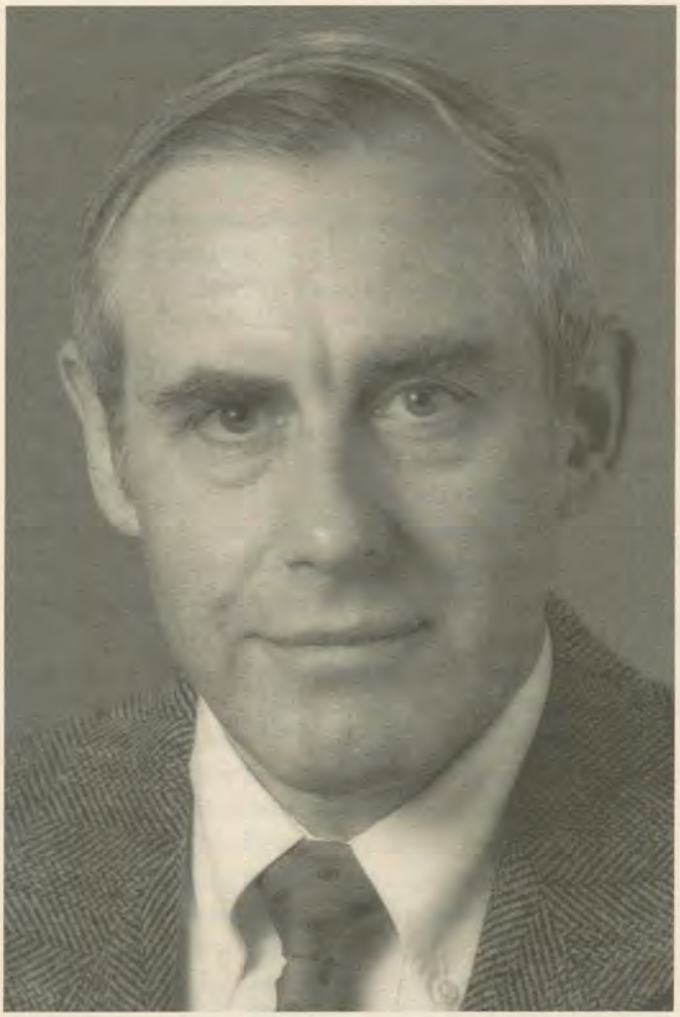
The Hushed Case Against a Supreme Court Appointment:

Judge Parker's "New South" Constitutional Jurisprudence, 1925-1933

Peter G. Fish



Professor of Political Science and Law, Duke University. Professor Fish, who has taught at Duke since 1969, served as a lay member of the United States Circuit Judge Nomination Commission, Panel for the Fourth Circuit (1977-79). At the Law School, he has taught a seminar on the politics of judicial adminstration and a research tutorial on the development of the United States Courts of the Fourth Circuit: 1789-1958. This article is a section of a larger work, Fish, Torchbearer for Pre-New Deal Southern Economic Development: Judge John J. Parker of the U.S. Court of Appeals for the Fourth Circuit *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 253 (K. Hall & J. Ely, Jr. eds. 1989), *a portion of which was published as* Fish, Judge Parker and the Public Service State, *DUKE L. MAG., Summer 1985, at 37.*

He was hailed as an exponent of the "New South" when nominated in 1930 by President Herbert Hoover for Associate Justice of the United States Supreme Court.[1] But Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit soon found himself politically marooned between the Scylla of alleged racism and the Charybdis of a reputed anti-labor predisposition.[2] In a Senate confirmation process run amuck, Parker's judicial record compiled after his appointment to the appellate bench in late 1925 received little attention—with the exception of *United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.*[3] wherein lay putative evidence of his anti-labor proclivities. From that single case and from his 1920 North Carolina gubernatorial campaign speeches, critics transmogrified the jurist; he personified alternatively the consummate nullifier of the legal rights of blacks and labor and the defender of white supremacy and private property.[4]

Yet Parker on the bench proved no zealous proponent of either racism or private property, although few cases involving black Americans reached the circuit court in the 1920s and early 1930s. Instead, the judge, then in his forties, developed and expounded an authentic "New South" constitutional jurisprudence which implicitly nurtured the economic conditions necessary for southern growth.[5] It was a jurisprudence which might well have given pause to some of his confirmation opponents who hailed from rival sections of the nation. Their apprehensions, if they existed, remained unarticulated. Instead, they attacked the Supreme Court nominee on more politically efficacious grounds.

As an appellate court judge, Parker was no advocate of economic laissez-faire. Rather, he labored to unleash state police power as a vehicle for realizing economic development in the southern states, a topic previously considered in the *Duke Law Magazine*.[6] Nor did he, unlike southern traditionalists, perceive of local or even regional economic development as a means of protecting white supremacy from erosion by broad nationalistic tides responsive to national economic and political integration.[7] Such regional chauvinists regarded national regulation of economic life as a precursor to centralized control of race relations in the South. They and their predecessors railed against federal judges and federal courts seen as diabolical instruments of northern

Judge John J. Parker following his appointment in 1925 by President Calvin Coolidge to the United States Court of Appeals for the Fourth Circuit shown holding a cane, a gift from Amos M. Stack, his former law partner in Monroe, NC.

economic and political exploitation of the South.[8] Parker stood apart from these sometimes deafening and demagogic critics of the national judiciary. He was an ardent judicial nationalist, but one with a pronounced regional bias,[9] especially on matters relating to southern economic life.

Balancing Law and Policy

Cases which pitted national interests against southern regional interests tested Parker's fidelity to the tenets of judicial nationalism. Activism on the part of the federal government could promote development of an economically viable "New South." On the other hand, Hamiltonian initiatives from Washington could have the opposite effect.[10] How to temper national policies injurious to regional growth perplexed Parker in cases involving national banking, electric power and railroad freight rate policies.

