamber of Commerce, Dec. 27, 1921, 3. Many of his observations *mutatis mutandis* are apropos *re* Lend-Lease settlements. N.Y. Times, March 23, 1945, p. 18, col. 2.

17. *Id.* at n. 13.

18. Clarke, "Observations and Reflections on Practice in the Supreme Court of the United States," an address at the N.Y.U.L. Alumni Dinner, Feb. 4, 1922, 9-10. Every law student would profit by reading these brief remarks. There are also some rather humorous observations, though apparently not intended as such, *re* the "bright" young lawyers, at 18.

19. *Ibid.* See also his "Reminiscences of the Courts and the Law," *Proceedings of 5th Annual Meeting*, 5 STATE BAR OF CALIF. 20 (1932). This speech contains very interesting so-called "inside" information on the mechanics of the Supreme Court. To the best of my knowledge these details are nowhere else set down in writing.

20. "Observations . . ." 9. 5 STATE BAR OF CALIF. 20, 23.

plaudits: "Even here I cannot withhold the expression of the hope that the bill pending in Congress to modify the imperative statutory jurisdiction of the Court may soon become a law, so that you may not be so burdened with unimportant cases as you now are, and so may have more time and strength for the consideration of the many causes of great public concern constantly coming before you, the decisions which are so fateful to our country."<sup>21</sup> Yet while he held the Court in highest esteem he did not share any notions of its infallibility nor of the mechanical jurists.<sup>22</sup> His view that the Court was necessarily engaged in the task of broad interpretation was related to his approach to constitutional questions generally. He warned that great changes were afloat and that our "existing social order, stable though it seems, may not long endure even when buttressed by great armies, unless the masses of the people, on whom at last all governments rest, are given a fair share of that comfort and safety which it should be the first purpose of every government to provide for those who live under it," and in order to accomplish this the constitution must be interpreted "in that spirit of sound practical wisdom and common sense with which the founders launched the great experiment." He despaired at the use to which the "elusive and much overworked Fourteenth Amendment" was being put by a law profession which was rapidly being converted into a "group of casuists rivaling the Middle Age schoolmen in subtlety of distinction and futility of argument."<sup>23</sup> It was apparently these reactions that motivated him to make a radio address on President Roosevelt's Court "packing" plan. Although he meticulously avoided a position on the public policy issue, yet he supported the constitutionality of the proposal and he must have realized that his remarks would be used by its supporters.

Mr. Justice Clarke was critical of the Bar. He felt that instead of assisting in strengthening our institutions, lawyers were in fact, seeking with "refinement of argument and subtlety of metaphysical reasoning to expand the powers of the federal constitution for the purpose of avoiding the payment of taxes or punishment for crimes . . . or in an effort to erect barriers against every change proposed in the name of progress."<sup>24</sup> He did not tire of reminding the members of the Bar that the Constitution of the United States and the League Covenant were "human and therefor imperfect instruments which must be slowly modified to adapt them to the needs they are designed to serve as experience shall show them to be."<sup>25</sup>

21. 260 U.S. vi-vii (1922). See his dissents in *Detroit United Ry. v. Michigan*, 242 U.S. 238, 254 (1916); *Northern Ohio Traction Co. v. Ohio*, 245 U.S. 574, 585, 591-92 (1918); *Cincinnati v. Cincinnati & Hamilton Traction Co.*, 245 U.S. 446 (1917); *Eureka Pipe Line v. Hallahan*, 257 U.S. 273, 276 (1921) and his joining the Brandeis, J., dissent in *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 293 (1921).

22. ". . . I have never known any judges no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason." Clarke, *supra* note 18, at 20, 22.

23. *Id.* at 4-5.

24. *Ibid.* See also his remarks *re* the 14th Amendment having been and the 5th Amendment rapidly becoming a fertile source for trivial litigation. *Id.* at 6.

25. CLARKE, *op. cit. supra* note 14, at 96.

This then, in a general way, was the personal and intellectual make-up of the sixty-first associate justice of the Supreme Court.<sup>26</sup>

## II. LEGAL IDEAS

Mr. Justice Clarke's judicial career began on July 21, 1914, in the Federal District Court for the Northern Judicial District of Ohio and on July 28, 1916—just two years later—he found himself elevated to the Supreme Court.<sup>27</sup> Even during his brief stay on the district court he succeeded in establishing a reputation for expeditious handling of cases and for keeping his docket up to date.<sup>28</sup> The most striking feature about his opinions in the district court is their brevity and his serious concern with jurisdictional and procedural matters. It becomes quite evident that he approached his task with a philosophy as to the role of the federal courts in our constitutional system<sup>29</sup> and as to the effective functioning of the judicial system.<sup>30</sup> Judge Clarke's tenure on the district bench, brief though it was, was also valuable in speeding the Senate's "advice and consent."<sup>31</sup> When the Court

26. Mr. Justice Clarke's opinions as a district judge will be taken topically together with his Supreme Court decisions.

27. President Wilson nominated Mr. Clarke on July 14, 1916 to fill the vacancy created by the resignation of Mr. Justice Charles Evans Hughes to accept the Republican nomination for President. N.Y. Times, July 15, 1916, p. 4, col. 1. Professor Mason states that "It seems not unlikely that Brandeis may have suggested Clarke's name to President Wilson." MASON, *op. cit. supra* note 1, at 513.

28. Editorial, *The Changing Supreme Court of the United States*, 8 VA. L. REC. (n.s.) 439 (1922). Cerri v. Akron-People's Tel. Co., 219 Fed. 285 (N.D. Ohio 1914), decided on Nov. 30, 1914, was Judge Clarke's first decision in the district court. His name is listed among the judges from volumes 214 to 234. His last decision in the district was Panther Rubber Mfg. Co. v. I.T.S. Rubber Co., 234 Fed. 377 (N.D. Ohio 1916) decided July 8, 1916. Although the material here is based on the Federal Reporters, it is well to remember that not all district court decisions are reported in the Federal Reporters.

29. Cerri v. Akron-People's Tel. Co., 219 Fed. 285 (N.D. Ohio 1914). We need seek no further than his first decision. The opinion is short and the case is dismissed because it was evident that the plaintiff had entered into collusion in order to get the case into the federal court; Clarke, *supra* note 19, at 14.

30. He was at his best in patent and trade-mark cases. Because of the technical material that is often involved in the patent suits, counsel, unless kept in line, can confuse the court. Judge Clarke, however, was not easy to mislead. See, for example, Kellogg Switchboard and Supply Co. v. Dean Electric Co., 231 Fed. 190, 193 (N.D. Ohio 1915), where he lectured counsel for the plaintiff for introducing hundreds of pages of testimony, numerous expert witnesses and delaying for 10 years a resolution of the controversy; Coulston v. Franke Steel Range Co., 221 Fed. 669, 671, 672 (N.D. Ohio 1915), another patent infringement suit; in the course of the opinion he said: ". . . I am convinced it was the purpose of the new rules (Equity No. 30, 198 Fed. xxvi, 115 CCA xxvi) to require that counsel shall so study the patent upon which they intend to rely that in their pleadings they can state in short and simple terms just what they claim with respect to them, rather than to defer such study until after a record is made up to volumes of irrelevant matter. . . ." Again after pointing out that the old practice had been "found to be expensive to litigants, burdensome to courts, and a fruitful source of delay of justice," he continued: "this court cannot refrain from observing in this connection that the old notion that a suit at law or in equity is chiefly a game affording an opportunity for the matching of wits of counsel and for the exercise of the ingenuity of courts is fast giving place to the conception that suits both at law and in equity should be sincere and candid attempts to reach the real point of difference between the parties to them, and to secure a just settlement of such difference. . . ."

31. "This time the selection was sufficiently conventional, the appointee being a fairly progressive Ohio lawyer, John H. Clarke, 58 years old, who had had the much

convened for the October term there were in fact two new justices on it<sup>32</sup> who were to team up in the future on many occasions and upon whom many, including President Wilson, had counted "to restrain the Court in some measure from the extreme reactionary course which it seem[ed] inclined to follow."<sup>33</sup> In the succeeding pages an effort will be made to analyze Mr. Justice Clarke's legal ideas primarily as they are developed in his opinions in the Supreme Court,<sup>34</sup> but note will also be taken of his opinions in the lower court and of his position in the more crucial decisions. Although the business of the Supreme Court in the public law field during the 1916-1922 period involved the normally controversial constitutional provisions—the commerce and taxing powers of the federal government, the "due-process" and "equal protection" clauses of the Fourteenth Amendment—the objects of controversy were new. Labor and anti-trust questions loomed large but the war also brought into the arena of controversy the scope of the war powers and the interpretation and application of the Bill of Rights.

A. *Commerce Cases.* The commerce power came in for substantial interpretation during Mr. Justice Clarke's tenure, involving questions as to the general scope of the power and its availability to promote more general ends and the perennial problem of harmonizing national and state interests in the regulation of commerce. Although he did not write any major commerce power decisions,<sup>35</sup> he made his position on the interpretation of the power very clear. He believed that the Constitution vested Congress with broad discretion as to the scope and application of its control over commerce. He was, at the same time, sympathetic toward the power of the states to deal with matters affecting their welfare even though some effect on federal regulation of interstate commerce might ensue. In a word, while he would interpret the power broadly and ordinarily joined in upholding the congressional authority under the commerce power, he did not attribute an automatic negative exclusionary effect to the grant of the power to Congress and was therefore prepared, in the absence of clear congressional intent to occupy the field, to uphold state regulation or taxation. As an example

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valued 'judicial experience'—which had long since come into favor—as a federal district judge." Bates, *The Story of the Supreme Court*, N.Y., 1936, 245. *The N.Y. Times*, July 15, 1916, p. 4.

32. Mr. Justice Brandeis had in fact taken his seat on the closing day of the previous term, June 5, 1916.

33. MASON, *op. cit. supra* note 1, at 536, citing BAKER, WOODROW WILSON viii, 594 (1939).

34. Mr. Justice Clarke's opinions are to be found in volumes 242 to 259 inclusive of the Supreme Court reports. *United States v. Northern Pac. Ry.*, 242 U.S. 191 (1916) was his first opinion. The case is rather insignificant—it involved a suit for a \$500,000 penalty imposed on the railroad by the ICC and went off on a matter of construction and application to the facts at hand of the penal provision of § 20, Act to Regulate Commerce, 36 STAT. 539, 31 U.S.C. § 72 (1910), but note some of his rather unrealistic language at 195.

