

JUSTICE RUTLEDGE ON CIVIL LIBERTIES

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FOR Justice Rutledge the law was an instrument of philosophy, of life, and ultimately, of faith. "Justice is a part of life itself," he wrote, "subject to the law of growth without which all is death. In this sense there is confirmation of the idea that the principle of justice is eternal. For it too is alive and must reach new levels and horizons, as man does in all his higher aspirations."¹ Here is the common law tradition at its viable best, logic tempered by experience and an abounding faith in the destiny of man. In the continuing adjustment between the "firmament of law" and the needs of democratic life, Rutledge's intellectual faculties were infused with a personal humanitarian philosophy which assessed the consequences of judicial decision in human terms. "Of what good is the law if it does not serve human needs?" he frequently observed to his law students. His judicial decisions, particularly on constitutional questions, demonstrate this humanitarian largesse which pervaded his democratic faith.

Roosevelt's eighth and last appointee to the Court, scholarly, self-effacing Rutledge was the least known of any of them. At his death, six and a half years later, he was still the least known and one of the least appreciated of any of the Justices. He probably had more of the qualifications which public opinion considers desirable for a Supreme Court Justice than any of his colleagues. But public opinion has an aversion to dissenting opinions and departures from *stare decisis*. The high incidence of both of these among the Justices in recent years has elicited much criticism.² This trend frequently has been attributed to insufficient judicial, legal, or scholarly experience. But Rutledge, one of the most active dissenters, came to the Court with a background of four years as a federal judge and fifteen as a law school teacher and dean. He respected precedent but he was not constrained by it. When competing values and large questions of public policy confront a Justice, faith and philosophy influence his choice more than the extent of his judicial experience. For the judicial function is more political than legal where broad constitutional issues are concerned. This is best illustrated by the career of Justice Murphy, who came to the Court with virtually no judicial or scholarly experience. He rose to the Court on the ladder of a successful political career. Yet in his voting record Rutledge was closer to Murphy than anyone else on the Court. Murphy, the Justice with probably the most variegated

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1. RUTLEDGE, *A DECLARATION OF LEGAL FAITH* 16 (1947).

2. For commentary by a member of the present Court on the function of dissent and *stare decisis*, see Douglas, *The Dissenting Opinion*, 8 *LAW. GUILD REV.* 467 (1948) and Douglas, *Stare Decisis*, 49 *COL. L. REV.* 735 (1949).

political career, agreed most frequently with Rutledge, the Justice who combined judicial experience and scholarship more than any of his colleagues. What determined similar voting behavior for these two Justices of disparate background was a common philosophy, in the light of which they interpreted the broad mandates of the Constitution.

Prior to his judicial career Rutledge once commented, "I am not a radical in any sense of the word, but I cannot remain blind to the ills of the present system, and I am interested in seeing them remedied as far as possible." For him the premises of democracy logically required the growth of the welfare state. He understood and accepted big government, yet he had profound respect for the dignity of the individual man. The two were not incompatible in his mind. He saw nothing in the Constitution to preclude the use of extensive public power. But to him the Constitution also spoke with an implacable voice against government intrusions into the private domains of thought and personal rights. He was, in this sense, a twentieth century Jeffersonian.

To support his views on socio-economic issues his intellectual method was essentially pragmatic. On questions of civil liberties, however, his method of reasoning was largely *a priori*. Rigid, uniform protection of civil liberties was for him very nearly an absolute general principle. Intellectually his views on civil liberties were rooted in his convictions concerning the basic premises of democracy itself, and these were uncompromising. They derived also from an act of faith. For to Rutledge the major premises of democracy were rooted ultimately in what St. Paul called "the substance of things hoped for, the vision of things not seen." "However guided by reason," Rutledge wrote, "choice at the last must be intuitive, must be felt, or it cannot be complete. So also must nations and societies choose and live by a faith. Else they die."³

CIVIL LIBERTIES: PROCEDURAL

Concern for the constitutional rights of persons accused of crime was second to none in Rutledge's judicial conscience. While these rights have received vastly increased protection during the past decade the Supreme Court has been badly split as to the extent of its jurisdiction over state criminal procedure and the constitutional standards to be employed.⁴ A thin majority has espoused what may be called the "fundamental rights" rule deduced from the commands of due process.

3. RUTLEDGE, A DECLARATION OF LEGAL FAITH 5 (1947).

4. For an analysis of the alignments thus produced during this period see PRITCHETT, THE ROOSEVELT COURT, c. 6 (1948). For an analytic discussion of many of the cases up to 1946 see Boskey & Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. OF CHI. L. REV. 266 (1946). A more general discussion of the issues to 1944 is to be found in FRAENKEL, OUR CIVIL LIBERTIES, cc. 10-17 (1944).

Cardozo was the principle progenitor of the rule in *Palko v. Connecticut*.⁵ There he articulated that remarkably influential dictum concerning the "rationalizing principle" by which rights protected against federal power in the Bill of Rights were to be selected for protection against state action through the Fourteenth Amendment. Only those rights "implicit in the concept of ordered liberty, . . . of the very essence of a scheme of ordered liberty," reflecting "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" ⁶ were protected against state action by the Fourteenth Amendment. The "fundamental rights" rule thus contains a strong tincture of subjectivity, despite its presumption of objectivity via the catalyst of an assumed common concept of justice. By its own terms the rule requires the Court to make an independent examination of the record in each case. This has had the dual effect of increasing the number of applications for review and increasing confusion as to what the law may be, since the Justices have been known to differ in their reading of the same record.⁷

Against this view of the majority, a minority consisting of Black, Murphy, Douglas, and Rutledge has unsuccessfully argued for more concrete and objective guides. The cleavage was polarized in 1947 in the much discussed case of *Adamson v. California*.⁸ The defendant claimed that the privilege against self-incrimination guaranteed by the Fifth Amendment against federal action was made binding against the states by the Fourteenth. The majority, speaking through Justice Reed upheld the conviction on the basis of the "fundamental rights" rule and precedent.⁹ A concurring opinion by Frankfurter confirmed the impression that he is the leading exponent of this rule.¹⁰ But in a

5. 302 U.S. 319 (1937).

6. *Id.* at 325.

7. For an extended and excellent discussion of the development of this rule which the author calls the "fair trial" rule see Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948). Among other things, the author points out that the uncertainty for state courts engendered by the rule produced 528 petitions for review from state convicts during the 1946 term. These constituted two-fifths of all petitions for certiorari. *Id.* at 896-7.

8. 332 U.S. 46 (1947).

9. Principally, *Twining v. New Jersey*, 211 U.S. 78 (1908).

10. Five months prior to the *Adamson* decision Frankfurter, concurring, had spelled out the "fundamental rights" rule in detail in the notorious case of the electric chair that failed. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). With numerous references to the *Palko* case, Frankfurter argued that the "Fourteenth Amendment did not mean to imprison the states into the limited experience of the eighteenth century" by limiting it to the provisions of the Bill of Rights. Rather "the Fourteenth Amendment expresses a demand for *civilized standards*" and the "*consensus of society's opinion*." (Italics added.) *Id.* at 468, 471.

The case involved the issue of double jeopardy and cruel and unusual punishment. The majority held that petitioner had been subjected to neither. Justice Rutledge dissented. Probably Frankfurter's pointed re-formulation of the "fundamental rights" rule in

thirty-page dissent buttressed by historical data Black bitterly attacked it as allowing the Court "boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental principles of liberty and justice.'" ¹¹ He thought such a formula should be abandoned "as an incongruous excrescence on our Constitution." Instead, all the guarantees of the Bill of Rights should be absorbed by the Fourteenth Amendment. Douglas agreed with this completely. Rutledge joined a brief dissent by Murphy agreeing with the Black opinion but with the reservation that the Fourteenth Amendment was not necessarily limited to the Bill of Rights. "Occasions may arise where a proceeding falls so far short of conforming to *fundamental standards* of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." ¹²

Thus Rutledge read the Fourteenth Amendment as embracing the entire Bill of Rights *plus* unspecified "fundamental standards" of criminal procedure not included in the first eight amendments. Unlike Black and Douglas, who desire to scrap the "fundamental rights" rule entirely, he desired to retain it as a supplement to the Bill of Rights in his version of the Fourteenth Amendment in order to fill in the chinks. This epitomized Rutledge's attitude on this strongest article of his constitutional faith—to interpret the constitutional shield of civil liberties so broadly as to leave no chinks "permitting dubious intrusions."

With respect to this view of the Fourteenth Amendment his attitude reflected interesting divergences from those of Black and Douglas. Black's position entails more judicial self-restraint since discretion in protecting procedural rights in any jurisdiction would be confined by the provisions of the Bill of Rights. What Holmes called "the sovereign prerogative of choice" would by no means evaporate but it would operate in a narrower ambit than under the "fundamental rights" rule. By retaining the rule Rutledge would have maintained broader highways of judicial discretion than Justice Black—and partly for the same reasons that Black would narrow them. Although Black is concerned with establishing a more objective standard than the "fundamental rights" rule, he is at the same time an ardent defender of civil liberties. Since the Court has not, in his opinion, sufficiently extended essential protections to criminal defendants in state cases under the "fundamental rights" rule he would bring this about by his *Adamson*

this case was a major factor in evoking Justice Black's notable dissent in the *Adamson* case five months later.

11. *Adamson v. California*, 332 U.S. 46, 69 (1947).