Federal Reserve Bank of Richmond. Parker as lawyer had represented southern country banks then warring against the Federal Reserve's "par clearance" system. In the United States Supreme Court he had defeated the central bank's attempt to establish a national clearinghouse system whereby onerous exchange charges were imposed on checks tendered at Reserve Bank counters by country banks.[11] Once on the bench, Parker implicitly questioned the Reserve system's centralizing tendencies as a development antithetical to southern interests. Yet, he proved unable to curb the Federal Reserve Bank of Richmond. "I have been sweating for a week over the opinion" in *Federal Reserve Bank v. Early*, he wrote. After reading "all of the cases cited and a great many others and...looking at the case from every angle," he acknowledged that the national clearinghouse's claim to the deposit balance of one of South Carolina's numerous insolvent banking institutions seemed unassailable. "I started out to write an opinion on the other side of the proposition," he confessed, "but I found that it would not write that way."[12]

A disappointed Parker held that "the deposit balance in favor of the insolvent bank should be applied to checks as the Federal Reserve Bank contends."[13] The decision effectively accorded a preferential claim on deposit reserves of failed banks to remote users of the Federal Reserve clearinghouse system over claims of local depositors and other creditors of such insolvent financial institutions.

Southern Utilities. Parker had previously affirmed the exercise of governmental power as against the right of private property asserted by timber owners in a case wherein national and regional interests in developing Great Smoky Mountains National Park had been complementary.[14] Federal condemnation of the Duke-owned Southern Power Company's right-of-way across Nantahala National Forest, however, encouraged close scrutiny of this interference with the keystone of the region's economic infrastructure. As the utility's brief stressed, the electric power generated by the company went out "to cities and towns, cotton mills, and other industrial enterprises, and to the public generally," and the transmission lines in question also "constitute[d] the sole connecting link between the system of the defendant and that of the Georgia Railway & Power Company and... the system of other power companies lying to the south of the defendant's system." To sever vital connections between power grids in the region would cause irreparable loss to the public.[15]

Parker agreed with counsel's assessment. The land in question had been obtained for laudable conservation purposes which hardly suffered from rights-of-way enjoyed by public utilities. But interference with their lines would certainly "involve inconvenience with loss to the public and needless expense to the government."[16] Furthermore, Congress had never intended to endow the Department of Agriculture with power "to condemn the rights-of-way of railway and power companies for forestry purposes merely because they happen to be situated on forest lands acquired by the government."[17]

Intrastate Freight Rates. Freight rates established by the Interstate Commerce Commission had far-reaching implications for southern life. The I.C.C.-fixed rates constituted a national internal tariff system perceived as responsible for perpetuating the South's colonial economy and

He was an ardent judicial nationalist, but one with a pronounced regional bias, especially on matters relating to southern economic life.

How to temper national policies injurious to regional growth perplexed Parker in cases involving national banking, electric power and railroad freight rate policies.

subordinating it to the economic hegemony of the northern metropole.[18]

To be sure, Parker affirmed exercises of Congress' power to regulate interstate commerce in order to protect that commerce from harmful consequences flowing from intrastate activities.[19] But like Chief Justice William Howard Taft, he saw a clear distinction between freight shipped in intrastate commerce and that carried in interstate commerce.[20] The distinction became significant for local consumers, shippers, and producers because classification of commerce as intrastate meant subjecting goods used within the several states to rates set by state agencies at levels often below those authorized by the I.C.C.[21] In an opinion which Parker deemed among his "most important," he rejected a regional rail carrier's contention that petroleum shipped interstate by sea to a tank storage depot at the port of Wilmington and thereafter distributed in railroad tank cars to some 20,000 Tar Heel customer constituted "continuous shipments in interstate commerce."[22] Instead, he held in *Atlantic Coast Line Railroad and Seaboard Air Line Railway Co. v. Standard Oil Company of New Jersey* that at Wilmington the oil and gasoline "came to rest and lost their identity in complainant's storage tanks and were mingled with its general stock."[23] Consequently, shipments from the North Carolina port constituted "independent movements" within the meaning of a Brandeis-coined Supreme Court test. The applicable rates became those approved by the North Carolina Corporation Commission for intrastate shipments rather than the higher I.C.C.-fixed interstate rates.[24] I.C.C. rates and orders encountered similar judicial hostility in another case, but several which portended either lower costs or enhanced intra-regional competition or both were approved.[25]

At the critical decisional points where federal judges enjoyed discretion, Parker's regional proclivities surfaced. His decision-making approach involved the parsing of often complex facts of cases wherein national power was arrayed against southern regional interests in economic viability. That same approach also manifested reasoned exposition of statutes and constitutional doctrines, and a pragmatic, if usually implicit, policy determination compatible with the tenets of the "New South" creed. It was an approach which suffused judicial resolution of conflicts involving the southern bituminous coal industry.

Southern Coal Industry

On no other subject did the Fourth Circuit confront greater national-regional tensions than in cases which related to the labor intensive bituminous coal industry of the southern Appalachians. And, in no other area did a policy-based pro-South jurisprudence so strikingly emerge during the decade before the New Deal than it did in defense of the threatened coal industry. At stake were that industry's transportation costs regulated by the I.C.C.; its labor costs dependent on avoidance of high uniform and nationwide union wage scales; and its price-fixing powers. Favorable resolution of these three key issues meant apparent preservation of regionally important mining enterprises. To the federal court in the 1920s came southern coal operators to relate doleful tales of their bare survival, tales which became the focus of the court's attention.

The trial and appellate judges in the circuit heard about intersectional economic strife that soared to new heights in the Harding-Coolidge era. Coal shortages and escalating prices during World War I had induced a boom in bituminous coal and related development of new mines in the southern Appalachians. With demobilization and enhanced competition from petroleum and natural gas, the coal industry confronted vast surplus capacity, an inelastic demand for its product, and slipping prices and profits.[26] Operator survival in this laissez-faire jungle meant cuts in either or both key factors which determined coal costs to the consumer: transportation and labor.