35. Mr. Justice Clarke wrote a number of very crucial anti-trust decisions which obviously involve the commerce power—these will be treated under a separate heading.



of his interpretation of the scope of congressional power he joined the majority in upholding the peculiar exercise of congressional power under the Webb-Kenyon Act<sup>36</sup> and federal regulation of hours and wages of interstate railroad employees.<sup>37</sup> Likewise he held that the services connected with the assembly of a plant, the parts for which had been shipped in interstate commerce, was a part of that commerce;<sup>38</sup> that the authority of the Interstate Commerce Commission under the Transportation Act of 1920 to order increases in intrastate rates to conform to interstate rates in order to safeguard the financial position of the railroads was a proper exercise of the commerce power;<sup>39</sup> and that federal regulation of commission men and dealers in the large stockyards under the Packers and Stockyards Act of 1921 was valid—joining in Chief Justice Taft's opinions—including the "flow of commerce" and "current of commerce" concepts.<sup>40</sup> Similarly, consistent with his position in the other cases, he joined Mr. Justice Holmes in dissent in *Hammer v. Dagenhart*.<sup>41</sup>

The conclusion that the commerce clause constituted a great reservoir

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36. 37 STAT. 699, 27 U.S.C. 122 (1913), upheld in *Clark Distilling Co. v. Maryland*, 242 U.S. 311 (1916). But see *United States v. Hill*, 248 U.S. 420, 428 (1919) where McReynolds and Clarke dissented—holding the Reed Amendment to the Webb-Kenyon Act invalid as an unconstitutional exercise of the commerce power; *United States v. Simpson*, 252 U.S. 465, 480 (1920), Clarke and McReynolds dissenting. Both cases involved convictions under the Reed Amendment for transporting (by carrier, Hill case, and personally, Simpson case) small quantities of liquor for personal use into states wherein the manufacture of liquor was prohibited. I suggest that Clarke's position in the liquor cases should not be taken as an index of his ideas on the commerce power—the attempt to foist temperance upon the country by legislation was one of his pet peeves. "The Eighteenth Amendment required millions of men and women to abruptly give up habits and customs of life which they thought not immoral or wrong, but which they believed to be necessary to their reasonable comfort and happiness, and thereby, as we all know, respect not only in that law but for all law has been put to unprecedented and demoralizing strain in our country, the end of which is difficult to see." Quoted in *N.Y. Times*, Mar. 23, 1945, p. 19, col. 1. See also Clarke, J., dissent, *National Prohibition Cases*, 253 U.S. 350, 407 (1920) and his limiting application of the Volstead Act in *Street v. Lincoln Safe Deposit Co.*, 254 U.S. 88 (1920), holding that a storage company may properly continue to store for the owner liquor lawfully acquired before the passage of the Act and even transport it to his house. See also *Ruppert v. Caffey*, 251 U.S. 264, 310 (1920) (Clarke, J., dissenting); but see *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).

37. *Wilson v. New*, 243 U.S. 332 (1917), White, C.J., with McKenna, Holmes, Brandeis and Clarke, J.J. constituted the majority; Day, J., McReynolds, J., and Pitney, J., concurred with Van Devanter, J., writing dissenting opinions. The case went off also as temporary emergency and war legislation.

38. *York Mfg. Co. v. Colley*, 247 U.S. 21 (1918) *per* White, C.J., Pitney, J., dissenting. See also *United States v. Feger*, 250 U.S. 199 (1919), forgery of bill of lading covering interstate shipment punished under commerce power, Clarke, J., approving.

39. *Wisconsin R.R. v. Chicago B. & O. R.R.*, 257 U.S. 563 (1922) and *New York v. United States*, 257 U.S. 591 (1922), *per* Taft, C.J. The latter case involved also overriding of charter provision restricting charges.

40. *Stafford v. Wallace*, 258 U.S. 495 (1922) *per* Taft, C.J., McReynolds, J., dissenting. Clarke, J. and White, C.J. concurred in the McKenna, J., dissent in *Caminetti v. United States*, 242 U.S. 470 (1916) but the opinion goes off on statutory construction.

41. 247 U.S. 251 (1918), with Day, J., White, C.J., Van Devanter, Pitney, McReynolds, J.J., composing the majority; Holmes, J., with McKenna, Brandeis, Clarke, J.J., dissenting.

of congressional power did not, as already suggested, cause Mr. Justice Clarke to adopt an intransigent attitude toward state action affecting interstate commerce—he was not one who readily found “burdens” on interstate commerce. He would have no part in the creation of “twilight zones.” He held that the Congress had the power to legislate as to matters affecting interstate commerce without being subjected to psychoanalysis as to “motive, intent or purpose,” but in the absence of a clear declaration of an exclusionary policy by Congress Mr. Justice Clarke would uphold local and state regulation. In other words, mere enactment of national legislation as to matters affecting both the states and the nation did not exhaust for Mr. Justice Clarke the field of permissible regulation. Nor did he differentiate whether the regulation was under the so-called “police power” or other state powers, *e.g.*, taxation. Hence, he concurred in Mr. Justice Brandeis’ dissent to the Court’s holding that enactment by Congress of the Federal Employers’ Liability Act precluded states from legislating for the liability of carriers even without fault;<sup>42</sup> and, again, to the Court’s holding invalid the North Dakota grading and inspection law as a direct burden on interstate commerce.<sup>43</sup> Since the crops were to proceed in interstate commerce after passing through the graders and the weighers, the majority viewed the licensing system provided by the act as a direct burden on interstate commerce in spite of the fact that the federal government had failed to regulate this intrastate aspect of the transaction and the farmers were in fact being defrauded.<sup>44</sup> Similarly, Mr. Justice Clarke upheld the validity of a Mississippi “Anti-Gin Act” prohibiting ownership of a cotton gin by a corporation which was also engaged in the manufacture of cottonseed oil or cottonseed meal against attack by a foreign corporation engaged in interstate sales of the oil, among other reasons, as a burden on interstate commerce.<sup>45</sup> Mr.

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42. *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 154 (1917), *per* Van Devanter, J. See also *Eric R.R. v. Winfield*, 244 U.S. 170, 174 (1917); *New York Cent. R.R. v. Porter*, 249 U.S. 168 (1919); *Southern Pac. Ry. v. Indiana Acc. Comm’r*, 251 U.S. 259 (1920); *Philadelphia & Reading Ry. v. Hancock*, 253 U.S. 284 (1920); *Philadelphia & Reading R.R. v. Polk*, 256 U.S. 332 (1921); *Philadelphia & Reading Ry. v. Di Donato*, 256 U.S. 327 (1921). Clarke, J., dissented in these cases. In each one of them the Supreme Court held applicable the Federal Employers’ Liability Act, rather than the state act.

43. *Lehmke v. Farmer Grain Co.*, 258 U.S. 50 (1922), *per* Day, J.

44. *Id.* at 56. See also *Gulf, Colo. Santa Fe Ry. v. Texas*, 246 U.S. 58 (1918), where the Court with Holmes, J., and Clarke, J., forming part of the majority, upheld the Texas statute requiring trains, although on interstate runs, to stop at the county seat against attack as constituting a burden on interstate commerce—White, C.J., McKenna, McReynolds, J.J., dissenting.

45. *Crescent Oil Co. v. Mississippi*, 257 U.S. 125 (1931). See also *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 293 (1922). The decision *per* Van Devanter, J., is on the merits holding that the company’s purchases were part of interstate commerce. The dissent by Brandeis, J., concurred in by Clarke, J., is directed, however, to the procedural aspect—against the hearing of the case on a writ of error. See also *Pennsylvania R.R. v. Public Service Comm’r*, 250 U.S. 566 (1919), Clarke, J., dissenting, at 570. But see *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917), where the court, *per* McKenna, J., with Clarke, J., (also Holmes, Day, Van Devanter, McReynolds, J.J.) joining the majority, held the Georgia “Blow-Post” law invalid as constituting a direct burden on interstate commerce. White, C.J., (Pitney, Brandeis, J.J.)

Justice Clarke followed a similar policy of respecting the judgment and recognizing the needs of the states—the other partner in the federal system—when state or local tax measures were called into question on the ground that they constituted a burden on interstate commerce. Hence, for example, he upheld a license tax and per pole fee for the use of its streets by the City of Richmond against a telegraph company engaged in interstate business;<sup>46</sup> he upheld an Illinois tax which required the inclusion of a corporation's interstate business as one of the factors in the computation of its tax;<sup>47</sup> he dissented from the Court's decision holding unconstitutional a West Virginia tax on the privilege of engaging in business of transporting petroleum in pipelines where by far the greater percentage of the petroleum went into interstate commerce and the locally produced oil sometimes mixed in the pipelines with oil in interstate transit, in spite of the fact that the company had four thousand miles of pipelines in West Virginia and that the intrastate-produced oil normally came to a stopping point—"delivery" or "tariff" points—and tenders of a shipment had to be made out before oil was shipped in interstate commerce;<sup>48</sup> and, he dissented from the decision holding unconstitutional a Georgia statute applying the "mileage rule" in the evaluation of a carrier's property for tax purposes.<sup>49</sup>

The problem of harmonizing the competing demands of the states for

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dissented. See also *St. Louis and San Francisco Ry. v. Public Service Com.*, 254 U.S. 535 (1921), where the Court *per* McReynolds, J., with Pitney and Clarke, J.J., dissenting, held invalid an order requiring a detouring of trains in order to supply additional service for communities along the way.

46. *Postal Telegraph Cable Co. v. City of Richmond*, 249 U.S. 252, 257 (1919); Justice Clarke here introduces the phrase "even interstate business must pay its way." The phrase was picked up and doctored by Holmes, J. in *New Jersey Bell Tel. v. State Board*, 280 U.S. 338, 351 (1930), to read "even interstate commerce must pay its way."

47. *Hump Hairpin Co. v. Emmerson*, 258 U.S. 290 (1922). The amount of property and intrastate business were the other factors. Some of Mr. Justice Clarke's language is very much like the language in Mr. Justice Stone's now famous dissent in *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927). See *id.* at 295. See also *St. Louis & E. St. Louis Ry. v. Hageman*, 256 U.S. 314 (1921), where the Court *per* Clarke, J., upheld a statute providing for the inclusion among the corporation's property of the total valuation of a franchise which extended to both intrastate and interstate business where the valuation formed the basis for tax assessment; he also joined, *e.g.*, in *Citizens National Bank v. Durr*, 257 U.S. 99 (1921) (upholding Ohio tax on Ohioan's seat on the New York Stock Exchange); *Peck Co. v. Lowe*, 247 U.S. 165 (1918) (tax on net income valid, though some was from sales in interstate and foreign commerce).