12. *Id.* at 124 (*italics added*). For extended comment on the *Adamson* case see Green, *supra* note 7, at 892-910, and Comment, 58 YALE L.J. 268 (1949).

formula. This formula provides both a more objective standard for judicial review and a more rigid protection of procedural rights.¹³ And Black is willing to settle for this even though there may be some loopholes in the Bill of Rights. Rutledge did not want the more objective standard at the price of the loopholes. Hence the "fundamental rights" rule to plug them. Thus he would have kept the rule for quite different reasons from the majority of the Court. They, spearheaded by Frankfurter, employ it not only out of deference to stare decisis but out of deference to the right of the states to experiment with various modes of procedure. To Rutledge, civil liberties were not the stuff for experimentation.

Under Black's more mechanistic formula the Court would be relieved of an independent examination of the record in each case. By retaining the "fundamental rights" rule as a prop, Rutledge's position would have required this examination in doubtful instances. The Court, in his view, should have no reluctance in exercising a careful supervision over state criminal procedure in order to maintain standards logically if not literally required by the Bill of Rights.

For Rutledge the demands of civil liberties transcended considerations of federalism. Latitude for the exercise of discretion by the states on questions of civil liberties, therefore, played no part in his conception of the federal scheme. He would settle only for a uniformly rigid standard. Where personal rights were concerned he regarded the Fourteenth Amendment as a great centralizing amendment. Otherwise the vital protoplasm of democracy might be diluted. In this he was guided by a frank value judgment. On this aspect of federalism an *a priori* standard influenced his thinking rather than the pragmatic one which dominated his approach to socio-economic issues.

The position he took in the *Adamson* case pretty much crystallized Rutledge's views on the extent of the Court's jurisdiction over state criminal procedure and the constitutional standards to be employed. He ran a close second to Murphy in his insistence on rigid protection of the rights of criminal defendants in both state and federal jurisdictions. In the forty-six non-unanimous decisions involving such rights which were handed down between February, 1943, and June, 1949, Rutledge voted to uphold the right claimed by the defendant in 91% of the cases. Murphy did so in 98%, Douglas in 78%, and Black in 74%.¹⁴

Since decision in these cases has turned on an examination of the

13. For a discussion of attempts to frame an objective standard of judicial review in this area see Braden, *The Search for Objectivity in Constitutional Law*, 57 *YALE L.J.* 571 (1948).

14. Votes for the defendant in the forty-six non-unanimous cases were cast as follows by these four Justices: Rutledge, 42 (20 dissents); Murphy, 45 (22 dissents); Douglas, 36; Black, 34.

record in each proceeding, further exploration of Rutledge's position requires comment seriatim on particular cases in the several categories of procedural rights.

Right to Counsel. Rutledge voted to uphold the right to counsel claimed in all of the fourteen non-unanimous decisions on that issue during this period.¹⁵ Dissenting six times, he agreed with Murphy throughout and with Black and Douglas in all cases but one.

The right to counsel in state prosecutions has been something of a judicial football. The first Scottsboro case¹⁶ extended this guaranty of the Sixth Amendment to state trials involving capital offenses. Later it was required via the Fourteenth Amendment for all indigent defendants in any criminal prosecution whether or not requested.¹⁷ Still later applying the "fundamental rights" rule the Court backed down from this position, holding that the right to counsel was not a "fundamental right" essential to state criminal trials.¹⁸ Except in capital cases, where the Scottsboro rule still holds, the fairness of each decision was to be considered on its own merits. This rule has persisted as majority doctrine. Where the gravity of the crime and other factors such as the age and education of the defendant, the conduct of the Court or prosecution, and the complicated nature of the offense charged render criminal proceedings without counsel so apt to result in injustice as to be "fundamentally unfair," the majority has held that the Fourteenth Amendment requires assistance from counsel.¹⁹

Rutledge believed that the right to counsel is fundamental in all criminal cases. This followed, in his opinion, from the dual grounds that the Sixth Amendment is made binding on the states by the Fourteenth, and that even without such dependence on the Sixth Amendment the very concept of due process alone requires it in most circumstances. Further, where counsel is not provided, prosecutions involving "the indigent and ignorant who are unable to employ counsel from

15. *Williams v. Kaiser*, 323 U.S. 471 (1945) (claim sustained); *Tompkins v. Missouri*, 323 U.S. 485 (1945) (claim sustained); *House v. Mayo*, 324 U.S. 42 (1945) (claim sustained); *Rice v. Olson*, 324 U.S. 786 (1945) (claim sustained); *Canizio v. New York*, 327 U.S. 82 (1946) (claim not sustained); *Carter v. Illinois*, 329 U.S. 173 (1946) (claim not sustained); *Foster v. Illinois*, 332 U.S. 134 (1947) (claim not sustained); *Gayes v. New York*, 332 U.S. 145 (1947) (claim not sustained); *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (claim sustained); *Bute v. Illinois*, 333 U.S. 640 (1948) (claim not sustained); *Wade v. Mayo*, 334 U.S. 672 (1948) (claim sustained); *Gryger v. Burke*, 334 U.S. 728 (1948) (claim not sustained); *Townsend v. Burke*, 334 U.S. 736 (1948) (claim sustained); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948) (claim sustained).

16. *Powell v. Alabama*, 287 U.S. 45 (1932).

17. *Smith v. O'Grady*, 312 U.S. 329 (1941).

18. *Betts v. Brady*, 316 U.S. 455 (1942).

19. See Reed's summary of the present dichotomy between the Justices on this question in *Uveges v. Pennsylvania*, 335 U.S. 437 (1948).

their own resources and do not know their rights" deny equal protection of the laws.²⁰

When the majority in 1948 held that the Fourteenth Amendment did not require a state court "to initiate an inquiry into the desire of the accused to be represented by counsel, to inquire into the ability of the accused to procure counsel, or, in the event of the inability of the accused to procure counsel, to assign competent counsel . . .,"²¹ Rutledge joined the acid dissent of Douglas which pretty much sums up the attitude of the minority on this question:

"In considering cases like this and the ill starred decision in *Betts v. Brady* . . . we should ask ourselves this question: Of what value is the constitutional guaranty of a fair trial if an accused does not have counsel to advise and defend him?

"The Framers deemed the right of counsel indispensable, for they wrote [it] into the Sixth Amendment. . . . Hence if this case had been tried in a Federal Court appointment of counsel would have been mandatory even though Bute did not request it. . . . I do not think the constitutional standards of fairness depend on what court the accused is in. I think that the Bill of Rights is applicable to all courts at all times. . . . The basic requirements for fair trials are those which the framers deemed so important to procedural due process that they wrote them into the Bill of Rights and thus made it impossible for either legislatures or Courts to tinker with them."²²

Although no significant difference existed between Rutledge and Black and Douglas on this issue, on one occasion Rutledge insisted on a more rigid standard than they as to what constitutes effective counsel. In *Canizio v. New York*²³ Black and Douglas thought that the defendant had received adequate assistance when counsel was assigned partway through the proceedings after the defendant had changed his plea. Rutledge and Murphy thought that the right to counsel in each step of the proceedings was essential.

Self-Incrimination and Coerced Confessions. In each of the eleven non-unanimous decisions involving self-incrimination during this period Rutledge was the only member of the Court who was convinced that a constitutional right had been violated.²⁴ The "funda-

20. See *Foster v. Illinois*, 332 U.S. 134 (1947), where Rutledge concurred in Black's dissent.

21. *Bute v. Illinois*, 333 U.S. 640, 674 (1948).

22. *Id.* at 677-9. A year later, concurring in *Gibbs v. Burke*, 69 S. Ct. 1347, 1251 (1949), Black and Douglas flatly asserted that *Betts v. Brady* should be overruled. Rutledge and Murphy merely concurred in the result, which sustained a claim that lack of counsel denied due process under the *Betts v. Brady* rule.

23. 327 U.S. 82 (1946).

24. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (claim sustained); *Feldman v. United States*, 322 U.S. 487 (1944) (claim not sustained); *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (claim not sustained); *Malinski v. New York*, 324 U.S. 401 (1945) (claim made

mental rights" rule and the position of the *Adamson* dissenters generally unite in forbidding species of self-incrimination which entail coerced confessions. But Rutledge insisted on more rigid standards than his brethren of what in fact constitutes coercion or self-incrimination. Thus in *United States v. Bayer*,²⁵ the only case in which he disagreed with Murphy, he thought that an initial confession conceded by the majority to be inadmissible had sufficient nexus with a confession of six months later to infect the second confession with self-incrimination. He agreed with the view of the Circuit Court that the second confession was the "fruit" of the improperly obtained first one. In so doing he applied the analogy of search and seizure cases which forbid the use of evidence derived from improperly obtained documents.²⁶ The majority in rejecting this contention commented, "[A] later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."²⁷

A variant of this situation had arisen three years earlier in *Feldman v. United States*.²⁸ Here the compulsory testimony of a defendant in a state court was employed to convict him in a federal court. Since such testimony was not "wrongfully" acquired by the federal officers²⁹ and since they had not elicited the self-incrimination, a majority, speaking through Frankfurter, upheld the conviction. Rutledge joined a strong dissent by Black which accused the majority of regarding the prohibition against self-incrimination with "grudging eyes and reducing its

by one of defendants sustained, by another, not sustained); *United States v. Bayer*, 331 U.S. 532 (1947) (claim not sustained); *Adamson v. California*, 332 U.S. 46 (1947) (claim not sustained); *Haley v. Ohio*, 332 U.S. 596 (1948) (claim sustained); *Taylor v. Alabama*, 335 U.S. 252 (1948) (claim not sustained); *Watts v. Indiana*, 338 U.S. 49 (1949) (claim sustained); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (claim sustained).