Lake Cargo Coal Case. *Anchor Coal Co. v. United States* called into question I.C.C.-fixed coal freight rates and the consequences for the region's economy of such nationally established charges.[27] The suit by southern operators to enjoin rates on their coal shipped into the lucrative Great Lakes industrial market reflected acute intra-industry and intersectional rivalry for dominance in "Lake Cargo Coal." Northern operators in the Central Competitive Field stretching from western Pennsylvania into Illinois enjoyed a natural advantage in their geographical proximity to industrial markets, an advantage offset by prevailing union wage scales which raised their production costs to levels exceeding those of the southern operators.[28]

Inroads made by southern bituminous in Great Lakes markets evoked protests from northern operators and action by the I.C.C. At issue were the "Lake Cargo Coal" rates charged by railroads. Rates on a per ton basis from nearby northern fields ranged below those charged remote producers in southern West Virginia, Kentucky, and Tennessee. Higher total transportation costs, even if much lower per mile, required that southern operators achieve the smallest possible per ton rate differential from mine to market. Between mid-1922 and mid-1927 the differential between the benchmark Pittsburgh and Kanawha rates stood at twenty-

As an isolated and low wage labor market, the South enjoyed a competitive edge in common markets against products from regions with higher labor costs and/or more capital intensive industries.

five cents. But in August 1927 the northern carriers, with I.C.C. permission, reduced their rates by twenty cents, thereby increasing the differential to forty-five cents. Southern railroads retaliated. They lowered their rates by the same amount and restored the former twenty-five cent differential. Appeals for protection by the northern carriers won an I.C.C. order directing their sectional competitors to suspend the unauthorized twenty cent rate reduction and to justify its reinstatement.[29]

When their justification failed to satisfy the commission, southern coalmen, led by Wall Street lawyer John W. Davis, went into the United States Court for the Southern District of West Virginia to enjoin enforcement of the agency's rate suspension order and justification requirement.[30] Three days of what Parker termed a "strenuous hearing" was followed in March 1928 by his selection as author of the three-judge district court's opinion.[31] The *Lake Cargo Coal Rate* opinion reflected his conviction that the I.C.C.'s rate suspension order presented "a question fraught...with the gravest consequences to the future of the country, if the power asserted... can be sustained." Answering this question required an activist approach. It would be necessary, he stated at the outset, "to look behind" the I.C.C.'s conclusions on the reasonability of rates "and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusion."[32] What the agency had done seemed self-evident to resident District Judge George W. McClintic. It had played sectional favorites, affording "a 'special providence' for the Ohio and Pittsburgh coal operators, rather than thinking of the consumers in the north-western states or the southern carriers or coal operators."[33]

The immediate question before the court involved statutory construction. Had Congress empowered the agency to make national economic policies? Quoting voluminously from commission reports reciting the collapsed state of the beleaguered bituminous industry in the North, Parker thought it

> perfectly evident...that, in reducing the rates from the northern field, and in directing the cancellation of the reduction from the southern field, the Commission was primarily concerned, not in fixing rates, but in fixing the differential which was to prevail between the two fields and that the Commission based its action upon the shift of tonnage from the northern to the southern field and the industrial conditions resulting therefrom.[34]

Wielding of the rate-fixing power to correct displacement of northern coal in the Lake Cargo market was not, he declared in echoing McClintic, a regulation of rates, but rather a regulation of "industrial conditions under the guise of regulating rates." The Commission had considered production and employment as well as transportation in "an effort to equalize industrial conditions or offset economic advantages [of the South]."[35]

In reaching its rate decision, the I.C.C had relied on the 1925 Hoch-Smith Resolution, a farm relief measure, which authorized the agency to adjust rates in order to correct those found "unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country."[36] Parker held in the *Lake Cargo Coal Rate* case, the federal judiciary's first interpretation of the resolution, that the statutory language constituted "no more than a general declaration that freight rates shall be adjusted in such a way as to provide the country with an adequate system of transportation." Surely Congress had never intended "by this language to create in the Commission an economic dictatorship over the various sections of the country, with power to kill or make alive." Today, the I.C.C. took aim at southern coal. Tomorrow, he warned, its target could be "cotton manufacturing,...fruit growing,...furniture manufacturing, in short,...every branch of industry."[37]

If the I.C.C. had exceeded its rate-fixing powers, could Congress remedy the deficiency by empowering the regulatory agency to weigh intersectional economic conditions in setting rail tariffs? Probably not. In an *obiter-dictum,* Parker invoked the Supreme Court's regionally beneficial decision in *Hammer v. Dagenhart,*[38] a case that had arisen out of the North Carolina textile industry. The decade-old precedent

The violent and emotion-laden labor conflict in the bituminous coal fields of southern West Virginia, dramatized for modern movie audiences by director John Sayles in his 1987 pro-union film "Matewan," reached the Fourth Circuit court sixty years earlier.

A northbound Norfolk and Western freight in the "Lake Cargo" trade, hauling bituminous coal from mines in southern West Virginia, steams near Circleville, Ohio, thirty miles south of Columbus, on October 5, 1933.

solidly supported his contention that Congress "could not give the Commission power to fix rates to equalize industrial conditions." Regulation of production lay within the police powers of the states, a power reserved to them by the Tenth Amendment. Futhermore, Parker suggested, but did not decide, that such a rate-fixing basis likely violated the due process clause of the Fifth Amendment in that the rates promulgated would necessarily be "unreasonable and constitute an unprecedented interference with the industrial conditions of the country."[39] Dixie's hardpressed coal industry would be especially disadvantaged by the national regulatory agency's rate-making policies.

Red Jacket. New South industries seemingly needed protection not only from unfavorable freight rates set by the I.C.C., but also from the imposition of national labor standards. As an isolated and low wage labor market, the South enjoyed a competitive edge in common markets against products from regions with higher labor costs and/or more capital intensive industries.[40] Standardized national wages and working conditions threatened this regional advantage, thereby inflicting economic losses on both southern producers and their labor forces.[41] The United Mine Workers of America (UMWA), in its quest for monopoly control over the price of all coal mine labor, posed just such a threat to regional economic development. Without judicial intervention to foil unionization, an advocate for the southern operators predicted, "the Union will succeed in the end in forcing...non-union mined coal of West Virginia out of competition in the markets of the country with the coal produced by Union operators and miners under Union rules and regulations and sold at prices determined by the Union."[42]

The violent and emotion-laden labor conflict in the bituminous coal fields of southern West Virginia, dramatized for modern movie audiences by director John Sayles in his 1987 pro-union film "Matewan,"[43] reached the Fourth Circuit court sixty years earlier. The primary issue in *United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.* involved application of the Sherman Anti-Trust Act to John L. Lewis' union then seeking to organize the West Virginia miners.[44] The Act's application hinged, in turn, on discovery of a relationship between the UMWA's organizational strategies and interstate commerce.