48. *Eureka Pipe Line Co. v. Hallahan*, 257 U.S. 265 (1921), *per* Holmes, J.; Clarke, J., joined by Pitney and Brandeis, J.J., dissented, at 273 (the dissent also raises a procedural issue).

49. *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), McReynolds, J., spoke for the majority and Pitney, J., spoke for Brandeis and Clarke, J.J. The dissent is based chiefly upon the authority of *Pullman Car Co. v. Pennsylvania*, 141 U.S. 18, 26 (1891). It should be clear that the "burden on interstate commerce" was only one of the contentions in these cases. See also *Crew-Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917) a tax on gross receipts where the receipts include sales in interstate or foreign commerce is invalid. No disagreement there. Apparently the consensus carries over to the original package doctrine and to taxes on imports from interstate commerce. *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921) and *Texas Co. v. Brown*, 258 U.S. 467 (1922), taxes held invalid; the former on gasoline brought in interstate commerce and sold in original package and the latter an inspection fee at state border yielding substantially more than inspection costs.

control and revenue and of the nation for the free flow of commerce unencumbered by local barriers occupied much of the Court's attention then—as it does now. Nor is it clear that the success or lack of it in dealing with this crucial problem in our constitutional system was any greater during Mr. Justice Clarke's tenure. The words of incantation have varied; whereas the Court then spoke of "direct" and "indirect" effect, more recently it has been in vogue to invoke "competitive disadvantage," "multiple burden" and "discriminatory" as the operative words or tests of validity. However, the ambiguity, uncertainty and confusion have not been materially lessened.<sup>50</sup> The fact is that the able judge, although he too often finds it necessary to invoke judicially well lubricated terms, is neither beguiled nor enchanted by these words and he is fully aware that these terms most often are merely contractions for the expression of legal results.<sup>51</sup> Hence, before invoking these "conclusion-expressing" words, such a judge will searchingly examine the facts and analyze and evaluate the policy considerations and consequences of alternative solutions. It is perhaps in order to state that one is entitled to expect from a sophisticated judge an awareness and perhaps even a frank avowal that approximately some such approach is essential to intelligent determination of the complex issues that confront the Court, especially those involved in adjusting the competing demands of the states and the nation in the maintenance of our federal system—instead of either the petty acrimonious accusations about judicial legislation or avowals of automaton-like behavior that have pervaded far too many of the opinions. Although Mr. Justice Clarke did not write any of the outstanding commerce decisions of the period, his opinions and votes indicate that he approached his job as a sophisticated judge—he examined the facts and balanced policy considerations.<sup>52</sup>

B. *Taxation Cases.* Mr. Justice Clarke's record in the taxation cases can be summarized very briefly as a sound and consistent one. He generally

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50. Dowling, *Interstate Commerce and the State Power*, 27 VA. L. REV. 1 (1940) and *Interstate Commerce and State Power—Revised Version*, 47 COL. L. REV. 547 (1947); Wechsler, *Stone and the Constitution*, 46 COL. L. REV. 764 (1946): Note the policy issues involved in the "Stone-Black" controversy in the *Henneford* case, 305 U.S. 434 (1939). What was true in the "Stone-Black" controversy was also true during other periods in the Court's history—the disagreement over a word often was symptomatic or reflective of profound philosophical differences as to the role of government and especially of the role of the Court in our constitutional system.

51. See e.g., Holmes, J., in *Du Pont Co. v. Masland*, 244 U.S. 101, 103 (1917), where he says, "The word 'property' as applied to trade-marks and trade secrets, is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirement of good faith," also, ". . . and in a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts of which the right is a prophetic summary." *Beech-Nut Packing Co. v. P. Lorillard Co.*, 273 U.S. 629, 632 (1926).

52. See *Hump Hairpin Co. v. Emmerson*, 258 U.S. 290, 295 (1922). Clarke, *supra* note 18, at 12-15 per White, C.J., (Pitney, Brandeis, Clark, J.J., dissenting), extended the immunity doctrine to stock held in a national bank so that stockholders of a bank holding national bank stock were entitled to a deduction in estimated value of the bank's stock calculable on the basis of its national bank stock holdings; *Controller of Ga. Ry. v. Wright*, 250 U.S. 519 (1919) (taxing power restricted by implication).

voted to uphold the exercise of the taxing power by the nation and the state. He recognized that under our constitutional system with the doctrine of delegation of powers a broad interpretation of the scope of the federal government's taxing (and commerce) power was essential if the federal government was to be able to discharge the responsibilities which modern conditions have cast upon it<sup>53</sup> and that a free hand as to taxation generally was paramount if government was to perform the services which we have come to expect from it.<sup>54</sup> He is generally to be found among the majority in the decisions which upheld the taxing power<sup>55</sup> and in dissent when the power was being restricted.<sup>56</sup> Mr. Justice Clarke's special solicitude for the taxing needs of government did not, however, blind him so that he did not recognize the unfairness of some tax impositions—even if

53. Mr. Justice Clarke was the lone dissenter in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (Child Labor Tax Case), and joined the majority in *United States v. Doremus*, 249 U.S. 86 (1919) (upholding the Harrison Narcotic Drug Act). But see *Hill v. Wallace*, 259 U.S. 44 (1922) where he joined the Court in holding invalid the Future Trading Act, 42 STAT. 187 (1921). There is always the untapped reservoir of the "general welfare" clause as an independent power. See 2 PUSEY, CHARLES EVANS HUGHES 743-744 (1951) *re* the *Bailey* decision. Mr. Pusey makes the gratuitous observation that "Any alert constitutional lawyer should have known that the taxing power was not a secure foundation on which to rest a sweeping regulatory law," at 743. Mr. Pusey forgets that the commerce power had not yet been revived and that in *McCray v. United States*, 195 U.S. 27 (1904); *United States v. Constantine*, 296 U.S. 287 (1935); *Sonqinsky v. United States*, 300 U.S. 506 (1937); the Court went along with regulations erected on a tax foundation. The Pusey comment is *re* the Hughes, C.J., vote in *United States v. Butler*, 297 U.S. 1 (1936).

54. All that the statement assumes is that there is general agreement that it is wise for government at some time or another to meet its expenditures with taxes; that deficient spending is not a permanent policy.

55. See note 53 *supra* and *e.g.*, *Citizens National Bank v. Durr*, 257 U.S. 99 (1921) (Ohio may tax Ohioan's seat on New York Stock Exchange); *Peabody v. Eisner*, 247 U.S. 247 (1918) (upholding "income" tax on stock dividend by corporation A resulting from stock which is held in corporation B—dividend involved declaration by Board of B hence the stockholder got something that he didn't have before); *Lynch v. Horal*, 247 U.S. 339 (1918) holding taxable as "income" a cash dividend declared after effective date of the Sixteenth Amendment though based on profits accumulated before 1913). Clarke, J., did not get caught in the *Itney*, J., net as to what is "income." He consistently held that the Sixteenth Amendment opened the field generally and without any sophistry. See also *United States v. Phillis*, 257 U.S. 136 (1921); *Merchants' Loan and Trust Co. v. Smiebanka*, 255 U.S. 509 (1921); *Eldorado Coal Co. v. Mager*, 255 U.S. 523 (1921); *Goodrich v. Edwards*, 255 U.S. 527 (1921); *Maxwell v. Bugbee*, 250 U.S. 525 (1919). Also see his local government tax decisions, *Breiholz v. Board of Supervisors*, 257 U.S. 118 (1921) and *Branson v. Bush*, 251 U.S. 182 (1919). But see *Evans v. Gore*, 253 U.S. 245 (1920) where Clarke, J., joined the majority in maintaining that a federal judge's salary was immune from income tax even under the Sixteenth Amendment.

56. *Eisner v. Macomber*, 252 U.S. 189 (1920); the Court *per* Pitney, J., held that a stock dividend was not taxable as income; *Southern Pac. Ry. v. Lowe*, 247 U.S. 330 (1918), the Court *per* Pitney, J., considering a declaration of dividend by lessor corporation which was in fact identical with the lessee held that the recipient of the dividend is not taxable; *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), the Court *per* Holmes, J., (in a real off-day opinion) held immune from taxation the income of a lessee derived from the sale of oil drawn from Indiana land on an "instrumentality" of the United States government theory; *Bank of Calif. v. Richardson*, 248 U.S. 426 (1919), the Court *per* White, C.J. (Pitney, Brandeis, Clarke, J.J., dissenting), extended the immunity doctrine to stock held in a national bank so that stockholders of a bank holding national bank stock were entitled to a deduction in estimated value of the bank's stock calculable on the basis of its national bank stock holdings; *Controller of Ga. Ry. v. Wright*, 250 U.S. 519 (1919) (taxing power restricted by implication).

they were directed against Mr. Rockefeller.<sup>57</sup> While Mr. Justice Clarke made no outstanding contribution in the tax field, his opinions manifested a realistic approach to the issues.<sup>58</sup>

C. *Police Power Cases.*<sup>59</sup> The preceding discussion of Mr. Justice Clarke's conception of the commerce and taxing power has shown that he was generally solicitous of the federal government's plea for authority and discretion in the exercise of the tax and commerce powers—the primary vehicles for federal regulation.<sup>60</sup> An analysis of his opinions and votes in cases where the constitutionality of state action was questioned, especially as violation of the Fourteenth Amendment and the impairment of obligations of contract clause, shows him equally sympathetic to the determinations of the states and the local communities as to the need for regulation, respectful of their choice of means, and zealous in the protection of governmental power in behalf of the body politic. The following are examples of his position in this area: he upheld a Chicago ordinance regulating outdoor advertising;<sup>61</sup> he upheld a city ordinance requiring street cars to be operated

57. *Rockefeller v. O'Brien*, 224 Fed. 541 (N.D. Ohio 1915), where Judge Clarke held invalid the attempt by Ohio to tax all of Mr. Rockefeller's intangible property (\$311,000,000) on the theory that he became an Ohio resident when he overstayed his usual summer visit. Judge Clarke in contrasting the taxing statute looked to its legislative history and concluded that physical presence plus intent to stay were necessary qualifications; in this case Mr. Rockefeller clearly did not intend to make Ohio his residence; his extended stay was due to his wife's illness. See also *Smietank v. Indiana Steel Co.*, 257 U.S. 1 (1921).