25. 331 U.S. 532 (1947).

26. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and *Nardone v. United States*, 308 U.S. 338 (1939). The rule was first enunciated in *Boyd v. United States*, 116 U.S. 616 (1886) that the search and seizure clause of the Fourth Amendment must be read in conjunction with the self-incrimination clause of the Fifth. Accordingly, evidence seized "unreasonably" in the sense of the Fourth Amendment may not, under the Fifth, be received in any federal court in evidence against the person from whom they were seized.

27. *United States v. Bayer*, 331 U.S. 532, 540-1 (1947). Three years earlier the Court had held, in *Lyons v. Oklahoma*, 322 U.S. 596 (1944), that a voluntary confession is not vitiated by the fact that a previous one (in this instance, twelve hours before) was coerced. Rutledge dissented without opinion. Murphy and Black also dissented, although they thought the second confession was admissible in the *Bayer* case. The difference in time interval between the first and second confessions in the two cases probably accounts for their position in the later case.

28. 322 U.S. 487 (1944).

29. Relying on *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

scope to the narrowest possible limits." The dissenters felt that the decision "cuts into the very substance of the Fifth Amendment. And it justifies this result not by the language or history of the Constitution itself, but by a process of syllogistic reasoning based on broad premises of 'dual sovereignty'. . . . Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in walls of formal logic built upon vague abstractions found in the U.S. Reports."³⁰

Again in *Malinski v. New York*³¹ the Court upheld the conviction of a defendant based in part on evidence from the coerced confession of a co-defendant. The conviction of the co-defendant, however, was reversed. Only Rutledge and Murphy thought that the proceeding was a single, continuous process, and that due process should not allow a man to be convicted upon a confession wrung from another by coercion.

Although the Court, under the "fundamental rights" rule, has repeatedly asserted that it will carefully examine the factual record of the trial court,³² Rutledge in company with Black, Douglas, and Murphy insisted on a more careful scrutiny of the record than the others. This was manifest with respect to the extent to which the Supreme Court should weigh the evidence submitted to the jury in state proceedings. Vinson, Reed, Jackson and Burton eschew this.³³ Frankfurter leans toward the view of the former group,³⁴ although he has not gone as far in insisting that doubts as to a defendant's allegation of coercion be fully resolved by the trial court even though on its face the contention appeared highly improbable.³⁵

Search and Seizure. In leaving to the Courts the task of defining an "unreasonable" search and seizure, the Fourth Amendment invited

30. *Feldman v. United States*, 322 U.S. 487, 498-9 (1944). Douglas also joined the dissent. Murphy did not participate.

31. 324 U.S. 401 (1945).

32. For example, *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *White v. Texas*, 310 U.S. 530 (1940); *Smith v. O'Grady*, 312 U.S. 329 (1941); *Malinski v. New York*, 324 U.S. 401 (1945).

33. See dissenting opinion in *Haley v. Ohio*, 332 U.S. 596, 607-25 (1946).

34. As in *Malinski v. New York*, 324 U.S. 401 (1945), where he joined them in a concurring opinion to give them majority status—albeit via the rationale of the "fundamental rights" rule. Three cases decided on June 27, 1949, crystallized, at least temporarily, this division. Frankfurter's adherence to the Black, Douglas, Murphy, Rutledge bloc gave it majority status. Frankfurter wrote the opinion in all three cases: *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949). See particularly *Watts v. Indiana*, where he discusses the differences between the Anglo-American "accusatorial" system of criminal justice and the Continental "inquisitorial" system.

35. *Taylor v. Alabama*, 335 U.S. 252 (1948), Murphy, Douglas and Rutledge dissenting. Black did not participate.

unending disputation. For "the test of reasonableness cannot be stated in rigid and absolute terms."³⁶ During his six years on the Court Rutledge entered this semantic wilderness in only one opinion of his own. But his voting record and agreement with dissents of other Justices reveal his position clearly enough. In the non-unanimous cases deciding this issue between 1943 and 1949 he thought the searches and seizures in all but one of them were "unreasonable."³⁷ These cases produced unusual alignments among the Justices. Frankfurter and Jackson joined Murphy against the law enforcement methods employed in all of the cases in which they participated,³⁸ whereas Black agreed with this group only once.³⁹ Douglas was the pivot point—agreeing with the hundred percenters in five out of the nine cases.

The dissenting opinions elicited by the contentious decision in *Harris v. United States*⁴⁰ express at some length the views to which Rutledge subscribed. Frankfurter, Murphy and Jackson each dissented in separate opinions. Rutledge concurred with both the Frankfurter and Murphy opinions. The substance of these three Justices' views is that a search is "unreasonable" when made without a warrant issued by a magistrate's authority with "minor and severely confined

36. *Harris v. United States*, 331 U.S. 145, 150 (1947). For a discussion of recent cases, see Note, *Searches and Seizures: 1948*, 15 U. OF CHI. L. REV. 950 (1948).

37. *Davis v. United States*, 328 U.S. 582 (1946) (claim of unconstitutional search and seizure denied); *Zap v. United States*, 328 U.S. 624 (1946) (claim denied); *Harris v. United States*, 331 U.S. 145 (1947) (claim denied); *United States v. Di Re*, 332 U.S. 581 (1948) (claim upheld); *Johnson v. United States*, 333 U.S. 10 (1948) (claim upheld); *Trupiano v. United States*, 334 U.S. 699 (1948) (claim upheld); *McDonald v. United States*, 335 U.S. 458 (1948) (claim upheld); *Lustig v. United States*, 338 U.S. 74 (1949) (claim upheld); *Brinegar v. United States*, 338 U.S. 160 (1949) (claim denied) (Rutledge wrote the majority opinion); *Wolf v. Colorado*, 338 U.S. 25 (1949) (evidence obtained from an "unreasonable" search and seizure may be introduced in state trials). All of the cases except *Wolf v. Colorado* involved Federal officers.

38. The solid agreement of Frankfurter and Jackson with the rigorous civil libertarian position of Murphy and Rutledge in these cases marks a departure from their usual alignment. This can be explained on several grounds. In the first place, "the right of privacy" occupies a high place in the hierarchy of values of both Justices. This is manifest in the two sound-truck cases—*Saia v. New York*, 334 U.S. 558 (1948), and *Kovacs v. Cooper*, 336 U.S. 77 (1949). In the former case Frankfurter protests eloquently against "intrusion into cherished privacy." In his dissent in *Harris v. United States*, 331 U.S. 145 at 198 (1947), Jackson speaks warmly of the forefathers' concern for "that decent privacy of home, papers, and effects which is indispensable to individual dignity and self respect." That a magistrate rather than a law enforcement officer should determine the occasion for search is also quite consistent with Frankfurter's respect for the judicial process. Cf. *Bridges v. California*, 314 U.S. 252 (1941); *Craig v. Harney*, 331 U.S. 367 (1947). Further, censoring search and seizure proceedings does not require Frankfurter to sit in judgment on state court proceedings or state legislation—both of which he is loath to do.

39. *McDonald v. United States*, 335 U.S. 451 (1948).

40. 331 U.S. 145 (1947). The five-page majority opinion of the Chief Justice evoked eighteen pages of acrid dissent.

exceptions." The exceptions are limited to cases where a warrant for arrest authorizes seizure of all that is on the person, or where objects are in such open and immediate physical relation to a person being lawfully arrested as to be considered a projection of his person.⁴¹ In this view the quality of "reasonableness" is imparted to a search only when inferences as to its necessity are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."⁴² A less rigid standard, the dissenters thought, "can be used as easily by some future government determined to suppress political opposition under the guise of sedition as it can be used by a government determined to undo forgers and defrauders." As well as having an eye to the future, the dissenters assign great weight to past historic experience that was written into the Fourth Amendment. Frankfurter is strongly convinced that "[h]istorically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American independence."⁴³ To all of this Rutledge subscribed. He also agreed with this minority that the command of the Fourth Amendment is no less rigid when public rather than private property is concerned.⁴⁴

Furthermore, to Rutledge the Fourth Amendment forbade evidence from illegal searches and seizures to be introduced in state trials. With Murphy and Black he dissented from a holding to the contrary in *Wolf v. Colorado*.⁴⁵ Without such a sanction the Fourth Amendment was to him "a dead letter." In this case a gust of wind from past controversy stirred, but not without profit for the dissenters. In the majority opinion Frankfurter referred to the issue of whether the Fourteenth Amendment embraces the entire Bill of Rights as "closed." Nevertheless, for the first time a majority of the Court asserted that the guaranty of the Fourth Amendment "is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process clause." Notwithstanding this, Frankfurter asserted that evidence obtained from search and seizures which the Fourth Amendment forbids may be introduced in state trials because "most of the English speaking world does not regard as vital . . . the exclusion of evidence thus ob-

41. As stipulated in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), and *United States v. Lefkowitz*, 285 U.S. 452 (1932).

42. Jackson for the Court in *Johnson v. United States*, 333 U.S. 10 (1948)—a five to four decision.

43. Frankfurter appears to assign the Fourth Amendment "a place second to none in the Bill of Rights." See his dissenting opinion in the *Harris* case, 331 U.S. 145, 159 (1947).

44. Dissenting with Frankfurter and Murphy in *Zap v. United States*, 328 U.S. 624 (1946). Jackson, who was in Europe, would unquestionably have dissented also.