Resolution of the jurisdictional question reflected Parker's fidelity to judicial nationalism. He acknowledged Chief Justice Taft's holding in the *First Coronado* case wherein Taft declared "that coal mining is not commerce, and that ordinarily interference with coal mining could not be said to be interference with interstate commerce." But Parker entertained "no doubt that...interference with coal mining did interfere with interstate commerce in coal as a natural and logical consequence."[45] The Taft Court had said as much in its *Second Coronado* decision.[46] The rule of that case, not that of *First Coronado*, applied to *Red Jacket* because the union, by calling a strike in order to organize the bituminous coal fields of West Virginia, surely "intended to interfere with the shipment of coal in interstate commerce" even in the absence of any evidence of interference with the actual transportation of coal.[47]

The facts spoke for themselves. The 316 coal companies joined as parties in the *Red Jacket* case produced 40,000,000 tons a year, over ninety percent of which went into interstate commerce. "Interference with the production of these mines," he reasoned, "would necessarily interfere with interstate commerce in coal to a substantial degree." This result suggested a conspiratorial intent, within the scope of the Act, to prevent interstate shipments of southern coal. "It was only as the coal entered into interstate commerce," Parker noted, "that it became a factor in the price and affected defendants in their wage negotiations with the union operators. And in time of strike, it was only as it moved in interstate commerce that it relieved the coal scarcity and interfered with the strike."[48]

Once Parker's broad conception of national commerce power had brought the UMWA's local organizing activities within the court's federal question jurisdiction, he considered the scope of freedom to be accorded the union in its efforts to penetrate and organize the West Virginia coal miners employed under anti-union "yellow dog" contracts.[49] Resolution of this issue depended on the nature of the

57 *Poor's Manual of Railroads* (1924); facing pages 452, 964. Map by Susan N. Havrilesky.

Routes of the intersectional "Lake Cargo" bituminous coal trade from southern West Virginia to Lake Erie ports via the Chesapeake and Ohio Railway Co., Hocking Valley Railway (consolidated with C. & O. Ry. in 1930), and the Norfolk and Western Railway Co. as well as the C. & O. and N. & W. rail link with Chicago.

union and on Supreme Court precedents. The UMWA, headquartered in Indianapolis in the midst of the Central Competitive Field, clearly acted as a remote third party interloper whenever its organizers appeared in West Virginia. Thus Parker correctly regarded the conflict not as one between that state's coal operators "and their [non-union] employees over wages, hours of labor, and other causes, but [one]...between them as non-union operators and the international union which is seeking to unionize their mines."[50]

Hitchman Coal and Coke Co. v. Mitchell,[51] a case originating in the Fourth Circuit and decided by the High Court in 1917, together with that circuit's 1926 decision in *Bittner v. West Virginia-Pittsburgh Coal Co.*[52] controlled the extent of permissible strategies available to unions such as the UMWA. Both precedents advanced injunctions as remedies for protecting non-union or "yellow dog" contracts under the constitutionally based "liberty of contract" doctrine previously approved by the Supreme Court in *Adair v. United States* and *Coppage v. Kansas*.[53] Language of the *Hitchman* decree had pervaded the *Bittner* opinion authored by Parker's senior colleague, Edmund Waddill, Jr., as well as the trial court's rendition of *Red Jacket*.[54]

Hitchman barred union organizers from peacefully persuading workers under "yellow dog" contracts to break their contracts by joining the union while remaining in their employer's work force. It also prevented union agents from merely persuading employees to join up and, honoring their contracts, leave their employment in order to strike. This anti-enticement provision was augmented by another preventing persuasion of "any of plaintiff's employees to refuse or fail to perform their duties as such."[55] *Hitchman* and its progeny, including *Bittner*, effectively walled off non-union workers in the southern bituminous fields from the blandishments of national union organizers.

UMWA efforts to distinguish *Hitchman* by confining its prohibitions to union-organizing strategies involving violence, fraud and/or deceit, factors present in *Hitchman* but not in *Red Jacket*, foundered on the sweeping language of the *Hitchman* decree which restrained even "peaceful persuasion."[56] Nor did section 20 of the 1914 Clayton Act apply.[57] That section prohibited issuance of injunctions against nonviolent persuasion tactics used by unions. *Duplex Printing Press Co. v. Deering* had made clear, however, that this statutory restraint on federal judicial power applied only to conflicts between an employer and his own employees or prospective employees.[58] It did not protect a remote third party union's peaceful intervention on behalf of the employer's workers and all other similarly situated employees. Chief Justice Taft thereafter modified *Duplex* in *American Steel Foundries v. Tri-City Central Trades Council* to permit peaceful persuasion when the union involved was a geographically local one.[59]

The UMWA fit within neither the *Duplex* nor *Tri-City* interpretation of the Clayton Act's protective shield. With a membership generously pegged by Parker at 475,000 and with local affiliates spanning the North American continent, the union bore precious little resemblance to the geographically confined Tri-City Central Trades Council composed of thirty-seven craft unions in a cluster of three Illinois

Once Parker's broad conception of national commerce power had brought the UMWA's local organizing activities within the court's federal question jurisdiction, he considered the scope of freedom to be accorded the union in its efforts to penetrate and organize the West Virginia coal miners employed under anti-union "yellow dog" contracts.

He held that union agents might peacefully persuade non-union employees to leave their employment and join the union in order to go on strike and to refrain from entering the employee's workplace during a strike against it.

towns.[60] And the UMWA's goals were different too. It sought not standardization of wages and working conditions in a confined locality, but their standardization on a national industry-wide basis.[61]

Impelled by advice received from dying colleague John C. Rose and by his own latent sympathy for working men and women which had emerged in political appeals made in the 1920 gubernatorial campaign as well as in judicial opinions, Parker limited the *Hitchman* doctrine.[62] He held that union agents might peacefully persuade non-union employees to leave their employment and join the union in order to go on strike and to refrain from entering the employee's workplace during a strike against it. What the Union could not do was,