58. See Notes 46-49 *supra* for his tax views *vis-a-vis* interstate commerce.

59. Many of the cases cited in the discussion of the commerce and taxation cases also fall within the category of police power cases. The ensuing summary will deal with cases where the exercise of state authority was sought to be justified as in furtherance of "public health, public morals, public safety and public welfare generally" and was contested primarily as violating the Fourteenth Amendment and the impairment of obligations of contracts provision, U. S. CONST. Art. I, § 10. See DOWLING, *CASES ON CONSTITUTIONAL LAW* 834-838 (3d ed. 1941), for a collection of attempts at defining the "police power;" DODD, *CASES ON CONSTITUTIONAL LAW* 945-946 (1941), for similar material.

60. Except for some of the prohibition cases which, as we have seen, are a class by themselves (see note 36 *supra*), Mr. Justice Clarke consistently joined in upholding federal authority. *North. Pac. Ry. v. North Dakota*, 250 U.S. 135 (1919) and *Dakota Central Tel. Co. v. South Dakota*, 250 U.S. 163 (1919), upholding immunity of wartime federally operated activities from state rate regulation; *Missouri v. Holland*, 252 U.S. 416 (1920), upholding the validity of the "Migratory Bird Treaty Act" of July 3, 1918, and the regulations of the Secretary of Agriculture pursuant thereto; *Smith v. Kansas City Title Co.*, 255 U.S. 180 (1921), upholding the constitutionality of the Federal Farm Loan Act of July 17, 1916, and the establishment of the land banks and the joint stock land banks; *Block v. Hirsch*, 256 U.S. 135 (1921), upholding the Federal Rent Law of Oct. 22, 1919; *Newberry v. United States*, 256 U.S. 232 (1921), where he joined Pitney, J., dissent (also Brandeis, J.) from McReynolds', J., narrow interpretation of federal authority in the electoral process—excluding authority as to primaries—when the election of congressmen and senators is involved; *Selective Draft Law cases*, 245 U.S. 366 (1917).

61. *Cusack v. Chicago*, 242 U.S. 526 (1916); this is one of his first opinions. In this and the succeeding cases cited in this section, the state action is challenged as in violation of the Fourteenth Amendment, usually invoking both the "due process" and "equal protection" clauses. In this case the plaintiff also claimed that the ordinance was bad as an unconstitutional delegation of legislative authority, since in residence areas the consent of the residents would remove the legislative prohibition. The court found in the legislation a prohibition, with only the capacity to consent and remove the prohibition as distinguishing this case from *Enbank v. Richmond*, 226 U.S. 137 (1912). Note the

with two employees—a motorman and conductor;<sup>62</sup> he upheld a Minnesota statute imposing a fee for the inspection by the state of oil and gasoline brought and sold in the state with results of the tests as to adulteration, ignition point, etc., to be shown on each container;<sup>63</sup> he dissented from the Court's holding invalid a Pennsylvania law requiring the addition of a rear platform to end cars and other apparently reasonable safety measures;<sup>64</sup> he joined in Mr. Justice Pitney's demolishing dissent in *Truax v. Corrigan*<sup>65</sup> and in Mr. Justice Brandeis' classic dissent in *Adams v. Tanner*,<sup>66</sup> and he joined in upholding the "Blue Sky" Laws,<sup>67</sup> the employers' liability and workmen's compensation acts,<sup>68</sup> the Oregon hour (and overtime wage) law,<sup>69</sup> the Kansas labelling statute,<sup>70</sup> the "service-letter" statutes,<sup>71</sup> the operation of municipal yards for the sale of coal, wood and other forms of fuel,<sup>72</sup> and the New York emergency rent control law.<sup>73</sup> After this dulling enumeration of ordinances and statutes which Mr. Justice Clarke either joined in sustaining or would have had the Court sustain, it is well to note that upholding state action was to him not an end in itself and that he did not hesitate to join in striking down a statute which was repugnant to the spirit of our society—even if the Court's rationale left much to be desired.<sup>74</sup>

Mr. Justice Clarke's respect for legislative enactments drew its vitality

mild tap on the wrist administered to the plaintiff for mistakenly invoking the Fifth Amendment, at 529. See also *St. Louis Poster Adv. Co. v. St. Louis*, 249 U.S. 269 (1919). The *Cusack* decision does not square easily with *Enbank v. Richmond*, *supra*, or *Washington v. Roberge*, 278 U.S. 116 (1928).

62. *Sullivan v. Shreveport*, 251 U.S. 169 (1919).

63. *Pure Oil Co. v. Minnesota*, 245 U.S. 158 (1918). The case was also argued on the interstate commerce point.

64. *Pennsylvania R.R. v. Public Service Comm'n*, 250 U.S. 566, 570 (1919). Mr. Justice Holmes takes the position that the establishment by the postmaster general of construction specifications for mail cars and congressional safety provisions have preempted the field. But see especially Clarke, J., at 570, 572-573.

65. 257 U.S. 312 (1921). Taft, C.J., wrote the opinion for the Court, joined by McKenna, Day, Van Devanter, JJ., Holmes, J., dissented; Pitney, J., joined by Clarke, J., dissented; Brandeis, J., wrote a third dissenting opinion and concurred in the Holmes and Pitney dissents.

66. 244 U.S. 590, 600 (1917), where the Court *per* McReynolds, J., held invalid the Washington Employment Agency Law. "Splendidly done!" was Mr. Justice Clarke's comment to Mr. Justice Brandeis. Also "Only the Lord can so harden their heads as well as their hearts as to prevent their professing their sin of ignorance when voting in so grave a matter. No matter what decision is rendered this (referring to the dissent) will soon be the law of the case. . . ." cited in MASON, *op. cit. supra* note 1, at 517-518.

67. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1916).

68. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Arizona Employers' Liability Act Cases*, 250 U.S. 400 (1919); *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922); *Thornton v. Duffy*, 254 U.S. 36 (1921).

69. *Bunting v. Oregon*, 243 U.S. 426 (1917). In *Dominion Hotel Inc. v. Arizona*, 249 U.S. 265 (1919), the Court *per* Holmes, J., upheld an Arizona law regulating the working hours of women hotel workers, where he said, "The 14th Amendment is not a pedagogical requirement of the impracticable."

70. *Corn Products Refining Co. v. Eddy*, 249 U.S. 427 (1919).

71. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922) and *Chicago R. I. & Pac. Ry. v. Perry*, 259 U.S. 548 (1922).

72. *Jones v. Portland*, 245 U.S. 217 (1917).

73. *Marcus v. Feldman*, 256 U.S. 170 (1921).

74. *Buchanan v. Wardey*, 245 U.S. 60 (1917).

from his devotion to democratic principles. It is, therefore, to be expected that he would interpret most restrictively legislative abdications of public authority for the benefit of private groups or private arrangements to negate public authority. Surely, he would not permit a private contract between a carrier and a shipper to limit the power of a governmental agency to alter the carrier's rates even as to this shipper<sup>75</sup> and he would insist on very clear and unambiguous terms before he would saddle on the body politic a perpetual franchise for the benefit of a private corporation<sup>76</sup>—most certainly not by implication.<sup>77</sup> It could also reasonably be inferred that in contests generally between those exercising public authority and private interests, Mr. Justice Clarke would normally side with those representing the public interest especially when the challenged decision was arrived at by an expert body after a careful examination of the facts.<sup>78</sup>

The preceding discussion has endeavored to show Mr. Justice Clarke's position on the question of the constitutionally permissible scope of governmental authority.

His opinions and votes, especially in the commerce and taxation cases and to a lesser extent (but only because they were less often adjudicated), in the war, fiscal and treaty cases, indicate an adherence to a broad constructionist's philosophy of the Constitution as to the powers of the federal government—that a faithful observance of the Constitution did not rule out the capacity of the federal government to deal with the problems of a radically altered world. Mr. Justice Clarke again demonstrated his recognition of the vital role of government today in the cases questioning the exercises of state power and especially in those involving that difficult and crucial problem of adjusting the boundaries of federal and state action in furtherance of their legitimate interests. Having thus recognized the vital role of government and therefore arming it with authority commensurate with its responsibility, did he further realize the importance of strengthening the democratic process to insure that this powerful government is to be

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75. *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 246 U.S. 372 (1919); see also *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

76. *Owensboro v. Owensboro Water Works Co.*, 243 U.S. 166, 174 (1917), Clarke, J., joined by Brandeis, J., dissenting. (Day, J., also dissented).

77. *Northern Ohio Traction Co. v. Ohio*, 245 U.S. 574 (1918); *Covington v. Covington & Cinn. Ry.*, 246 U.S. 413, 423 (1918), where in dissenting, joined by Brandeis, J., Clarke, J., said: "Fully realizing the futility, for the present, of dissenting from what seems to me to be an unfortunate extension of the doctrine of the *Owensboro* case . . . I deem it my duty to record my dissent, with the hope for a return to the sound, but now seemingly neglected doctrine of *Blair v. Chicago*. . . ." (It will be remembered that the *Blair* case laid down the "plain-terms" principle in the interpretation of claims of private rights in the use of public streets).

78. *Houston v. Southwestern Bell Tel. Co.*, 259 U.S. 318 (1922). Clarke, J., was among the dissenters, e.g., in: *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); *Federal Trade Comm'n v. Gratz*, 253 U.S. 427 (1920); *Vandalia R.R. v. Schull*, 255 U.S. 113 (1912); *Louisville & N. R.R. v. United States*, 24 620 (1916)—the last was his first dissent on the Court. Administrative determinations relating to immigration and use of the mails, etc., that also have a civil liberty aspect, are dealt with in the section of this article on Civil Liberty cases.



effectively controlled in the public interest? In a word: Did he appreciate that just as the means and techniques of governmental action require constant revision and readjustment in order to effectuate the realization of its basic ends, so too must the techniques of keeping government responsible—the political processes—be guarded and strengthened if democratic government is to be maintained?<sup>79</sup> An examination of his position in the anti-trust, labor, and civil liberty cases may throw some light on the answer to this question.

*D. Anti-Trust Cases.*<sup>80</sup> Mr. Justice Clarke compiled a remarkably consistent "anti-trust" record. As a matter of fact, with the notable exception of his vote in *United States v. Colgate Co.*,<sup>81</sup> wherein a unanimous Court upheld the validity of a connivance by a manufacturer designed in fact to control retail resale prices,<sup>82</sup> Mr. Justice Clarke most faithfully upheld and fostered the policy of the Sherman Act.<sup>83</sup> He did more than that! His opinions and dissents were to do yeoman's service as precedent at a later day when the government and the Court, with the emphasis on the government, were again to accept the Sherman Anti-Trust Act as national law and

79. See Dowling, *supra* note 50, at 15 n. 23, suggesting this approach to Mr. Justice Stone's decisions. *Mutatis mutandis* casewise and "political restraints" theory goes back to Mr. Chief Justice Marshall's statement in *McCulloch v. Maryland*, 4 Wheat. 316 (U.S. 1819), in demolishing the mutuality argument as to federal and state taxation.