45. 338 U.S. 25 (1949).

tained." 46 Rutledge, while rejecting this last conclusion, felt moved to toss a rather frayed orchid in the direction of the majority. "'Wisdom,'" he quoted, "'too often never comes, and so one ought not to reject it merely because it comes late.' Similarly, one should not reject a piecemeal wisdom, merely because it hobbles toward the truth with backward glances. . . . I welcome the fact that the Court in its slower progress toward this goal [of extending the Fourteenth Amendment to the entire Bill of Rights], today finds the substance of the Fourth Amendment 'to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, . . . valid as against the states.'" 47

In the only case where he thought a seizure permissible 48 he justified it by the doctrine of "probable cause" which had evolved during the period of national prohibition. Speaking for the majority he regarded the facts in this case as analogous to those in *Carroll v. United States*,⁴⁹ which held that a valid search of a vehicle moving on a public highway may be conducted without a warrant provided probable cause for the search exists. Jackson, Frankfurter and Murphy, more adamant in their views on the stringent prohibitions of the Fourth Amendment, constituted an unusual trio of dissenters in a civil liberties case.⁵⁰

Composition of Juries and Jury Trial. Rutledge was willing to sanction somewhat more latitude in federal and state jury trial practices than in other areas of procedure. In the eight non-unanimous cases decided in this category between 1943 and 1949 he voted to sustain the defendant's claim in five and to reject it in three.⁵¹ He dissented but twice. Murphy voted to sustain the claim in all eight cases; Black and Douglas in seven.

The present minority view that any method of jury selection employed by the states which excludes a portion of the community invalidates an indictment or a conviction, even though proof of intent to exclude is lacking, was shared by Rutledge. Thus he joined Black, Douglas and Murphy in dissent in the two New York blue ribbon jury cases.⁵² The Court had recently ruled that federal jury rolls

46. *Id.* at 27-8, 29.

47. *Id.* at 47.

48. *Brinegar v. United States*, 338 U.S. 160 (1949).

49. 267 U.S. 132 (1925).

50. Jackson's dissent, in a self-styled "prologue," expounds the rationale of his search and seizure views.

51. *Galloway v. United States*, 319 U.S. 372 (1943) (claim not sustained); *Akins v. Texas*, 325 U.S. 398 (1945) (claim not sustained); *Ballard v. United States*, 329 U.S. 187 (1946) (claim sustained); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (claim sustained); *Fay v. New York*, 332 U.S. 261 (1946) (claim not sustained); *In re Oliver*, 333 U.S. 257 (1948) (claim sustained); *Moore v. New York*, 333 U.S. 565 (1948) (claim not sustained); *Frazier v. United States*, 335 U.S. 497 (1948) (claim not sustained).

52. *Fay v. New York*, 332 U.S. 261 (1947), and *Moore v. New York*, 333 U.S. 565

must represent a fair cross-section of the community⁵³ but refused to extend the principle to state practice. This refusal was based on the dual ground that no intent to discriminate was revealed by the records in the state cases, and a conviction that the Court ought to "adhere to this policy of self-restraint and . . . not use this great centralizing amendment [the Fourteenth] to standardize the administration of justice and stagnate local variations in practice." The latter ground follows partly from the "fundamental rights" rule. It also carried over from the field of social legislation to that of civil liberties Brandeis' classic plea for tolerance of state experimentation.⁵⁴ The minority, however, felt that the lack of intent to discriminate merely made it difficult to prove what was in fact "a very subtle and sophisticated form of discrimination." Nor, in these circumstances, did tenderness for judicial self-restraint prevent them from invoking the prohibitions of the equal protection clause.

Rutledge accepted the majority view that the equal protection clause does not require proportional representation of community groups on juries.⁵⁵ In this he did not follow Murphy, who thought that limiting the number of Negroes on the jury panel to one violated the equal protection clause since the factor of color had not been disregarded. The only other case in which he voted to deny the claim of a defendant that the jury was stacked against him arose in a unique federal case. The defendant was convicted of violating the Federal Narcotics Act by a jury composed entirely of federal employees—two of whom were connected with the Treasury Department, which is responsible for enforcing the act. Speaking for the majority, Rutledge held that the defendant himself was responsible for the final composition of the jury.⁵⁶ The jury panel contained a fair distribution of publicly and privately employed persons. But defense counsel employed his peremptory challenges in such a manner as to eliminate all but government employees.

In another case relating to jury trials but not involving the composition of juries, Rutledge rejected the contention that a directed

(1948), where the method of selection produced a special jury panel unrepresentative of a cross-section of the community. No evidence of an intent to discriminate was found.

53. See *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), where laborers had been largely excluded from the jury lists, and *Ballard v. United States*, 329 U.S. 187 (1946), where women were excluded.

54. *New State Ice Company v. Liebmann*, 285 U.S. 262, 311 (1932).

55. *Akins v. Texas*, 325 U.S. 398 (1945).

56. *Frazier v. United States*, 335 U.S. 497 (1948). Jackson, Frankfurter, Douglas and Murphy dissented. They thought that the dual standard of jury compensation in the District of Columbia, whereby a non-government employee is paid \$4 a day but a government employee is given leave with full pay discriminated against the former. Such a system, they felt, should be disapproved by the Supreme Court in the exercise of its supervisory power over the federal courts.

verdict offends the Seventh Amendment.⁵⁷ That amendment, he said, is "designed to preserve the basic institutions of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying . . . so widely among common law jurisdictions."⁵⁸

The "basic institutions of jury trial," however, were more seriously vitiated in Rutledge's opinion than in the minds of his brethren by the Michigan one-man grand jury system. In 1948 the Court condemned a summary conviction for contempt by a Michigan judge acting as a one-man grand jury after a secret hearing. This, said the Court, denied due process because of the secrecy of the proceedings and because the defendant had no reasonable opportunity to be heard on the contempt charges.⁵⁹ Rutledge, concurring in the result, condemned the entire one-man jury system as a travesty on the Fourteenth and the Sixth Amendments. With strong adumbrations of Black's *Adamson* dissent he deplored the Court's toleration of state experimentation with civil liberties.

"This case demonstrates how far this Court has departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights. In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute . . . their 'ideas and processes of civil justice' in place of the time-tried 'principles and institutions of the common law' perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in this case. It is the immediate offspring of *Hurtado v. California* . . . and later like cases. . . . So long as they stand, so long as the Bill of Rights is regarded here as a straight jacket of Eighteenth Century procedures rather than a basic charter of personal liberty, like experimentations may be expected from the states. And the only check against their effectiveness will be the agreement of the majority of this Court that the experiment violates fundamental notions of justice in civilized society.

"I do not conceive that the Bill of Rights . . . incorporates all such ideas. But as far as its provisions go, I know of no better substitutes. . . .

"Room enough there is beyond the specific limitations of the Bill of Rights to experiment toward improving the administration of justice. Within those limitations there should be no laboratory excursions, unless or until the people have authorized them by the

57. *Galloway v. United States*, 319 U.S. 372 (1943).

58. Black, Douglas and Murphy, dissenting, deplored the practice of directed verdicts since the trial of fact by juries rather than judges is an essential bulwark of civil liberties. They thought the decision a judicial erosion of the Seventh Amendment.

59. *In re Oliver*, 333 U.S. 257 (1948).

constitutionally provided method. This is no time to experiment with established liberties.”⁶⁰

Exhaustion of State Remedies. Consistent with his vigilant solicitude for the rights of criminal defendants, Rutledge advocated expeditious procedure for Supreme Court review of petitions arising from state prosecutions. The Supreme Court has ruled that it will not intervene until state remedies have been exhausted.⁶¹ Illinois law provides a variety of remedies to one claiming a denial of a constitutional right but fails to enlighten perplexed petitioners as to which may be the appropriate one for them. Consequently, petitioners from Illinois may find their state remedies inexhaustible, thus precluding a review of the merits of their case by the federal courts. Rutledge castigated this “merry-go-round.”⁶² “The Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one.” He thought that for Illinois the Supreme Court should no longer require exhaustion of state remedies before permitting resort to the federal courts. “We should neither delay nor deny justice, nor clog its administration, with so useless and harmful a procedural strangling of federal constitutional rights.”⁶³

This chicken came home to roost in a majority opinion the next term of Court. The Chief Justice, observing that the exhaustion of state remedies rule “presupposes that some adequate state remedy exists,” sent a similar case back to the state courts with the injunction that “If there is now no post-trial procedure by which federal rights may be vindicated in Illinois we wish to be advised of that fact upon remand of this case.”⁶⁴

Access to Courts. In *Yakus v. United States*,⁶⁵ where the Court upheld wartime price control, Rutledge thought the Emergency Price Control Act afforded inadequate recourse in the courts for individuals who ran afoul of regulations. He admitted compelling reasons for Congress to balance the scales of litigation unevenly in favor of enforcement. But the statute permitted an individual to question the validity of a regulation through only one narrow, briefly open route. Beyond this route no court was allowed jurisdiction to consider the validity of a regulation. This, he thought, went too far. It not only denied due process

60. *Id.* at 280-2.

61. *Ex parte Hawke*, 321 U.S. 114 (1944).

62. *Marino v. Ragen*, 332 U.S. 561 (1947).

63. Referring again to this Illinois procedure in a dissenting opinion in *Parker v. Illinois*, 333 U.S. 571, 578 (1948), four months later, Rutledge observed: “Constitutional rights may be nullified quite as readily and completely by hypertechanical procedural obstructions to their effective assertion and maintenance as by outright substantive denial.”

64. *Young v. Ragen*, 337 U.S. 235 (1949).