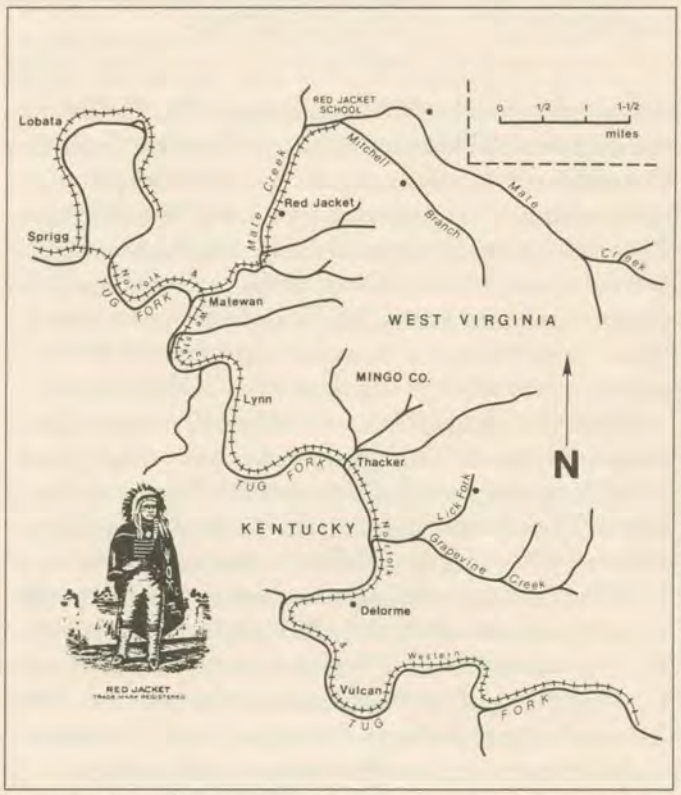
> to approach a company's employees, working under a contract not to join the union while remaining in the company's service, and induce them, in violation of their contracts, to join the union and go on strike for the purpose of forcing the company to recognize the union or of impairing its power of production.[63]

"*Hitchman*," Parker declared, "is conclusive of the point involved here." But the sole "point involved" was actual or attempted contract-breaking, an unlawful act which only occurred when an employee joined the union while remaining in the employer's workforce. *Red Jacket's* decree, as he stated, was "certainly not so broad as that of the decree approved by the Supreme Court in *Hitchman Coal and Coke Co. v. Mitchell*...which also enjoined [any] interference with the contract by means of peaceful persuasion."[64]

Red Jacket reflected a cautious balancing of the competing interests of a nationwide labor union and a regional industry within the rigid confines of the labor law current at the time.[65] Parker weighed organized labor's interest in communicating its message to non-union miners, recruiting them into union ranks, organizing the mines, thereafter developing a collective bargaining relationship conducive to improved standardized wages and working conditions for individual southern coal miners. At the same time, he took account of the interests of the bituminous operators. Their regionally important production and employment capabilities depended on offering their soft coal at marginally lower market prices which, in turn, rested partially on wage scales remaining below uniform industry-wide scales prescribed by the UMWA and on the enforcement of "yellow-dog" contracts as a defense against injurious strikes intended to promote the union's goals.

Appalachian Coals, Inc. Notwithstanding protection accorded the faltering soft coal industry by the *Lake Cargo* and *Red Jacket* decisions, conditions in the southern coalfields went from bad to worse as the Great Depression began. Shrinking markets, sinking prices, and demoralization of an ever smaller labor force caused desperate operators in Virginia, West Virginia, Kentucky, and Tennessee to establish a sales cartel early in 1932. Appalachian Coals, Inc. consisted of 137 producers who, in 1929, mined fifty-four percent of all bituminous extracted in the southern fields and twelve percent of total soft coal produced east of the Mississippi River. Their sales predominated in competitive markets from the Carolinas and Georgia westward to Indiana, southern Michigan, and the Great Lakes region. Once the cartel had been created, the Department of Justice acted to enjoin the agency's operations under the Sherman Anti-Trust Act.[66]

Following hearings on *United States v. Appalachian Coals, Inc.* before a three-judge district court wholly composed of circuit judges, Parker expressed doubts about the erstwhile



Map: U.S. Geological Survey, Dep't of the Interior, W. Va.-Ky.-Va. Matewan Quadrangle (1928); logo-letterhead: letter from Landon C. Bell to Clerk, U.S. Court of Appeals, Fourth Circuit, June 28, 1935, Red Jacket, Records of U.S. Cts. App., Record Group 276 (4th Cir.) 54-A-0177, Box 49, File No. 7-10-025-5-1 (available at Federal Records Center, Philadelphia, Pa.) Map by Susan N. Havrilesky.

Mines of Red Jacket Consolidated Coal and Coke Company, Thacker Coalfield, Mingo County, West Virginia. Mines of the Red Jacket Company are denoted by dots.

cartel's capacity for success in stabilizing coal prices.[67] Yet, he "started into the case with the feeling that the combination ought to be upheld and that it could be upheld under the decisions in the *Steel* and *Harvester* cases."[68] The association, he reasoned, had "been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from over-expansion, destructive competition, wasteful trade practices, and the inroads of competing industries."[69]

However justifiable the combination, hopes for eluding the Anti-Trust Act were soon dashed by close examination of Supreme Court precedents and of the decision in *United States v. American Can Co.* handed down by his late appeals court colleague, Judge John C. Rose.[70] The then federal district judge in Maryland used the Supreme Court's "rule of reason" standard to distinguish monopolies arising out of natural and legitimate business expansion from those caused by unnatural and illegitimate acquisitions intended to restrain interstate trade or to create monopolies.[71] Appalachian Coals Inc. clearly fell into the latter category. Agency members, independent coal operators who together controlled "a substantial part of the trade," had agreed to fix uniform selling prices in order to eliminate competition among themselves. Such an agreement suggested a plan to fix monopoly prices in consuming markets "forbidden by the Sherman Act."[72]

Parker adjudicated appeals that enabled him to help shape economic life from West Virginia and Maryland to South Carolina and from the Appalachians to the Atlantic.

Parker regretted the conclusion. "We sympathize with the plight of those engaged in the coal industry, whether as operators or as miners," he wrote, "but we have no option but to declare the law as we find it. We cannot repeal acts of Congress nor can we overrule decisions of the Supreme Court interpreting them." Quite possibly a cooperative coal marketing agency offered the sole hope for relieving the industry's economic distress. That remedy, however, was one "which addresses itself to the lawmaking branch of the government."[73]

The Supreme Court, not Congress, soon acted to protect a major regional industry. A week prior to Franklin Roosevelt's first inauguration, Chief Justice Hughes held that an unreasonable restraint of trade did not arise from mere establishment of a cooperative enterprise which affected market conditions, especially when that combination had a laudable purpose and, as Parker had shown, no capacity for becoming a monopolistic menace. The Court took cognizance of the reality that "when industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."[74] The Sherman Act did not mandate that outcome.