80. For a review of the anti-trust cases, see HANDLER, *CASES AND MATERIALS ON TRADE REGULATION* (2nd ed. 1947); Handler, "A Study of the Construction and Enforcement of the Federal Anti-Trust Laws, Monograph No. 38 T.N.E.C. (1941). The recent developments are well summarized in Zlinkoff, *Monopoly versus Competition: Significant Trends in Patent, Anti-Trust, Trademark, and Unfair Competition Suits*, 53 YALE L.J. 544 (1944) and Zlinkoff and Barnard, *Trade Regulation*, 47 COL. L. REV. 914 (1947).

81. 250 U.S. 300, 307 (1919), where the Court *per* McReynolds, J., in a most unrealistic analysis distinguished the *Dr. Miles* case, 220 U.S. 373 (1911), and upheld the *Colgate* scheme. It was only "a refusal to deal with anyone who failed to maintain its resale prices and not with selling its products to dealers under agreements obligating them to re-sell at prices fixed by the company."

82. I suggest that upon reconsideration of the decision Justices Day, Pitney and Clarke realized their error and sought to narrow the breach in the anti-trust law. The decision was somewhat limited by McReynolds, J., in *United States v. Schrader's Sons Inc.*, 252 U.S. 85 (1920) and had Pitney, Day and Clarke, JJ., had their way it would have been further limited by *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208 (1921). See also *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) where Day, Pitney and Clarke, JJ., were joined by Taft, C.J., and Van Devanter, J., to regain the ground lost in the *Frey* case, *supra*. For an analysis of these decisions, see Dunn, *Resale Price Maintenance*, 32 YALE L.J. 676 (1923).

83. Mr. Justice Clarke also joined a unanimous Court in upholding the "call" rule in *Board of Trade v. United States*, 246 U.S. 231 (1918); Brandeis, J., certainly puts the plaintiff's best foot forward—so much so that it is not clear that the case constitutes a setback for the anti-trust policy. It is true that the "call" rule did constitute an agreed check on the price mechanism and to that extent is contrary to the policy of the Sherman Act. Certainly it is contrary to the language if not the holding in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 222-223 (1940). Mr. Justice Clarke also deviated somewhat from his ultra anti-trust position in *Ceddes v. Anaconda Copper Mining Co.*, 254 U.S. 590 (1921), where, speaking for a unanimous Court (McReynolds, J., concurring in the result) he makes it quite plain that the purchase by Anaconda, which controlled 22% of the industry, of a small copper company was not a violation of the Sherman Act. A merger not exceeding 22% is not illegal since it does not give it a monopolistic position. The case goes off on the ground that the president and director of the purchased corporation was also general manager and a member of the Anaconda board.

as national policy.<sup>84</sup> It may well be said of Mr. Justice Clarke's opinions in this field: "No matter what decision is rendered this will soon be the law of the case. . . ."<sup>85</sup>

It is obvious that there are various ways of controlling an industry and that one of these ways is through a control of the patents employed in the industry. Pursuant to the constitutional mandate<sup>86</sup> Congress has provided that a patentee shall enjoy a seventeen-year monopoly as to his patent. It is clear that the patent policy and the anti-trust policy are to some extent antagonistic policies and that the extent of the conflict will vary with the liberality with which patent monopolies are granted and with the scope of the grants. Mr. Justice Clarke was strict in his interpretation of patent law requirements<sup>87</sup> and in his construction of the extensive scope of patent monopolies,<sup>88</sup> and strict and realistic as to the intensive scope of the patent monopolies.<sup>89</sup> This strong anti-trust attitude was not sufficient, however, to cause Mr. Justice Clarke to deviate in patent cases from a *res judicata* pol-

84. Mr. Justice Clarke's decision in *United States v. Reading Co.*, 253 U.S. 26 (1920), has occupied a conspicuous position in anti-trust law. It was emphasized, for example, in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940); *American Tobacco Co. v. United States*, 328 U.S. 761, 810 (1946); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). For a complete collection of the earlier cases, see Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COL. L. REV. 179 (1932).

85. See note 66 *supra* for Justice Clarke's comment to Mr. Justice Brandeis on the latter's dissent in *Adams v. Turner*.

86. U.S. CONST. Art. I, § 8, cl. 8.

87. In the following patent infringement suits, for example, he dismissed the suit for "want of novelty" in the alleged patent: *Philadelphia Rubber Works Co. v. Portage Rubber Co.*, 227 Fed. 623 (N.D. Ohio 1915); *Kellogg Switchboard and Supply Co. v. Dean Electric Co.*, 231 Fed. 194 (N.D. Ohio 1915); *Elite Mfg. Co. v. Ashland Mfg. Co.*, 235 Fed. 893 (6th Cir. 1916); *Railroad Supply Co. v. Elyria Iron Co.*, 244 U.S. 285 (1917). See also *Beidler v. United States*, 253 U.S. 447 (1920), patent denied, no practical invention disclosed. In other cases he was quite ready to invoke the doctrine of laches against one claiming infringement but who had not prosecuted his claim diligently, e.g., *Kellogg Switchboard & Supply Co. v. Dean Electric Co.*, 231 Fed. 197 (N.D. Ohio 1915); delay beyond statutory period in filing for patent; *Chapman v. Wintroath*, 252 U.S. 126 (1920). See also *Macbeth Evans Glass Co. v. General Electric Co.*, 231 Fed. 183 (N.D. Ohio 1916), for an excellent decision taking into account the public and private considerations in the patent cases.

88. Extent of patent limited to precise and limited terms of the patent grant, e.g., *Felton v. Williams*, 235 Fed. 131 (6th Cir. 1916); *Minerals Separation, Ltd. v. Hyde*, 242 U.S. 26 (1916); *Weber Electric Co. v. Freeman Co.*, 256 U.S. 668 (1921).

89. He saw through the various attempts of patentees to fix the ultimate retail prices of articles embodying their patents, e.g., *Straus v. Victor Talking Machine Co.*, 243 U.S. 490 (1917), manufacturer's use of a "license contract" and "license notice" scheme where there was in fact a sale of the machines; the Court found that the "real and poorly concealed purpose (of the licensing system) is to restrict the price of them. . . ." In *Motion Pictures Co. v. Universal Film Co.*, 243 U.S. 502 (1917), speaking for a 6-3 Court (Holmes, McKenna, Van De Vanter, JJ., dissenting) Mr. Justice Clarke held invalid a tie-in restriction requiring licensees to use only the plaintiff's films. The patent grant covers only "the mechanism described in the patent" and "has nothing to do with the materials with which or on which the machine operates." The decision overruled *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (6th Cir. 1896) and *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1912). The latter had been narrowed by *Bauer v. O'Donnell*, 229 U.S. 1 (1913). See also *Boston Store v. American Graphophone Co.*, 246 U.S. 8 (1918), holding invalid a price-fixing provision in a contract for the sale of a patented article; Clarke, J., joining the majority.

icy.<sup>90</sup> His position in the trademark and unfair competition cases similarly manifests a realistic appreciation of the anti-trust considerations.<sup>91</sup>

Mr. Justice Clarke's most significant contributions to anti-trust jurisprudence were in the anti-trust law relating to mergers and trade associations. He laid the foundation for his decisions in the *Anthracite Coal* cases<sup>92</sup> by a careful and pungent dissent in the *Shoe Machine* case.<sup>93</sup> Here was a corporation that had acquired and used the power to fix prices and exclude competitors, through 57 purchases of businesses operating in the same general field—and while not each of the concerns was a “full blown” competitor of the defendant, yet there had been some competition which the purchases eliminated; that produced 90-95% of the shoes used in the United States, controlling the patents covering the entire field of the manufacture of shoe machines; and that regimented the industry through tying agreements prohibiting the lessees of its machinery from using the machines of any other company—yet the Court, stressing the efficiency of the combination, condoned the whole scheme. Is there any wonder that Mr. Justice Clarke was driven to say:

It is impossible for me to understand how the transaction, thus described in Winslow's own words, (referring to the Plant purchase for over 6 million dollars) can fail to convince anyone who reads or hears the description that the Plant Company was a formidable competitor, actual and potential, of the United Company, and that the great sum of money paid to control it was paid to stifle and restrict competition. Standing alone it shows the defendant to be an unmistakable offender against the Anti-Trust Law, but when taken together with the origin of the company and with the history of the conduct of it, . . . it seems to me a flagrant and an all but confessed offender against that law, . . . and against the policy of the law as expressed in the act of Congress.<sup>94</sup>

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90. *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294 (1917); he viewed res judicata as a policy “of a fundamental and substantial justice ‘of public policy and of private peace’ which should be cordially regarded and enforced by the Courts.” It is questionable if this case is still good law; see *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1943); *Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *MacGregor v. Westinghouse*, 329 U.S. 402 (1947).

91. *Knable Bros. Co. v. American Piano Co.*, 229 Fed. 23 (6th Cir. 1916); *United Drug Co. v. Rectamus Co.*, 248 U.S. 90 (1918); *Schlitz Brewing Co. v. Houston Ice Co.*, 250 U.S. 28 (1919). But see *International News Service v. Associated Press*, 248 U.S. 215 (1918), where he joins the majority in finding the I.N.S. guilty of unfair competition. The superb dissent by Mr. Justice Brandeis failed to gain any converts—it should have. See especially *id.* at 262-263.

92. Professor Handler uses this heading to cover *United States v. Reading Ry.*, 253 U.S. 26 (1920) and *United States v. Lehigh Valley R.R.*, 254 U.S. 255 (1920).

93. *United States v. United Shoe Machine Co.*, 247 U.S. 32, 75 (1918). Mr. Justice McKenna wrote the opinion for the Court and was joined by White, C.J., Holmes, Van Devanter, JJ.; Day, J., dissented and concurred in the Clarke, J., dissent; Clarke, J., dissented and concurred in the Day, J., dissent; Pitney, J., concurred in the Day and Clarke, JJ., dissents; McReynolds and Brandeis, JJ., did not take part. Clarke, J., also concurred in the Day, J., dissent in *United States v. United States Steel Corp.*, 251 U.S. 417 (1920). Note that the majority opinion in this case too was written by Mr. Justice McKenna and that McReynolds and Brandeis, JJ., did not participate in this decision either.