65. 321 U.S. 414 (1944).

but infringed the independence of the judicial process in criminal trials. "War," he wrote, "requires much of the citizen. He surrenders rights for the time being to secure their more permanent establishment. Most men do so freely. . . . But the surrender is neither permanent nor total. The great liberties of speech and the press are curtailed but not denied. Religious freedom remains a living thing. With these, in our system, rank the elemental protections thrown about the citizen charged with crime, more especially those forged on history's anvil in great crises. They secure fair play to the guilty and vindication for the innocent. . . . Not yet has the war brought extremity that demands or permits them to be put aside. Nor does maintaining price control require this."⁶⁶ With the lone concurrence of Murphy, therefore, he objected to this provision which forbade a criminal court to consider the validity of the law on which the charge of crime was founded.

Contempt. In the celebrated John L. Lewis contempt case,⁶⁷ Rutledge pinned the burden of his lengthy dissenting opinion to an issue of procedural rights. In this he was joined only by Murphy. Action against Lewis had mingled civil and criminal contempt charges in the same proceeding. To Rutledge the Court ignored the vital principle that "civil and criminal proceedings are altogether different and separate things, and under the Constitution must be kept so."⁶⁸ A trial where civil and criminal charges were "hashed together in a single criminal-civil hodgepodge" deprived Lewis, Rutledge thought, of the more rigid trial procedures guaranteed by the Sixth Amendment. "In some respects matters of procedure constitute the very essence of ordered liberty under the Constitution. For this reason, especially in the Bill of Rights, specific guaranties have been put around the manner in which various legal proceedings shall be conducted. . . ."⁶⁹ [A]ll the Constitutional guaranties applicable to trials for crime should apply to such trials for contempt, excepting only those which may be wholly inconsistent with the nature and execution of the function the court must perform."⁷⁰

Martial Law and Military Trials. Martial law in Hawaii during the war came up for review in 1946.⁷¹ Rutledge subscribed to Black's majority opinion which held that in passing the Hawaii Organic Act of 1900 Congress did not intend to authorize the suspension of constitutional guaranties of a fair trial.⁷² The concurring opinion of

66. *Id.* at 487-8.

67. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947).

68. *Id.* at 384.

69. *Id.* at 363.

70. *Id.* at 374.

71. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). *White v. Steer* was decided in the same opinion.

72. See Anthony, *Hawaiian Martial Law and the Supreme Court*, 57 *YALE L.J.* 27

Murphy which squarely invoked the constitutional issue by condemning the military trials as a violation of the Bill of Rights did not attract Rutledge's adherence.

More significant for Rutledge was the Court's review of the habeas corpus petition of General Yamashita challenging his conviction for war crimes by a military commission.⁷³ The Court found that the Military Commission had authority under international law to proceed with the trial and in so doing did not violate any constitutional command. Both Rutledge and Murphy dissented vigorously in lengthy separate opinions.

Rutledge was deeply concerned that such military trials meet the standards of fairness of Anglo-American criminal proceedings. To him the record of the Yamashita proceedings made such a poor showing that he felt constrained to protest.

"It is not too early . . . for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. . . . Every departure weakens the tradition, whether it touches the high or low, the powerful or the weak, the triumphant or the conquered."⁷⁴

The majority had ruled that under the circumstances, the Fifth Amendment was not applicable. This Rutledge was unable to accept.

"In this sense I think the Constitution follows the Flag. . . . I am completely unable to accept the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for other, perhaps ultimately for all. . . . I cannot consent to even implied departure from that great absolute."⁷⁵

Admitting that the "essence" of the Fifth Amendment's protection is pretty hard to pin down, he thought the heart of it lay in proscribing two things that had characterized the procedure of General Yamashita's trial:

(1947), and Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833 (1946).

73. *In re Yamashita*, 327 U.S. 1 (1946). For a full discussion of this case see Fairman, *supra* note 72. For briefer comment see Wright, *Due Process and International Law*, 40 AM. J. INT'L L. 398 (1946).

74. *In re Yamashita*, 327 U.S. 1, 41-2 (1946).

75. *Id.* at 47, 79-80, 81.

"One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's *ex parte* investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend. This embraces at least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing to meet the charge and to have aid of counsel in doing so. . . ." ⁷⁶

In summary, then, Rutledge favored more extensive constitutional protection of the rights of criminal defendants than any other member of the Court except Murphy. No other Justice except Murphy read the Fourteenth Amendment as embracing the entire Bill of Rights plus "fundamental standards" of criminal procedure which may not be included in the first eight amendments. This position, of course, committed him to a vigorous exercise of judicial review where procedural rights were concerned.

Consequently he was the only member of the Court during this period who voted to sustain claims of criminal defendants in all cases involving the right to counsel and self-incrimination. In all but one instance he would have sustained allegations of unreasonable search and seizure. Concerning jury trials his views were substantially the same as those of Black and Douglas except that they would proscribe directed verdicts. He was second to none in his advocacy of expeditious procedures for review of petitions arising from state prosecutions, and in his opposition to any commingling of criminal and civil actions in the same proceeding. Finally, his view in the Japanese war crimes cases was shared only by Murphy. For neither Black nor Douglas assented to the proposition that the Constitution follows the flag in the sense that the guaranties of the Fifth Amendment should have applied to these cases.

CIVIL LIBERTIES: SUBSTANTIVE

Rights Guaranteed by the First Amendment. The *leitmotifs* of Rutledge's version of the First Amendment ⁷⁷ were voiced in *Thomas v.*

76. *Id.* at 79.

77. For a general discussion of these issues and alignments of the Justices thereon see PRITCHETT, *THE ROOSEVELT COURT*, c. 5 (1948). For a brief assessment of recent developments see Cushman, *Ten Years of the Supreme Court 1937-1947: Civil Liberties*, 42 AM. POL. SCI. REV. 42 (1948). See also FRAENKEL, *OUR CIVIL LIBERTIES* (1944) especially cc. 1-10.

Concerning rights of free speech, press, and religion, Rutledge differed with Black and Douglas only on rare occasions. But these differences cancelled out in the total voting record. In some twenty-four non-unanimous decisions since 1943 where these rights were at issue these three Justices each voted to sustain the right claimed in nineteen cases. Murphy's civil libertarian zeal elicited sustaining votes from him in all of the cases but one (*United States v. Ballard*, 322 U.S. 78 (1944)). With respect to speech, whether secular or religious, Rutledge, Black and Murphy voted to protect the right unfettered in all the cases where it was involved. Douglas was contrary-minded

Collins.⁷⁸ This is perhaps his most notable opinion. In the brief perspective of five years it appears as a distinctive high mark for the protection of civil liberties. The case arose from the action of R. J. Thomas of the C. I. O. in soliciting union membership at a meeting without benefit of an organizer's card required by a Texas statute. To secure the card an organizer had to give his name, affiliation, and show his credentials, but no discretion was vested in state officers to withhold the card. In holding the statute void under the First and Fourteenth Amendments, Rutledge placed the stamp of established doctrine on the then recently developed tenet that the guaranties of the First Amendment occupy a preferred place in our constitutional scheme. In reviewing legislation alleged to trammel these rights Rutledge felt it necessary for the Court to reverse the usual presumption in favor of a statute's validity:⁷⁹

"This case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."⁸⁰

Under the clear and present danger rule, therefore, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." This demands active and critical judicial review by the Court. For although judgment as to where the line of restraint on free expression may be placed "in the first instance is for the legislative body . . . in our system where the line can constitutionally be placed presents a question this Court cannot escape answering *independently, whatever the legislative judgment. . . .*"⁸¹

The opinion rejected the allegation that the guaranties of the First Amendment do not apply to business or economic activity. "Great secular causes, with small ones, are guarded. . . . [T]he First Amendment is a charter for government, not for an institution of learning.

twice (*Hartzel v. United States*, 322 U.S. 680 (1944), and *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947)).

78. 323 U.S. 516 (1945).

79. See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); *Schneider v. Irvington*, 308 U.S. 147, 161 (1939); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) for the beginnings of the doctrine. The phrase "preferred position" was actually first used by Chief Justice Stone, dissenting in *Jones v. Opelika*, 316 U.S. 584, 608 (1942). It reappeared as majority language in *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), and several subsequent cases.

80. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

81. Italics added.

'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."

Frankfurter has been the most articulate critic of this hypothesis. It offends his canons of judicial self-restraint and betrays what he considers to be the Holmes tradition from which it derives. In *Kovacs v. Cooper*,⁸² he took pains to point this up, asserting that the phrase "preferred position" mischievously infects laws touching communication with presumptive invalidity. It therefore disregards the "admonition most to be observed in exercising the Court's reviewing powers over legislation, 'that it is a *constitution* we are expounding,'" ⁸³ A further objection to summarizing Holmes' line of thought by the phrase "preferred position," he argues, is that it expresses a complicated process of constitutional adjudication by a deceptive formula. Such a formula makes for mechanical jurisprudence. This belies Holmes, for "to rest upon a formula is slumber that, prolonged, means death."⁸⁴ Furthermore, Frankfurter argues that Jackson didn't really subscribe to this view in its most extreme application in *Thomas v. Collins*.⁸⁵ Consequently, it has never fully commended itself to a majority of the Court. He did, however, list numerous cases wherein it was employed. It is therefore the more "mischievous because it radiates a constitutional doctrine without avowing it" by a convinced majority.⁸⁶ Of this argument Rutledge drily remarked that his brother Frankfurter "demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties . . . occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court."⁸⁷ Certainly with the deaths of Rutledge and Murphy only Black and Douglas fully subscribe to the rationale of the *Thomas v. Collins* opinion. It may be that this opinion marks but a vigorous mid-point in a cycle of constitutional interpretation now ended.⁸⁸

Reading the First Amendment in the light of the premises of his *Thomas v. Collins* opinion, Rutledge voted to uphold the rights of free expression in 79% of the non-unanimous decisions where these rights

82. 336 U.S. 77 (1949).