Parker's constitutional jurisprudence developed from 1925 to 1933 was a defensive jurisprudence endowed with a high, if rarely articulated, policy content.

Reversal by the High Court both bemused and pleased Parker. The Court had reached its conclusion, he noted, by overruling "some of its former decisions, which, of course, that Court has a right to do." That its policy-actuated holding overturned his own opinion did not make him "feel at all bad for I think that I would have decided the case exactly as the Supreme Court did if I had not felt bound by its former decisions."[75]

Conclusion

John J. Parker's performance, especially in cases involving important questions of southern regional economic development, spawned a "New South" constitutional jurisprudence that required a delicate balancing of national and regional interests. He was constrained by the abilities of aggrieved parties to litigate and appeal, by the reach of federal jurisdiction, by existing judicial precedents, and by the circumscribed position of a judge on a intermediate appellate court. Nevertheless, Parker adjudicated appeals that enabled him to help shape economic life from West Virginia and Maryland to South Carolina and from the Appalachians to the Atlantic.

Conflicts between state and national powers or between regional entrepreneurs and national regulations detrimental

Emerging in the twilight of an expiring economic order, this sometimes national and sometimes regional constitutionalism was marked by a combination of realism and optimism, by a sober reflection on the painful economic plight of the region, and by eternal optimism about the future of the South's human and natural resources.

to southern economic interests tested the judge. Aware that the South stood outside the nation's economic mainstream, Parker labored to clothe such regional interests with judicial protection. But he evaluated national regulations in terms of specific economic costs and benefits which the region derived from them. Ulterior motives associated with preservation of the racial *status quo* did not figure in his assessments. In fact, his lone pre-nomination judicial opinion which spoke directly to the race question actually threatened the racial *status quo* at its most sensitive points, intermarriage and residential living patterns.[76]

The financially pressed southern bituminous coal industry received his special solicitude. Elements of dual federalism and Marshallian nationalism combined in his adjudication of these coal cases to produce a pragmatic, policy-oriented, and regionally biased southern constitutional jurisprudence as proffered in the *Lake Cargo* case and as realized in the controversial *Red Jacket* decision. The latter invoked a broad nationalistic conception of the commerce power combined with a balanced consideration of union-operator relationships then controlled by a series of Supreme Court decisions based on the "liberty of contract" doctrine. Although favorable to the operators, his *Red Jacket* decision necessarily protected the jobs of southern miners while at the same time according some union access to employees working under "yellow-dog" contracts.

Parker's constitutional jurisprudence developed from 1925 to 1933 was a defensive jurisprudence endowed with a high, if rarely articulated, policy content. Emerging in the twilight of an expiring economic order, this sometimes national and sometimes regional constitutionalism was marked by a combination of realism and optimism, by a sober reflection on the painful economic plight of the region, and by eternal optimism about the future of the South's human and natural resources. Neither these considerations nor their policy consequences could have been received with equanimity by his critics who espoused the interests of rival geographic sections.[77] A pall of silence enveloped this eminently rational, albeit politically untenable, grounds for opposing elevation of a "New South" jurist to the Supreme Court. Far more simple and effective was it in 1930 to assail Judge Parker as a "white supremacist" and sworn enemy of labor.

---

[1] *The President's News Conference of March 21, 1930: Nomination of a Supreme Court Justice* in PUBLIC PAPERS OF THE PRESIDENTS: HERBERT HOOVER, 1930, 98-99 (1976); *From the "New South" to the Supreme Court*, 105 LITERARY DIGEST 12 (1930).

[2] *See* Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, in 50 MISS. VALLEY HIST. REV. 213-34 (1963).

[3] 18 F.2d 839 (4th Cir. 1927); President Calvin Coolidge nominated Parker on Oct. 3, 1925 (recess); U.S. REGISTER OF THE DEPARTMENT OF JUSTICE 18 (1927); the President again nominated Parker on Dec. 8, 1925; CONGRESSIONAL REC., 69th Cong., 1st sess., 1925, 67, pt. 1: 499; the Senate confirmed Parker on Dec. 14, 1925; *see id* at p. 769.

[4] *See* Watson, *supra* n.2.

[5] On Henry W. Grady and the "New South" creed, *see* D. GRANTHAM, SOUTHERN PROGRESSIVISM: THE RECONCILIATION OF PROGRESS AND TRADITION xvi (1983).

[6] Fish, *Judge Parker and The Public Service State*, DUKE L. MAG., Summer 1985, at 37.

[7] Scheiber, *Federalism, The Southern Regional Economy, and Public Policy Since 1865*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH, 73-80 (D. Bodenhamer & J. Ely, Jr. eds. 1984).

[8] *Id.* at 91-93.

[9] Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 ABA J. 435 (1932); Hewlett v. Schadel, 68 F.2d 502 (4th Cir. 1934) (wherein Parker praised the nationalizing virtues of general federal common law then current under Swift v. Tyson, 16 Pet. 1, 18 (1842)), *rev'd*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); United States v. Lindgren, 28 F.2d 725 (4th Cir. 1928) (holding that the Merchant Marine (Jones) Act of 1920 (533, ch. 250, 41 stat. 1007) pre-empted Virginia's wrongful death statue), *aff'd*, Lindgren, Adm'r v. United States, 281 U.S. 38 (1929); Ferris v. Wilbur, 27 F.2d 262, 265 (4th Cir. 1928) (upholding U.S. Navy's storage of high explosives in close proximity to private property); United States v. Tyler, 33 F.2d 724 (4th Cir. 1929), *aff'd*, 281 U.S. 497 (1929) (upholding constitutionality of federal estate tax).

[10] Scheiber, *supra* n.7, at 85-86, 92.

[11] Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond, Va., 262 U.S. 651 (1923).

[12] Letter from John J. Parker to Elliott Northcott (Dec. 21, 1928) (regarding Federal Reserve Bank of Richmond, Va. v. Early, 30 F.2d 198 (4th Cir. 1929)) (John J. Parker Papers, box 18, Southern Historical Manuscripts Collections, University of North Carolina, Chapel Hill, N.C.)