94. *United States v. United Shoe Machine Co.*, 247 U.S. 32, 89 (1918). The

Next came the *Steel* case<sup>95</sup> and in another 4-3 decision the Court held for the United States Steel Corporation—holding that the Sherman Act did not make “mere size”<sup>96</sup> an offense but rather the improper exercise of monopolistic power through “unilateral fixing of a monopoly price and the exclusion of competitors.”<sup>97</sup> “Big Steel” did control a minimum of 50 per cent of the production of steel products and its purpose was monopolization—but it had failed to accomplish its objective, hence its actions were condoned.<sup>98</sup> This was the state of the law when the *Reading* case<sup>99</sup> came up for decision. Some change in the line-up could be foreseen when Mr. Justice McReynolds would begin to take part in the anti-trust cases and with Mr. Justice Brandeis’ participation there was a likely possibility of a reversal of the Court’s decisions—none could have expected more. Yet only seven weeks after the *Steel* case, the very author of that and the *United Shoe* opinions joined the new majority in an opinion by Mr. Justice Clarke in holding a combination controlling 33-1/3% of the annual anthracite coal production a flagrant violation of the Sherman Act and the formation of the holding company which controlled the stock of the combination in and of itself a violation of the anti-trust laws.<sup>100</sup>

In *United States v. Reading Co.*, Mr. Justice Clarke not only reversed the trend of the Court’s decisions as to the legality of combinations of giant companies controlling substantial parts of the business in their field<sup>101</sup> but he followed through with equal firmness as to the remedy, ordering a dissolution of the combination and the “disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from

Clarke, J., dissent concentrated on the monopoly aspects of the case and the Day, J., dissent was directed at the tying clauses as unlawful restraints of trade. See also, *United Shoe Machine Co. v. United States*, 258 U.S. 433 (1922), where Day, J., (Clarke, J., with majority) held the company’s tying clauses to constitute a violation of § 3 of the Clayton Act.

95. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920), see note 93 *Supra*.

96. *Id.* at 451.

97. T.N.E.C. No. 38, *supra* note 80, at 65.

98. See especially Mr. Justice Day’s statement, in *United States v. United States Steel Corp.*, 251 U.S. 417, 460 (1920). *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), *American Tobacco Co. v. United States*, 328 U.S. 761 (1946), and *United States v. Yellow Cab Co.*, 322 U.S. 218 (1947) have sapped this decision of any real significance.

99. *United States v. Reading Co.*, 253 U.S. 26 (1920). The present defendant was established in its present form pursuant to a reorganization in 1896 when it became a holding company, turning over the coal fields originally acquired by the Philadelphia & Reading R.R. to the Reading Coal Co., the railroad to the Reading Railway Co., and the equipment and rolling stock to the Reading Company—the holding company. The holding company acquired a controlling interest in the Central R.R. of N.J. and through it in the Lehigh & Wilkes-Barre Coal Co. The original company had also engaged in extensive coal land purchases.

100. The *Steel* case was handed down on March 1, 1920, and the *Reading* case, April 26, 1920.

101. 253 U.S. 26, 47, 59-60 (1920).

that company and from each other. . . ."<sup>102</sup> Mr. Justice Clarke reviewed the history of the company and developed the theme of an avowed and constantly pursued purpose by the company to achieve by other than normal expansion, dominant control over the coal production in the Schuylkill fields and its transportation to the market.<sup>103</sup> He played on the defendant's power to increase the output and prices. He broadly interpreted the commodities clause of the Hepburn Act.<sup>104</sup> The basis of the decision rests, however, on these propositions: that "such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act . . .,"<sup>105</sup> that good intentions were no defense to violations of the statute; and, that in dealing with great evils such as here involved the Court would not permit itself to get enmeshed in "splitting hairs" or "to subordinate reality to legal form," but that it will "look through the forms to the realities of the relation between companies as if the corporate agency did not exist and will deal with them as the justice of the case may require."<sup>106</sup> The *Reading* case was followed rapidly by *United States v. Lehigh Valley R.R.*<sup>107</sup> with like result.<sup>108</sup>

In the *Lehigh* case the defendant was charged with violations of the Sherman Act and the Commodities Clause of the Hepburn Act. The government contended that the Lehigh Valley Railroad Co. and the Lehigh Valley Coal Co. constituted a combination in restraint of trade in anthracite coal; that the defendant was guilty of an attempt to monopolize and of actual monopolization of that commerce.<sup>109</sup> With the *Reading* decision still warm and available as a precedent, there could have been little surprise when Mr. Justice Clark found the defendant guilty on all counts—Sections

102. *Id.* at 64. See *Continental Insurance Co. v. United States*, 259 U. S. 156 (1922) for a follow up on the decree.

103. *United States v. Reading Co.*, 253 U.S. 26, 47-48, 57 (1920).

104. *Id.* at 60, 62.

105. *Id.* at 57, citing *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) and *United States v. Union Pacific R.R.*, 226 U.S. 61 (1912) as authority for its position.

106. *Id.* at 62-63.

107. 254 U.S. 255 (1920).

108. Mr. Justice Clarke spoke for the Court, with McReynolds and Brandeis, JJ., not participating, and White, C.J., and Holmes, J., concurring only because they felt constrained from dissenting from the *United States v. Delaware, L. & W. R.R.*, 238 U.S. 516 (1915) and *Reading Co.* decisions.

109. The basic facts about the defendant were: 1) that it transported more coal than any other railroad in the country; 2) that prior to the Sherman Act it had engaged in extensive purchases of coal land along its lines, but that it had made additional purchases between 1900 and 1905; 3) that in 1905 the railroad company had bought out the largest independent coal operator on their lines—the Coxe Bros. & Co. The Coxe firm controlled the extensive coal lands and all the capital stock of the Delaware, Susquehanna & Schuylkill R.R. which served many of the independents along the Lehigh lines; that soon thereafter the company stopped operating the Delaware R.R.; 4) that although the Lehigh Valley Coal Co. held the coal properties and the Lehigh Valley R.R. operated the Lehigh Line, the two companies had common officers and the coal company paid no dividends; 5) that in 1912 a subsidiary sales company was organized to market the coal; 6) that the Lehigh Coal Co. did not produce over 20 percent of the annual coal production. See T.N.E.C. No. 38, 69-70. The Court cites 18.84% as the amount of coal carried by the defendant.

One and Two of the Sherman Act and of the Commodities Clause—and ordered the dissolution of the combination and the establishment of the companies as independent concerns. The Court summarized the past history of the defendant with the statement, “The history of almost 25 years casts an illuminating light upon the intent and purpose with which the combination here assailed was formed and continued.”<sup>110</sup> Mr. Justice Clarke, conscious of the difficulty of holding that a company producing not more than 20% of the annual coal output and carrying only 18.84% constituted a monopoly in the accepted sense of the term, shifted to a “practical monopoly”<sup>111</sup> concept and emphasized the “methods” of the company’s growth.

It should be quite evident that the *Reading* and *Lehigh* decisions cannot be reconciled with the *Steel* case or with the philosophy of the *United Shoe Machine* case and it is to Mr. Justice Clarke’s credit that he does not indulge in sophistry and attempt to distinguish the cases. The *Steel* case is not even mentioned in either the *Reading* or *Lehigh* opinions. He might have gone a step further and overruled the *Steel* and *United Shoe* decisions and thereby have cleared away potential precedent—but perhaps with Mr. Justice McKenna among the majority it would have been inelegant to have ridden so roughshod over his newly produced offspring.

In the light of Mr. Justice Clarke’s number of merger decisions it is interesting to speculate just how effective an anti-concentration instrument the anti-trust laws might have become had the government—the political branches—chosen to exploit fully the newly-won victories in the *Reading* and *Lehigh* cases. It also suggests that the Court has perhaps on more than one occasion been made the scapegoat for errors and deficiencies of the political departments if not of the people themselves. The anti-trust truce was not of the Court’s making but of Harding-Coolidge “normalcy” and the Daugherty-Mellon super-legislature.

*American Column and Lumber Co. v. United States*,<sup>112</sup> was Mr. Justice Clarke’s contribution to the anti-trust jurisprudence relating to trade associations. The case involved the validity of the “Open Competition Plan” as practiced by the producers of 33-1/3% of the hardwood lumber in the United States. The American Column and Lumber Co. was a member of the “American Hardwood Manufacturers’ Association,” which had been organized in 1918 as an unincorporated association, and a member of the “Plan.” The “Plan” included a very extensive statistical and reporting program. The members were required to furnish elaborate price, production and sales data covering past and, to some extent, future transactions. The association circulated this data and issued interpretative letters, reports and forecasts which were limited to members, conducted monthly meetings at which market conditions were discussed, and made investigations of the

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110. *United States v. Lehigh Valley R.R.*, 254 U.S. 255, at 269 (1920).

111. *Ibid.*

112. 257 U.S. 377 (1921).

business conduct of the members. Although there was no definite agreement as to production levels and prices and although the "Plan" did not include specific sanctions for non-compliance, the Court<sup>113</sup> held that the "Open Competition Plan" constituted a combination and conspiracy in restraint of trade.<sup>114</sup> It found that the purpose of the "Plan" was to effect a rise in prices, that prices had in fact greatly increased and that "such close cooperation . . . controlling a large volume of interstate commerce, as provided in this 'Plan,' is plainly in theory as it proved to be in fact, inconsistent with that free and unrestricted trade which the statute compels shall be maintained. . . ."<sup>115</sup>

It was suggested earlier that Mr. Justice Clarke's position in the anti-trust cases might throw some light on the question of whether or not he realized the importance of safeguarding the political processes. His decisions in this field may be based on no more than a liberal reading of the statutes. Perhaps they mean more. The decisions, viewed in the light of his anti-Hanna campaign, the Tom Johnson and Newton Baker associations and his general philosophy, perhaps reflect a recognition of the dangers inherent in monopoly power to democratic government and to the free exercise of political rights by the citizenry. I think he appreciated the danger connected with having the overwhelming percentage of our population—the voters—dependent for their livelihood on a few giant corporations and the threat of such economic control extending to the political field through pressures on voters and public officials. Mr. Justice Clarke did not seek to draw fine hairline exceptions in the application of the Sherman Act because he too believed in its policy.