83. *Id.* at 90.

84. HOLMES, COLLECTED LEGAL PAPERS 306 (1921).

85. See Frankfurter, concurring in *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949). Jackson subsequently confirmed this in *Brinegar v. United States*, 338 U.S. 160 (1949).

86. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

87. *Id.* at 106.

88. The cycle, if such it be, was still near the zenith in the spring of 1949 when *Terminiello v. Chicago*, 337 U.S. 1 (1949) was decided. Here the adherence of Reed created a majority of five to uphold the right to speak under circumstances which admittedly pressed the guaranty of the First Amendment to its periphery. Jackson, writing the chief dissent on the substantive issue, believed "there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact." *Id.* at 37.

were invoked. So did Black and Douglas. Murphy's even greater sensitivity to any restrictions in this area impelled him to uphold the rights claimed in 96% of the cases.

Rutledge was particularly insistent that the common-law rule that criminal statutes be precisely drawn and narrowly construed must be rigidly applied to legislation affecting civil liberties.⁸⁹ Speaking for the minority, he thought that a Trenton, New Jersey, ordinance which forbade the use of sound amplifiers emitting "loud and raucous noises" was so ambiguously drawn that it would violate the Fourteenth Amendment even if no question of free speech were involved. He further felt that no man should be convicted under a law when even a bare majority of the Supreme Court could not agree as to what was actually forbidden.⁹⁰ Dissenting in *United States v. C.I.O.*,⁹¹ he thought the provision of the Taft-Hartley Act forbidding expenditures by labor unions "in connection with" any national election was fatally ambiguous. "Blurred signposts to criminality will not suffice. . . . Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long established constitutional principles surrounding their delimitation." The majority had construed that section of the statute as not applying to expenditures made in connection with the publication of a weekly periodical, thus scrupulously avoiding the constitutional issue. By such a construction Rutledge thought his brethren had abdicated their function of judicial review. To him the Congressional intent was clear, although the language was ambiguous. He, with Black, Douglas and Murphy, would have declared that section of the act unconstitutional. To justify this vigorous exercise of judicial review he reiterated the doctrine of *Thomas v. Collins*:

" . . . [W]hen regulation or prohibition touches them [basic rights] this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the [First] Amendment's meaning. That office cannot be surrendered to legislative judgment, however weighty, although such judgment is always entitled to respect.

"As the Court has declared repeatedly, that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation . . . restricts the rights of conscience, expression, and assembly protected by the Amendment, as are given to other regulations having no such tendency. The

89. This rule was first recognized by the Court in *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 450 (1904). It was first invoked to invalidate a statute in *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914). It has been used in some forty cases since then, invalidation following in about a third of them. See, further, Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

90. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

91. 335 U.S. 106 (1948).

presumption rather is against the legislative intrusion into these domains."⁹²

In the *Hatch Act* case,⁹³ Rutledge forsook the majority, agreeing with Black that "no statute of Congress has ever before attempted to stifle the spoken and written political utterances and lawful political activities of federal and state employees as a class. . . . The section of the Act here held valid reduces the constitutionally protected liberty of several million people to less than a shadow of its substance."

Rutledge was also at variance with the majority in the case of a conscientious objector who was not allowed to practice law in Illinois because of his scruples against bearing arms.⁹⁴ And with Black, Douglas and Murphy he urged that the *Schwimmer* and *Macintosh* cases,⁹⁵ where conscientious objectors had been refused citizenship for the same reasons, had been wrongly decided. They were, in fact, overruled the following year.⁹⁶

When a Justice like Rutledge insisted that the Constitution commands meticulous protection for the rights of criminal defendants, how did he resolve the competing civil libertarian claims where the criminal defendant is himself accused of depriving a person of his rights under the Constitution? Where is judicial zeal focused when two facets of civil liberties compete? *Screws v. United States*⁹⁷ provides some answers. This inconclusive decision involved the constitutionality and interpretation of Section 20 of the Federal Criminal Code—that rather hapless legislative attempt preserved from Civil War days to provide federal protection of civil rights. The defendants sought reversal of their conviction on the ground that the federal law invoked against them was too vague and indefinite to provide any ascertainable standard of guilt. For under our constitutional system criminal statutes must be specific. A further question concerning the "willful" intent of the defendants was raised. The case produced four separate opinions on these questions in no one of which did more than four justices concur.⁹⁸

92. *Id.* at 140. In three other cases Rutledge also protested that vaguely drawn criminal statutes offended basic rights: *Robinson v. United States*, 324 U.S. 282 (1945), *United States v. Petrillo*, 332 U.S. 1 (1947), and *Winters v. New York*, 333 U.S. 507 (1948). On the other hand, when indefiniteness of the criminal statute was alleged in *Screws v. United States*, 325 U.S. 91 (1945), he found the language sufficiently precise. But there the statute was directed at the *protection* of civil liberties, not at a restriction of them.

93. *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). Douglas also dissented, in part. Murphy did not participate.

94. *In re Summers*, 325 U.S. 561 (1945).

95. *United States v. Schwimmer*, 279 U.S. 644 (1929), and *United States v. Macintosh*, 283 U.S. 605 (1931).

96. *Girouard v. United States*, 328 U.S. 61 (1946).

97. 325 U.S. 91 (1945).

98. For a critical discussion of this case see Carr, *Screws v. United States: The*

Although a majority of the Court held the statute constitutional in face of the argument that it was too vague, five Justices sent the case back for retrial because they thought the jury had been inadequately charged on the question of willful intent. Rutledge and Murphy alone thought both that the statute was constitutional and that the evidence of willful intent was unequivocal. They thus demonstrated less meticulous solicitude than did their brethren for the rights of defendants charged with violating the civil rights of another.⁹⁹

In the five cases where Rutledge voted against the right claimed under the First Amendment, the civil liberty issue was subordinate in his opinion. Thus he wrote the majority opinion in *Prince v. Massachusetts*¹⁰⁰ holding that a state child labor statute can prohibit the sale and distribution of religious literature by one of Jehovah's Witnesses. Using the "preferred position" phrase he nevertheless thought the statute justified by the general interest which the community has in protecting its youth. He drew an analogy to compulsory school attendance and vaccination of children which have been consistently sustained regardless of religious objections.¹⁰¹ And in *United States v. Ballard*,¹⁰² Rutledge agreed with the majority that disseminators of religious doctrine may be punished for using the mails to defraud when clear evidence of fraudulent intention is disclosed by the record.¹⁰³ Regulation of the economic affairs of the press did not invade its freedom under the First Amendment in Rutledge's opinion. He was willing to apply both the Sherman Act and the Fair Labor Standards Act to the publishing business.¹⁰⁴ Speaking for the majority, he also remanded a case where denial of religious liberty was claimed, until the issues were "presented with clarity, precision and certainty."¹⁰⁵ Murphy and Douglas thought that the constitutional issue of religious freedom was clear enough.

Separation of church and state. Although the framers of the initial words of the First Amendment may have known precisely what they

Georgia Police Brutality Case, 31 CORNELL L.Q. 48 (1945); Cohen, *The Sercius Case: Federal Protection of Negro Rights*, 46 COL. L. REV. 94 (1946); and KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* 48-61 (1947).

99. Rutledge reluctantly voted to remand the case for retrial, however, in order to avoid a stalemate in the disposition of the case.

100. 321 U.S. 158 (1944).

101. Jackson, in an opinion "dissenting from the grounds of affirmance," used the occasion to analyze the basis of disagreement, as he saw it, among members of the Court in previous Jehovah's Witnesses cases.

102. 322 U.S. 78 (1944).

103. Jackson, curiously enough, was the only one who thought that the religious freedom of the defendants had been infringed.

104. *Associated Press v. United States*, 326 U.S. 1 (1945), and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Murphy alone of the Roosevelt appointees dissented in each case.

105. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

meant by "Congress shall make no law respecting an establishment of religion," the members of the Supreme Court cannot agree on it. The word "establishment" settled a semantic fog over the problem of banning Caesar from the temple. The question of whether Caesar had trespassed in the situation presented by *Everson v. Board of Education*¹⁰⁶ was a matter for debate among three different opinions comprising a total of almost forty pages.¹⁰⁷ New Jersey had reimbursed parents from general tax funds for expenses of transporting children to parochial schools where they received both religious and secular education. Black, speaking for Vinson, Reed, Douglas, and Murphy, thought that this did not constitute "a law respecting an establishment of religion." Rutledge, writing the principal dissent with which Frankfurter, Jackson, and Burton agreed, thought most emphatically that it did. To the majority,

"[t]he 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"¹⁰⁸

But the majority, in spite of this broad dictum, held that the payment from public funds of transportation expenses of parochial school pupils did not breach the wall of separation. Admitting that such payments undoubtedly facilitated attendance at parochial schools, the majority held that the ordinance "does no more than . . . help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." The expenditures were

106. 330 U.S. 1 (1947).

107. For a discussion of this case and its next of kin, *People ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), see Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387 (1948); Note, *Tracing the "Wall": Religion in the Public School System*, 57 YALE L.J. 1114 (1948). For a more extended examination of the historical background of the problem, see O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949) and JOHNSON & YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* (1948).