[13] *Federal Reserve Bank*, 30 F.2d at 199, *aff'd*, Early v. Federal Reserve Bank of Richmond, Va., 281 U.S. 84 (1929) (Holmes, J.); *see also* Craven Chemical Co. v. Federal Reserve Bank of Richmond, Va., 18 F.2d 711 (4th Cir. 1927) (holding the Federal Reserve Bank not negligent in handling a check drawn on a bank which failed during transit of the check).

[14] Suncrest Lumber Co. v. North Carolina Parks Commission, 30 F.2d 121 (W.D.N.C. 1929).

[15] Transcript of Record, Answer of Appellee, Case No. 2764, United States v. Southern Power Co., 31 F.2d 852, 9, 17 (4th Cir. 1929), filed Aug. 17, 1928.

[16] *Southern Power Co.*, 31 F.2d at 856.

[17] Letter from John J. Parker to William C. Coleman (Mar. 12, 1929) (Parker Papers, *supra* n.12, box 18); *see Southern Power Co.*, 31 F.2d at 856.

[18] *See* Woodward, *Orgins of the New South: 1877-1913* in 9 A HISTORY OF THE SOUTH 312-17, ch. 11 *generally*, (W. Stephenson & E. Coulter eds. 1971).

[19] United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927) (applying Sherman Anti-Trust Act to union interference with local coal mining, the output of which was intended for interstate shipment).

[20] Atlantic Coast Line R.R. Co. v. Standard Oil Co., 275 U.S. 257, 272 (1927) (wherein Taft, C.J. approvingly noted Parker's distinction between intra- and interstate commerce drawn in the related case of Atlantic Coast Line R.R. Co. & Seaboard Air Line Ry. Co. v. Standard Oil Co., 12 F.2d 541 (4th Cir. 1926)).

[21] *See* Houston, East & West Texas Ry. Co. v. United States, (The *Shreveport* Case), 234 U.S. 342 (1914) (Hughes, J.).

[22] Untitled memorandum, *circa* Mar. 1930 (Parker Papers, *supra* n.12, box 6); *Atlantic Coast Line R.R.*, 12 F.2d at 541 (memorandum on cases nos. 1441-42); *id.* (Parker Papers, *supra* n.12, box 48).

[23] 12 F.2d 541-44 (4th Cir. 1926), *cert. denied*, 273 U.S. 712 (1926).

[24] *Id.* at 545-46 (1926) (quoting Brandeis, J. in Baltimore & Ohio Southwestern R.R. Co. v. Settle, 260 U.S. 166, 173-74 (1922) that:

> the reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began.)

[25] United States v. Munson S.S. Line, 37 F.2d 681 (4th Cir. 1930) (holding that the steamship line need not file its rate schedule with the I.C.C. because the line's relationships with connecting rail carriers excluded "a common management for continuous carriage or shipment within the meaning of the Act of Feb. 4, 1887, § 1, 24 Stat. 379" (Interstate Commerce Act), thereby obviating any possibility of monopolistic price-fixing by a railroad endowed with power over water carriers and their rates), *aff'd*, 283 U.S. 43 (1930) (Hughes, C.J.)); Chandler

v. Pennsylvania R.R. Co., 11 F.2d 39 (4th Cir. 1926) (upholding I.C.C. interstate freight rates on potatoes shipped intrastate from points in Virginia to ports in that state and clearly destined for foreign export); Atlantic Coast Line R.R. Co. v. United States, 48 F.2d 239 (4th Cir. 1931) (affirming I.C.C. orders requiring regional carriers to grant lower through route rates to shipments carried by one line in competition with another under the common control of the regional carriers).

[26]M. BARATZ, THE UNION AND THE COAL INDUSTRY 33 (1955); H. MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY: A STUDY IN GOVERNMENTAL ADJUSTMENT OF A SECTIONAL DISPUTE 21-27 (1932).

[27]25 F.2d 462 (S.D.W.Va. 1928).

[28]*See* M. BARATZ, *supra* n.26, at 43; J. LAMBIE, FROM MINES TO MARKET: A HISTORY OF COAL TRANSPORTATION ON THE NORFOLK AND WESTERN RAILWAY 14 (1954); D. CORBIN, LIFE, WORK AND REBELLION IN THE COALFIELDS: THE SOUTHERN WEST VIRGINIA MINERS, 1880-1922 4 (1981).

[29]H. MANSFIELD, *supra* n.26, at 264.

[30]Anchor Coal Co. v. United States, 25 F.2d 462, 463, 469-70 (S.D.W.Va. 1928).

[31]Letter from John J. Parker to Edmund Waddill, Jr. (Mar. 23, 1928) (Parker Papers, *supra* n.12, box 18); Letter from John J. Parker to Edmund Waddill, Jr. (Mar. 26, 1928) (Parker Papers, *supra* n.12, box 18).

[32]*Anchor Coal*, 25 F.2d at 464.

[33]Letter from George W. McClintic to John J. Parker (Mar. 27, 1928) (Parker Papers, *supra* n.12, box 56).

[34]*Anchor Coal*, 25 F.2d at 470.

[35]*Id.* at 471-72.

[36]*Anchor Coal*, 25 F.2d at 473-74 (quoting Act of Jan. 30, 1925, ch. 120, 43 Stat. 802, amending Act of Feb. 28, 1920 (Esch-Cummins), ch. 91, 41 Stat. 456).

[37]*Id.* at 474.

[38]247 U.S. 251 (1918).

[39]*Anchor Coal*, 25 F.2d at 472, *acc'd* Ann Arbor R.R. Co. v. United States, 281 U.S. 658 (1930) (VanDevanter, J.).

[40]G. WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 163 (1986).

[41]*See* S. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW (1968).

[42]Brief for Appellees at 234, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927), filed Oct. 13, 1926, Case Nos. 2492-2503.

[43]Reviewed by Vincent Canby, N.Y. Times, Aug. 28, 1987, §3 at 3; M. BUCKLEY, FILMS IN REVIEW, Dec. 1987 at 38, 614; *see also* J. SAYLES, THINKING IN PICTURES: THE MAKING OF THE MOVIE "MATEWAN" (1987).