*E. Labor Cases.* Mr. Justice Clarke's position in the labor cases can be summarized most briefly. He did not write any of the labor decisions. His role was generally<sup>116</sup> that of a dissenter.<sup>117</sup> His dissents in the labor

113. Mr. Justice Clarke was joined by White, C.J., Day, Van Devanter, Pitney and McReynolds, JJ.; Holmes, J., dissented; Brandeis joined by McKenna, JJ., dissented.

114. *American Column & Lumber Co. v. United States*, 257 U.S. 377, 398-399 (1921).

115. *Id.* at 409. The numerous factors are included here because they were all emphasized in the opinion and it is not clear just which were the operative facts—perhaps all of them together make for illegality. See, Holmes, J., dissent at 412-413, but especially the Brandeis, J., dissent at 413, 417-418. Mr. Justice Brandeis' dissent is pitched, as always, on a broad social and philosophical level and one can certainly appreciate and sympathize with his position. Yet, this writer at least is left with a feeling that Mr. Justice Brandeis' approach to anti-trust prosecutions would result in nullification of the Sherman Act. See also Mr. Justice Brandeis' opinion in *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931) and the *Chicago Board*, *supra*. But see his dissent, concurred in by Clarke, J., in *FTC v. Gratz*, 253 U.S. 421 (1920).

116. The exceptions to the statement in the text are: *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917); *Arizona Employers' Liability Act Cases*, 250 U.S. 400 (1919); *Bunting v. Oregon*, 243 U.S. 426 (1917).

117. Suits involving the anti-trust laws: *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917); *Eagle Glass Manufacturing Co. v. Rowe*, 245 U.S. 275 (1917); *Duplex Printing Co. v. Deering*, 254 U.S. 443 (1921); *American Steel Foundries v. Tri-City Council*, 257 U.S. 184 (1921). Cases involving federal attempts to deal with child labor problem: *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture*

cases under the anti-trust acts—in the light of his otherwise consistent anti-trust record—emphasized his general position. His record in the labor cases further manifests his recognition of the importance of protecting and strengthening the political processes. He realized that some economic security is an absolute prerequisite to the development of one's sense of dignity and self respect; that a sense of self respect is essential to the development of the human personality; that the development of the human personality and dignity of the individual is one of the very basic aims of a democratic society; and, that no society, and in turn its government, can long remain democratic where the citizens lack a sense of their own dignity and their own self-respect. Surely no one devoted to these principles and possessing a sense of economic realities could fail to appreciate that there is, at least initially, a valid basis for distinguishing cases involving associations for the protection of individual human beings and associations of businesses to control prices. Mr. Justice Clarke's opinions and votes leave no doubt that he appreciated the validity of and would have approved the making of such a distinction. In point of fact, his position was that the acceptance by the Court of such a distinction was not a prerequisite to the correct adjudication of the cases either because the fact situations made the anti-trust laws inapplicable,<sup>118</sup> or what is more important—because Congress had made that determination.<sup>119</sup>

*F. Civil Liberties Cases.*<sup>120</sup> Mr. Justice Clarke's years on the Court coincided with an intense officially conducted witch-hunting campaign American entrance into the war and the revolutionary uprising in Europe—especially the Russian revolution—spread such consternation and hysteria as to cause even men of good will to lose their sense of proportion. It also established in the foreground the moral giants—the men with courage and vision to rise above the passions of the moment and with firm conviction in the democratic process—; only such men were able to withstand the tide of bigotry and intolerance that engulfed the nation. Mr. Justice Clarke was not among these. The Court's handling of the cases only made clearer what many already knew—that “the stuff of courts is human stuff.”<sup>121</sup>

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Co., 259 U.S. 20 (1922). Suits involving “pro-labor” state legislation: *Adams v. Tanner*, 244 U.S. 590 (1917); *Truax v. Corrigan*, 257 U.S. 312 (1921). Decisions limiting the coverage under Federal and State employers' liability and workmen's compensation acts: *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Clyde Steamship Co. v. Walker*, 244 U.S. 255 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Chelentis v. Luckenbach*, 247 U.S. 372 (1918); miscellaneous cases, e.g.: *Ex Parte Abdu*, 247 U.S. 27 (1918); *Sanberg v. McDonald* 248 U.S. 185 (1918); *Neilson v. Rhine Shipping Co.*, 248 U.S. 205 (1918).

118. 245 U.S. 229, 271 (1917).

119. See Clayton Act, §§ 6, 20, 38 STAT. 730 (1914), 15 U.S.C. § 17 (1946), 29 U.S.C. § 525 (1946). See also, Brandeis, J., dissent in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 479 (1921); Kovner, *The Legislative History of Section 6 of the Clayton Act*, 47 COL. L. REV. 749 (1947).

120. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941), is the most complete and eloquent statement of the issues and the cases.

121. Quoted in *id.* at X.



Mr. Justice Clarke's record in this field is at best a spotty one. His decisions reflect some minor shifts and inconsistency in his voting behavior, the reasons for which are not too clear. It is not difficult to understand his going along with a unanimous court in Mr. Justice Holmes' opinions in the *Schenck*,<sup>122</sup> *Frohwerk*,<sup>123</sup> and *Debs*<sup>124</sup> cases. After all, in the *Schenck* case, Mr. Justice Holmes did lay down and hold to the "clear and present danger" test and a great trial judge—Learned Hand—had held against the defendant; the *Frohwerk* case perhaps went against the defendant because of the inadequacy of the evidence on the record that Frohwerk was merely advocating a change of policy; and, although the *Debs* case is harder to explain, yet the test had not been altered.<sup>125</sup> Mr. Justice Clarke's joining the majority in the *Berkman* case,<sup>126</sup> while not to his credit, did not raise squarely a civil liberty issue. But his decision in the *Abrams* case did!<sup>127</sup> The *Abrams* case also brought forth Mr. Justice Holmes'<sup>128</sup> great dissent and from thereon he and Mr. Justice Brandeis were to constitute a minority,<sup>129</sup> in Professor T. R. Powell's words, *mutatis mutandis*, desperately trying to "hold a nation to ideals which it [was] determined to betray."<sup>130</sup>

In the *Abrams* case the defendants were indicted for agitating against the government's 1918 Siberian expedition under the sweeping 1918 amendment to the Espionage Act of 1917.<sup>131</sup> They were young Russian nationals who had lived from 5 to 10 years in the United States but had not applied for naturalization. The arrests followed the dropping of leaflets from a New York factory. The leaflets, in English with some in Yiddish, denounced the President's sending of American troops to Russia, generally abused the President, and contained the usual anti-capitalist agitation—but also denounced German militarism. The defendants were indicted and convicted on four counts, covering a conspiracy to violate four clauses of the 1918 statute.<sup>132</sup> They contested the constitutionality of the Act and claimed the Act was not violated and that their acts failed to satisfy the Act's criminal intent provision.

122. *Schenck v. United States*, 249 U.S. 47 (1919) (quite clear incitement to resist the draft and perhaps constituted direct interference with the power of Congress to raise armies).

123. *Frohwerk v. United States*, 249 U.S. 204 (1919).

124. *Debs v. United States*, 249 U.S. 211 (1919).

125. See CHAFFEE, *op. cit. supra* note 120, at 80-86, especially 84 n. 89, and 86 for Holmes' explanation for his writing the *Debs* opinion.

126. *Berkman v. United States*, 250 U.S. 114 (1919). Clarke, J., joined in the majority opinion by McReynolds, J.; Holmes, Brandeis, JJ., dissenting. The decision upheld the validity of REV. STAT. § 828 (1878), 28 U.S.C. §§ 555, 556 (1946) permitting the clerks of the district courts to retain one per cent of cash funds deposited with them in lieu of bail bonds.

127. 250 U.S. 616 (1919). See CHAFFEE, *op. cit. supra* note 120, at ch. 3, pp. 108-140.

128. Joined by Brandeis, J.

129. On occasion joined by Clarke, J., *infra*.

130. Quoted in CHAFFEE, *op. cit. supra* note 120.

131. 40 STAT. 553 (1918).

132. ". . . willfully utter, print, write or publish, 1) any disloyal . . . or abusive language about the form of government of the United States . . . ; 2) or any language

Mr. Justice Clarke sustained the conviction under the third and fourth counts.<sup>133</sup> That the leaflets did not abuse the United States but President Wilson, was for Mr. Justice Clarke, only a technical distinction. Nor did he have much difficulty finding that the jury had sufficient evidence on which to conclude that the defendants intended to interfere with the war against Germany by way of armed revolts and strikes<sup>134</sup>—although their primary aim was to help Russia. In the light of the then prevailing atmosphere, Professor Chafee's suggestion that the defendants were in fact convicted for "trying to hinder the Russian expedition"<sup>135</sup> is certainly reasonable. But whatever the jury's basis, Judge Clayton knew they were guilty of something and they were people whom he did not like and so he imposed on three of the defendants twenty-year terms, on one a fifteen-year term, and on one a three-year term plus money fines.<sup>136</sup> Mr. Justice Clarke found that there was sufficient evidence from which the jury could have established the specific intent required by the statute and that clauses of the Act corresponding to the third and fourth counts could constitutionally be interpreted broadly enough to apply to the issuance of these leaflets. As a matter of fact the constitutional issue was disposed of without discussion but merely on the basis of cases under the much narrower 1917 Act. The decision marked a radical extension of the civil liberties restrictions upheld in the *Schenck* case. It was no longer necessary to establish that the defendant was guilty of direct interference with the war effort, interference as an incidental consequence from opposition to the anti-revolution Siberian campaign was sufficient.<sup>137</sup> Mr. Justice Clarke followed up his *Abrams* opinion by joining the majority in *Pierce v. United States*<sup>138</sup>—"the least defensible"<sup>139</sup> decision under the criminal sections of the Espionage Act of 1917. His last effort in the civil liberty field—this time on the freedom of the press—was his opinion in *Milwaukee Social Democratic Publishing Co. v. Burleson*.<sup>140</sup> That decision upheld the Postmaster General's revocation of the *Milwaukee Leader's* second-class mailing privileges. While the precise hold-

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intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute . . . ; 3) or . . . any language intended to incite, provoke, or encourage resistance to the United States (in said war with the German Imperial Government) . . . ; 4) or shall willfully by utterance, writing, printing, publication . . . urge, incite or advocate any curtailment of production in this country . . . essential to the prosecution of the war . . . with the intent by such curtailment to cripple or hinder the United States in the prosecution of the war . . . ."

133. *Ibid.*

134. *Abrams v. United States*, 250 U.S. 616, 624 (1919).