108. 330 U.S. 1, 15 (1947).

for a public purpose—to pay the bus fares of all school children, including those who attend parochial schools. This was essentially similar to “such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks” which the parochial schools enjoy. To forbid this “is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.” Thus, although “the wall between church and state . . . must be kept high and impregnable . . . New Jersey has not breached it here.”

To Jackson this was like Lord Byron’s Julia, who “whispering ‘I will ne’er consent’,—consented.” To Rutledge it was worse, for it placed a less rigid construction on the establishment of religion clause of the First Amendment than it did on the freedom of religion clause. The prohibitions of the former, he felt, should be no less broadly enforced than the latter.¹⁰⁹ To support this position he reviewed the historical evidence, particularly Madison’s views on the subject, for “irrefutable confirmation of the Amendment’s history.”¹¹⁰ From this he concluded that the authors of the First Amendment—again, particularly Madison—condemned “support” for religion by use of the taxing power after the fashion of the New Jersey ordinance. And “support” of this kind constitutes a “law respecting an establishment of religion.”

Rutledge disagreed fundamentally, therefore, with the majority thesis that the Amendment merely “requires the state to be a neutral in its relations with” religion. Neutrality, like the farmer’s daughter, is subject to seduction. “Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any.”¹¹¹ Since neutrality as applied by the majority provides no logical stopping point, it infringes the basic principle of separation. Therefore the design of the framers “was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion . . . in any guise, form, or degree.”¹¹²

However, the historical evidence on which Rutledge based his position is more equivocal than his reading of it admitted. The theme of most

109. “We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.” *Id.* at 63.

110. “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.” *Id.* at 33.

111. *Id.* at 53.

112. *Id.* at 31–3.

state constitutional provisions relating to the separation of church and state, framed prior to the First Amendment, was simply a prohibition against preference for a particular sect.¹¹³ Madison in his *Memorial and Remonstrance Against Religious Assessment in Virginia* did assert "that in matters of Religion no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."¹¹⁴ Rutledge relied heavily on such passages from Madison's writings as indicative of the views of the primary author of the First Amendment. But Madison was objecting simply to making the Christian religion the *established* religion of the state of Virginia. It is by no means clear that tax support of the kind provided by New Jersey meant "establishment" to either Madison or Jefferson whose views the dissenting opinion invokes at length. Both men as President used tax funds for chaplains in Congress, the armed forces, and for religious education among the Indians.¹¹⁵

Insofar as the historical evidence is concerned, it would appear that the intent of the framers is inconclusive with respect to the issue presented in the *Everson* case. Probably no clear intent is demonstrable beyond the broad concept that Caesar remain aloof from the affairs of the deity. How aloof is not revealed as unequivocally as Rutledge's argument claimed. Thus the intent of the framers, while relevant, is not the only key to the semantic puzzle of a "law respecting an establishment of religion." As Jackson with characteristic candor observed a year later, "It is idle to pretend that . . . we can find in the Constitution one word to help us as judges decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our prepossessions."¹¹⁶

In *McCullum v. Board of Education*¹¹⁷ Black applied the broad dictum of his majority opinion in the *Everson* case to forbid the version of "released time" religious instruction in the public schools adopted by the Board of Education of Champaign, Illinois. The use of tax-supported property for religious instruction and the close cooperation between school authorities and a local religious council was held to integrate the state's compulsory education system with sectarian religious education so closely as to fall under the ban of the First Amendment. Rutledge's strong dissenting opinion in the *Everson* case

113. See Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387, 388-9.

114. The remonstrance is set forth as an appendix to Rutledge's *Everson* dissent. The quotation is from paragraph 1.

115. See O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949) for a vigorous attack on the accuracy of Rutledge's historical interpretation.

116. *People ex rel. McCullum v. Board of Education*, 333 U.S. 203, 237 (1948) (concurring opinion).

117. 333 U.S. 203 (1948).

was probably not without influence, for all but Reed agreed in condemning the Champaign plan. Frankfurter, in an opinion concurring with the majority, emphasized that "released time" programs vary among the many communities where they are employed, and that some may be constitutionally "unexceptionable." Thus "the formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. . . . We do not attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program." With this as well as with the majority opinion Rutledge concurred.¹¹⁸

Civil Liberties in Wartime. In the wartime cases affecting civil liberties (excepting the cases on Hawaiian martial law, Japanese war criminals, and denaturalization which are discussed elsewhere) Rutledge voted with the majority supporting the government in all but two actions—one involving treason, the other, sedition.¹¹⁹ In only one, *Hirabayashi v. United States*,¹²⁰ did he express himself separately. This was the first of three cases to reach the Court involving the Army's program of curfew, evacuation to inland areas, and subsequent relocation for persons of Japanese ancestry living on the West Coast. A unanimous Court, bypassing the evacuation issue, upheld the curfew order as an emergency war measure. Rutledge wanted to be sure that the door would remain open for future judicial review of such action. He concurred "except for the possible suggestion . . . that the Courts have no power to review any action a military officer may 'in his discretion' find it necessary to take with respect to civilian citizens in military areas." The evacuation program itself was reviewed in *Korematsu v. United States*¹²¹ and upheld, although not without pointed warnings from the Court of the dangers of race discrimination. Rutledge was again with the majority, but Murphy was not satisfied that the plea of public necessity urged by the military authorities was sufficiently demonstrated to justify the ugly racism and guilt by heredity which permeated the program.¹²² In neither of these cases

118. The case produced four separate opinions: Black's opinion for the majority; Frankfurter's concurring opinion in which Jackson, Rutledge, and Burton joined, a concurring opinion by Jackson, and Reed's lone dissent.

119. For a general discussion of these cases see Fraenkel, *War, Civil Liberties and the Supreme Court*, 55 YALE L.J. 715 (1946).

120. 320 U.S. 81 (1943).

121. 323 U.S. 214 (1944).

122. Roberts and Jackson also dissented. At the same time a unanimous Court held that loyal citizens of Japanese ancestry could not be detained against their will in the relocation centers to which they had been evacuated from the West Coast. *Ex parte Endo*, 323 U.S. 283 (1944).

For a critical analysis of these three cases on the treatment of Japanese-Americans see Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Dembitz, *Racial Discrimination and Military Judgment: the Supreme Court's Korematsu and Endo Decisions*, 45 COL. L. REV. 175 (1945); KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* (1946); CORWIN, *TOTAL WAR AND THE CONSTITUTION* 91-100 (1947).

did the Court apply the clear and present danger test, nor did Rutledge take exception to this, acquiescing, instead, in the more latitudinarian rule of reasonableness of the governmental action in the light of the war emergency.

In the two treason cases which came before the Court, Rutledge voted with the majority against conviction in the first¹²³ on the basis of what the four dissenters¹²⁴ called an "ultra-rigid test" as to the nature of the overt acts necessary to spell out treason. He was also with the majority in upholding the conviction in the second case two years later,¹²⁵ Murphy registering the only dissent. In *Hartzel v. United States*,¹²⁶ Rutledge voted with a majority of five to reverse the conviction of a Nazi protagonist on the ground that willful intent—required by the Espionage Act under which Hartzel was convicted by the trial court—had not been proved beyond reasonable doubt.

Although he voted against the government's contention in only two of these five cases Rutledge, nevertheless, was more favorably disposed to the civil liberties claims than either Douglas or Black. For Douglas voted against the government's contention in none, and Black only in the *Cramer* case. Murphy, on the other hand, upheld the claim of the individual in all but the *Hirabayashi* case and rejected it there only with grave reservations.

Deportation and Denaturalization. The right of aliens and naturalized citizens to enjoy the maximum security against the threat of deportation occupied a high place in Rutledge's conception of civil liberties.¹²⁷ Participating in six cases involving these issues, he voted against the government's contention in all of them. Of the other Justices, only Murphy was like-minded. The only instance in which Rutledge was not in entire agreement with him was when the government's hoary struggle to deport Harry Bridges came up for review in 1945.¹²⁸ To Murphy the deportation statute itself was unconstitutional, first, because it rested on the principle of guilt by association, and second, because it did not meet the clear and present danger test. Rutledge was content to join the majority opinion which construed the statute as not applying to Bridges.¹²⁹

123. *Cramer v. United States*, 325 U.S. 1 (1945).

124. Douglas wrote the dissent. Stone, Black and Reed concurred.

125. *Haupt v. United States*, 330 U.S. 631 (1947).

126. 322 U.S. 680 (1944).

127. For a careful discussion of these issues see KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* (1946), especially cc. 2 and 4.

128. *Bridges v. Wixon*, 326 U.S. 135 (1945).