[44]United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839, 843-46 (4th Cir. 1927).

[45]United Mine Workers of America v. Coronado Coal Co. (First Coronado Case), 259 U.S. 344, 407-08 (1922) (citing Hammer v. Dagenhart, 247 U.S. 251, 272 (1918). Parker stated that

> coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. . . . Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.)

Chief Justice Taft, however, had asserted that "a direct, material and substantial effect" on price or supply of coal or a subjective intent to control those variables would transform a local and indirect obstruction into an interstate and direct one. *Id.* at 411. On Parker's interpretation of Taft's opinion, *see* memorandum on cases nos. 2492-2503, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839, 5 (4th Cir. 1927) (Parker Papers, *supra* n.38, box 48); *see* Norfolk & Western Ry. Co. v. United States, 52 F.2d 967, 971 (W.D.Va. 1931) (Parker J. stating that "coal mining is a business entirely separate and distinct from the business of transportation. . . . It has been expressly held that the mining of coal is not commerce even though the coal when mined is to be used or transported in commerce. . . ."), *aff'd*, 287 U.S. 134 (1932) (Roberts, J.).

[46]Coronado Coal Co. v. United Mine Workers of America (Second Coronado Case), 268 U.S. 295, 309-10 (1925).

[47]*Red Jacket*, 18 F.2d 839, 845 (4th Cir. 1927); memorandum on cases nos. 2492-2503, *supra* n.45.

[48]*Red Jacket*, 18 F.2d at 845.

[49]*Id.* at 845-46, 848-49.

[50]*Id.* at 841.

[51]245 U.S. 229 (1917), *rev'ing* Mitchell v. Hitchman Coal & Coke Co., 214 F.2d 685 (4th Cir. 1914) (Pritchard, J.).

[52]15 F.2d 652 (4th Cir. 1926).

[53]208 U.S. 161 (1908); 236 U.S. 1 (1915).

[54]Bittner v. West Virginia-Pittsburgh Coal Co., 15 F.2d 652, 657 (4th Cir. 1926); *Red Jacket*, 18 F.2d at 842.

[55]Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 261-62 (1917) (enjoining the union "from interfering or attempting to interfere with plaintiff's employees so as knowingly and willfully to bring about the breaking by plaintiff's employees, present and future, of their [non-union] contracts of service known to the defendants to exist.").

[56]*See* Brief for Appellants, *Red Jacket*, 18 F.2d 839, 190 (4th Cir. 1927), cases nos. 2492-2503 filed Oct. 4, 1926.

[57]Act of Oct. 25, 1914, ch. 323, § 20, 38 Stat. 730, *construed in Red Jacket*, 18 F.2d at 849.

[58]254 U.S. 443, 471 (1921).

[59]257 U.S. 184, 209-10 (1921).

[60]*Id.*; *Red Jacket*, 18 F. 2d at 840, 844, 849; American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 195 (1921).

[61]*Red Jacket*, 18 F.2d at 844.

[62]Letter from John C. Rose to John J. Parker (Mar. 12, 1927) (Parker Papers, *supra* n.12, box 17); Greensboro [N.C.] Daily News, June 27, 1920, at 2 (assailing failure of North Carolina to enact a workman's compensation law); Charlotte [N.C.] Observer, Oct. 30, 1920, at 3 (attacking absence of state labor protection laws for women and children in mills and factories); *id.* Apr. 18, 1920, at 8 (stating that "laboring men have a right to organize..., [and] collectively, to enter into agreements with employers."); *see* Manly v. Hood, 37 F.2d 212 (4th Cir. 1930); George A. Fuller Co. v. Brown, 15 F.2d 672 (4th Cir. 1926).

[63]*Red Jacket*, 18 F.2d at 849.

[64]*Id., cert. denied*, 275 U.S. 536 (1927).

[65]*See* Bedford Stone Co. v. Journeyman Stone-Cutters, 274 U.S. 37 (1927).

[66]United States v. Appalachian Coals Inc., 1 F. Supp. 339, 339-40 (W.Va. 1932) *see* Act of July 2, 1890, ch. 647, § 4, 26 Stat. 209.

[67]*Appalachian Coals, Inc.*, 1 F. Supp. at 339, 348.

[68]Letter from John J. Parker to Morris A. Soper and Elliott Northcott (Sept. 13, 1932) (Parker Papers, *supra* n.12, box 22) (referring to United States v. United States Steel Co., 251 U.S. 417 (1920) and United States v. International Harvester, 274 U.S. 693 (1927), both of which held that mere size did not constitute a violation of the Sherman Act).

[69]*Appalachian Coals, Inc.*, 1 F. Supp. at 341.

[70]*Id.* at 343-48 (referring to United States v. American Can Co., 230 F. 859 (D. Md. 1916)).

[71]United States v. American Can Co., 230 F. 859, 902 (D. Md. 1916).

[72]*Appalachian Coals, Inc.*, 1 F. Supp. at 348.

[73]*Id.* at 349.

[74]*Appalachian Coals, Inc.*, 288 U.S. 344, 372-74 (1933).

[75]Letter from John J. Parker to Edwin Yates Webb (Mar. 20, 1933) (Parker Papers, *supra* n.12, box 23).

[76]In City of Richmond v. Deans, 37 F.2d 712 (1930) Parker wrote the court's per curiam opinion holding unconstitutional under the equal protection clause of the Fourteenth Amendment a municipal ordinance barring occupancy of residential dwellings "where the majority of residences on such street are occupied by those with whom such person is forbidden to intermarry" as stipulated in Virginia's Racial Integrity Act of 1924. The Supreme Court denied the City's petition for a writ of certiorari, 281 U.S. 704 (1930). *See* Parker's Memorandum on case no. 2900, City of Richmond v. Deans, 37 F.2d 712 (1930) (Parker Papers, *supra* n.12, box 48); Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional the state's anti-miscengenation statute, a revised version of the Act to Preserve Racial Intergrity of Mar. 20, 1923, 1924 Va. Acts 534, at issue in the *Deans* case).

[77]*See* Letter from William Edwin Chilton, Jr. to Lee S. Overman (Apr. 23, 1930) (John J. Parker Confirmation File, SEN71B-A3, tray 14, Records of the U.S. Senate, RG 46, National Archives, Washington, D.C.).