135. CHAFEE, *op. cit. supra* note 120, at 116.

136. Judge Clayton was brought up from Alabama to try the case.

137. CHAFEE, *op. cit. supra* note 120, at 134-136.

138. 252 U.S. 239 (1920)—Pitney, J., spoke for the Court; Brandeis, Holmes, JJ. dissented. For a statement of the opposing philosophy, see especially Brandeis' dissent at pp. 263-272 and Brandeis concurring in *Whitney v. California*, 274 U.S. 357 (1927).

139. CHAFEE, *op. cit. supra* note 120, at 92.

140. 255 U.S. 407 (1921), Brandeis, Holmes, JJ. dissented.

ing of the case is obfuscated by the repetition of barren concepts regarding governmental authority in the so-called "proprietary" area, the net significance of the decision was that it sanctioned the imposition of previous restraints upon the press.<sup>141</sup> Yet, between his *Abrams* and *Burleson* opinions Mr. Justice Clarke dissented in *Schaefer v. United States*<sup>142</sup> and reversed the district court and circuit court of appeals decisions in *Kwock Jan Fat v. White*<sup>143</sup>—although the opinions are of limited scope they yet reflect genuine regard for civil liberties. Nor are these the only cases where he manifests a concern for human freedom. *E.g.*, in *Valdez v. United States*,<sup>144</sup> he tells us that he is "idiosyncratic" about and has "undue regard for a man's life."<sup>145</sup> Also in *Gould v. United States*,<sup>146</sup> speaking of the guarantees of the Fourth and Fifth Amendments, he said, ". . . these amendments should receive a liberal construction so as to prevent stealthy encroachments upon or gradual deprecation of the rights secured by them, by imperceptible practice of the courts or by well-intentioned but mistakenly over-zealous executive officers."<sup>147</sup>

This summary of Mr. Justice Clarke's position in the war-time civil liberties cases makes it quite clear that in spite of the fact that on social issues he generally stood with Justices Holmes and Brandeis, in this crucial area they parted company. He was unable to rise above the passions and hysteria of the times. That which Holmes and Brandeis "characterized" as restraints on freedom of speech and press, Clarke "characterized" as government regulation of its services and as police and war power measures.

141. *Id.* at 413, 416. See *Id.* at 414 for the test statement of the scope of freedom of the press.

142. 215 U.S. 466 (1920). Note, however, that he did not concur in the Brandeis, J., dissent (joined by Holmes, J.). His dissent is based on misinterpretation of the Espionage Act by the trial court in its charge to the jury. Brandeis, J., pitched his dissent primarily on the First Amendment. See also *Berger v. United States*, 255 U.S. 22 (1921).

143. 253 U.S. 254 (1920). The decision discusses, without deciding, the question of the right of the government to base its decision on the testimony of secret witnesses even in the immigration field. The inference from the language is that a hearing which includes such testimony does not satisfy the "fair-hearing" requirements under the due process clause of the Fifth Amendment. If this is so, then perhaps government employees dismissed in the loyalty cases on the basis of secret testimony have a cause of action. See *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920). But see *Bailey v. Richardson*, 341 U.S. 918 (1951); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). His readiness to overrule the Immigration Commissioner and Secretary of Labor was perhaps also influenced, aside from the errors in the record, the ground of the decision, by the fact that "since becoming district judge in Cleveland he has taken especial interest in the naturalization and Americanization of foreign-born citizens." *N.Y. Times*, July 15, 1916, p. 4.

144. 244 U.S. 432 (1917).

145. *Id.* at 455

146. 255 U.S. 298 (1921).

147. *Id.* at 304. But see *Burdeau v. McDowell*, 256 U.S. 465 (1921), Clarke, J., with majority. See also *United States v. Wheeler*, 254 U.S. 281, 300 (1920). But see *United States v. Hambly*, 243 U.S. 476 (1917) and *United States v. Bathgate*, 246 U.S. 220 (1918).

## CONCLUSIONS

The review of Mr. Justice Clarke's activities and the analysis of his legal ideas suggests the following observations:

1. Mr. Justice Clarke was a man with moral courage and conviction. This trait runs through his whole career. It will be recalled that in 1880, at the very beginning of his career, his newspaper was the only Democratic paper in Ohio to crusade for federal civil service legislation; that in 1892 he bolted from the regular Democratic organization because he disagreed with Bryan; that he campaigned in 1903 on a platform hardly likely to endear him to his corporate clients; that he resigned from the Supreme Court—the highest legal post to which an American lawyer can aspire—to devote his time to crusade for American participation in the League of Nations and in the World Court; and, that during his tenure on the Court he dissented more often than any other member—casting 76 dissenting votes and writing 23 dissenting opinions.<sup>148</sup>

2. He approached his judicial duties with well thought out philosophy as to constitutional interpretation, as to the appropriate functioning of the courts and as to the role of the Supreme Court in our constitutional system. Mr. Justice Clarke viewed the Constitution as a "human and therefore imperfect instrument which must be slowly modified to adapt [it] to the needs [it] is designed to serve as experience shall show [it] to be."<sup>149</sup> He emphasized dispatch in adjudication of controversies. He sought clear presentation of the issues and clarity in the presentation of evidence. His own opinions are short and direct and emphasize the "stuff" of the controversy. He was zealous of the Supreme Court's role and prestige as an instrument of government. He was, therefore, forever anxious lest it become bogged down in the mire of private litigation or call forth abuse upon itself through its failure to exercise that judicial restraint and manifest that respect toward the states in the Union which is essential to a harmonious functioning of the federal system.<sup>150</sup>

3. He keenly appreciated international and national affairs and manifested a realism as to economic issues which was as refreshing as it was rare.<sup>151</sup> He believed, with the zeal of a prophet, in international cooperation. This thread runs through his whole life—it became evident in 1896

148. Mr. Justice Clarke wrote 129 opinions, 23 dissents and cast 76 dissenting votes. In this connection see also, Clarke, *Constitutionality of the President's Recommendations for the Reorganization of the Federal Judiciary*, radio address, March 27, 1937, *Hearing Before Senate Committee on the Judiciary* on S. 1392, 75th Cong. 1st Sess. (1937).

149. Clarke, *op. cit. supra* note 14, at 96. Note, however, his joining McKenna, J., in the pungent dissent in *The Western Maid*, 257 U.S. 419 (1922), emphasizing the importance of *stare decisis*.

150. See material cited in notes 18, 21, 29-30, *supra*.

151. See material cited in notes 14-16 *supra*; his anti-trust opinions; and dissents in the labor cases and in such cases as the *Child Labor Cases* and *Adams v. Tanner*. See also *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Grogan v. Walker & Sons*, 259 U.S. 80, 97 (1922).

when he rejoined the Bryan forces because of Bryan's anti-imperialist position in 1896. This faith he never forsook.

4. He espoused that new creed of liberalism which not only accepts governmental regulation as a necessary concomitant of a technological civilization but looks upon positive government as an instrument for the diffusion of "a fair share of that comfort and safety which it should be the first purpose of every government to provide for those who live under it."<sup>152</sup>

5. Mr. Justice Clarke's "new liberalism," however, lacked the *sine qua non* of a "genuine" liberalism—relentless vigilance of civil liberties wherein the concept is broadly defined.<sup>153</sup> True, he demonstrated humanitarian sentiments<sup>154</sup> and interest in the welfare of the average person but humanitarianism can not be equated with belief in civil liberties and in the civil liberty (free speech and press) cases he was most often on the "wrong side."<sup>155</sup>

6. Mr. Justice Clarke's only significant contribution to the jurisprudence of the Supreme Court was in the anti-trust field. His dissent in the *United Shoe* case and opinions in the *Reading* and *Lehigh* cases have not only stood the test of a quarter of a century but constitute the cornerstones of the emerging anti-trust law.

This analysis of Mr. Justice Clarke's legal ideas is not intended to be all-inclusive. His "private-law" opinions have been referred to only incidentally and no effort has been made to cover all of even his "public-law" decisions.<sup>156</sup> It is hoped that even a limited composite picture of Mr. Jus-

152. Clarke, *supra* note 19, at 20.

153. I take it that every member of the Court then (as now) believed in civil liberty—the crux is in the definition of the term or of the concept. When does a regulation start or stop being an interference with civil rights and become just an ordinary police measure. *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama* 310 U.S. 88 (1940); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Termienello v. Chicago*, 337 U.S. 1 (1949); *Kuntz v. New York* 340 U.S. 290 (1951); *Feiner v. New York*, 340 U.S. 315 (1951); *American Communications Ass'n, C.I.O. v. Douds*, 33 U.S. 382 (1950); *Dennis v. United States*, 341 U.S. 494 (1951), demonstrate the point and also the present divergence on the present Court as to the definition of civil liberties. On the matter of "characterization" generally see Cook's discussion of "substance" and "procedure." COOK, *THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS* chap. VI (1942).

154. See, e.g., his dissent in *United Zinc Co. v. Britt*, 258 U.S. 268, 276 (1922). Mr. Justice Holmes' comment on this dissent was: "My brother Clarke uttered a larmoyant dissent that seemed to me more sentiment and rhetoric than reasoning, but the C.J. and Day agreed with him. I cannot but suspect, on reasoning of their own." HOLMES-POLLOCK LETTERS, ¶ II, 92. Sir Frederick Pollock agreed with Holmes, J., II, 94. See also, II, 44 for an insight into Mr. Justice Clarke's lighter side.

155. Obviously the statement in the text reflects the writer's value judgment or as others would have it a "normative" conclusion.

156. E.g., his position on conflict of laws questions: *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Hartford Life Insurance Co. v. Johnson*, 249 U.S. 490 (1919); *Marin v. Angendahl*, 247 U.S. 142, 152 (1918); *Flexner v. Parsons*, 248 U.S. 289 (1919); *Great Northern Ry. v. Alexander*, 246 U.S. 276 (1918); *New York Life Insurance Co. v. Dodge*, 246 U.S. 357 (1918). I take it that it is generally agreed that the Brandeis, J., dissent joined in J. Pitney and Clarke, JJ., is the better of the opinions in the *Dodge* case and that it is the "law now."

tice Clarke will contribute to a better understanding of the work of the Court during the World War I period. The line-up on some decisions becomes more explicable when viewed in the light of the overall philosophy of each of the justices. This paper assumed, as a starting point, that Justices of the Supreme Court are rational men and that therefore there is some consistency to their behavior even if a "golden-thread" running through all of their decisions is not always to be found. On the whole, Mr. Justice Clarke's decisions manifest such a basic consistency.