129. The only other deportation case in which Rutledge participated was *Ludecke v. Watkins*, 335 U.S. 160 (1948). There a majority refused to disturb an order deporting a German enemy alien on the grounds that under the circumstances the finding of the Attorney General was not subject to judicial review, and that the termination of the war was a question for the political branch of the government, not for the courts, to decide. The four dissenters would have been less sparing of judicial review. Black thought that

In considering the validity of denaturalization proceedings the Supreme Court has framed the general principle that if it can be proved that the defendant took his oath of attachment to the United States Constitution with mental reservations at the time he secured his naturalization certificate, his citizenship may be cancelled for fraud.¹³⁰ In the denaturalization cases decided since 1943 Rutledge took a position fully shared only by Murphy. It amounts to this: first, at the very least a denaturalization action should be regarded as imposing the most severe kind of punishment. Therefore such a proceeding requires all the safeguards of criminal procedure provided by the Bill of Rights. Second, under the Constitution, Congress itself probably does not have the power to denaturalize by "any process which takes away . . . citizenship for causes or by procedures not applicable to native-born citizens. . . . In my opinion, the power to naturalize is not the power to denaturalize. The act of admission must be taken as final, for any cause that may have existed at that time."¹³¹

Both these points require comment. The second contention comes very close to denying that Congress enjoys the power of denaturalization at all. For the circumstances under which native-born citizens may be deprived of all their rights of citizenship, and these alone, are difficult to imagine. This contention stems obviously from the belief that the government must deal with the transgressions of naturalized citizens—whatever they may be—in the same ways as it does with those of the native-born. To employ any other standard places naturalized citizens "in a separate and inferior class." Against this status of "second-class citizens" for those who have acquired rather than inherited citizenship Rutledge consistently protested. In *Schneiderman v. United States*¹³² he observed, "If this is the law and the right the naturalized citizen acquires, his admission creates nothing more than citizenship in attenuated, if not suspended, animation. . . . It may be doubted that the framers . . . intended to create two classes of citizens, one free and independent, one haltered with a lifetime string tied to its status."¹³³

insofar as deportation of enemy aliens was concerned the war should be considered as terminated by 1948. Douglas would have examined the findings of the Attorney General since he saw no difference, for the purpose of judicial review, between the deportation of enemy aliens and any other deportation proceeding. They are both subject to the same due process requirements or reasonable notice and hearing. Rutledge, with Murphy, concurred in both of these dissents.

130. *Schneiderman v. United States*, 320 U.S. 118 (1943); *Baumgartner v. United States*, 322 U.S. 665 (1944); *Knauer v. United States*, 328 U.S. 654 (1946); *Klapprott v. United States*, 335 U.S. 601 (1949).

131. *Knauer v. United States*, 328 U.S. 654, 677-8 (1946).

132. 320 U.S. 118, 165 (1943) (concurring opinion).

133. Cf. Marshall's statement in 1824: "A naturalized citizen becomes a member of society, possessing all the rights of a native citizen, and standing in view of the Constitution, on the footing of the native. The Constitution does not authorize Congress to enlarge or abridge these rights." *Osborn v. Bank*, 9 Wheat. 738 (U.S. 1824).

But in the *Schneiderman* case Rutledge did not embrace this second contention, for he there conceded "that the power to revoke exists and rightly should exist to some extent. . . ." ¹³⁴ Three years later, however, in *Knauer v. United States*, ¹³⁵ he based his dissenting opinion partly on the view that "the power to naturalize is not the power to denaturalize." Only Murphy agreed with this.

Since the Court has not accepted the second contention, ¹³⁶ Rutledge insisted on the first as affording the minimal standard of protection for naturalized citizens. Thus in the most recent of these cases, *Klapprott v. United States*, ¹³⁷ he asserted:

"If in deference to the Court's rulings we are to continue to have two classes of citizens in this country . . . I cannot assent to the idea that the ordinary rules of procedure in civil causes afford any standard sufficient to safeguard the status given to naturalized citizens. . . . Regardless of the name given to it, the denaturalization proceeding when it is successful has all the consequences and effects of a penal or criminal conviction, except that the ensuing liability for deportation is a greater penalty than is generally inflicted for crime.

* * * *

"To treat a denaturalization proceeding . . . as if it were nothing more than a suit for damages for breach of contract . . . ignores, in my view, every consideration of justice and reality concerning the substance of the suit and what is at stake.

"To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure safeguarded by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment." ¹³⁸

The majority opinions in these two cases as well as the intervening case of *Baumgartner v. United States* ¹³⁹ had insisted that evidence of

134. *Schneiderman v. United States*, 320 U.S. 118, 167 (1943).

135. 328 U.S. 654 (1946).

136. The Court has derived the power to denaturalize from the constitutional grant of power to Congress "To establish an uniform Rule of Naturalization" (Art. I, §8) plus the "necessary and proper" clause. See Douglas' majority opinion in the *Knauer* case.

137. 335 U.S. 601 (1949).

138. *Id.* at 619, 616-17. Murphy agreed. This view Rutledge had previously pressed in the *Schneiderman* case and in his dissent in the *Knauer* case.

139. 322 U.S. 665 (1944). Here a unanimous Court followed the rule of the *Schneiderman* case in setting aside a denaturalization order of a Nazi sympathizer for lack of unequivocal evidence that the naturalization certificate was obtained fraudulently. Black, Douglas and Rutledge joined a concurring opinion by Murphy emphasizing the "patent" lack of such evidence.

fraud in obtaining naturalization must be "clear, unequivocal and convincing." By thus requiring proof beyond a reasonable doubt the Court had in effect applied the standards of a criminal proceeding to denaturalization actions. Only in the *Knauer* case did the majority think this standard was sufficiently met to permit denaturalization.¹⁴⁰ But in all three cases Rutledge thought the standards of criminal proceedings should have been applied more explicitly. And in the *Klapprott* case he thought that the standards applied in the three previous cases had been diluted.¹⁴¹ In this he expressed the same insistence pressed in the *John L. Lewis* contempt case,¹⁴² that accusations which in fact entail punishment be clothed with the procedural guaranties of the Sixth Amendment.

To sum up, Rutledge next to Murphy was the most consistent champion of substantive civil liberties on the Court. Although agreeing substantially with Black and Douglas, he went much further than they have gone in supporting individual rights in deportation and denaturalization proceedings. Rutledge also went further than Black and Douglas with respect to the separation of church and state. To him the First Amendment forbade in absolute terms even indirect, non-preferential forms of public aid to religious activity of any kind.

In the wartime cases involving Japanese-Americans, treason, and sedition he voted against the government contention in only two out of five cases—one treason and one sedition case. Nevertheless, he was on the side of protecting individual rights more than any of the present Justices in these cases. Only when he assented to the government's questionable treatment of the Japanese-Americans on the West Coast did he depart from his otherwise consistently rigid standard of judgment in civil liberties issues. There, the standard to which he assented was the reasonableness of governmental action in the context of the war emergency rather than the strict version of the clear and present danger rule as in *Thomas v. Collins*.¹⁴³ His position in these cases marked also an *ad hoc* departure from his usual view that governmental action intruding on rights which occupy a preferred position in the scale of constitutional values is presumptively invalid.

140. Douglas for the majority declared "there is solid and convincing evidence that . . . when he [Knauer] foreswore allegiance to the German Reich he swore falsely." Black, in a concurring opinion, was satisfied "beyond all reasonable doubt" that Knauer obtained his citizenship fraudulently.

141. The Court granted a hearing on the merits of a denaturalization judgment which had been rendered by default against the petitioner without requiring proof of the allegation or benefit of counsel. Under his standard Rutledge thought that the complaint should have been dismissed. Murphy was of the same opinion.

142. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947).

143. 323 U.S. 516 (1944).

CONCLUSION

Where the basic values of democratic life were concerned Rutledge's interest in a pragmatic adjustment of competing claims evaporated. If, as he once observed, federalism was the unique institutional core of American democracy,¹⁴⁴ the rights of persons provided the human core. They transcended all else. Nothing less than a rigorous protection of all personal rights on a uniform national scale would satisfy his interpretation of the constitutional mandates. Thus he voted to uphold the claim of personal rights in 84% of all the non-unanimous decisions involving civil liberties—including both procedural and substantive ones. Excluding the war cases, he so voted in 87% of the cases.

Although he consistently asserted that the guaranties of the First Amendment occupied a preferred position, this did not mean that he thought guaranties of procedural rights occupied a deferred position. As a matter of cold statistics he voted to uphold the claim of criminal defendants in 91% of all the non-unanimous decisions involving procedural rights. When rights guaranteed by the First Amendment were involved, he voted to uphold the right in 79% of the non-unanimous decisions. These figures alone would therefore imply a preferred position in his mind for procedural rights. This, of course, is deceptive. There was no hierarchy of values among civil liberties for Rutledge. They were all primary, for they were all bulwarks of human dignity.

To Rutledge, the vast expansion of governmental power in social and economic matters required correspondingly greater protection of civil liberties. The impact of the massive political community on individuality must be cushioned by comprehensive safeguards of personal liberty if the promises of democratic life are to remain meaningful. Big government can remain healthy only if civil liberties are rigorously protected. Thus he contributed as forcefully as anyone to the recent trend of the Court in practicing judicial self-restraint where economic and social legislation is involved. But when fundamental democratic values are at stake, he asserted in *Thomas v. Collins*, this "presents a question this Court cannot escape answering independently, whatever the legislative judgment."¹⁴⁵ To him the protection of personal liberty was the most vital responsibility of the Court.

Concerning issues of free speech, press, and religion, Rutledge's basic premises as well as his voting record were virtually identical with those of Black, Douglas and Murphy. This solid minority of four had been able to enlist the sporadic support of either Reed or Jackson to give them majority status from time to time. Black and Douglas are now in a virtually hopeless minority position. Their premises will control decision in civil liberties cases only if they can enlist the adherence of three other Justices. Reed, Jackson, Clark, and Minton are the most

144. RUTLEDGE, A DECLARATION OF LEGAL FAITH 75-6 (1947).

145. 323 U.S. 516 (1944).

possible candidates. But that any three of them will be so persuaded seems unlikely. It would thus appear that the 1948 term of the Supreme Court marked the end, for a while at least, of an expanding definition of civil liberties.

The death of Justice Rutledge all but marks the passing of what came to be known as the Roosevelt Court. However the future lines may be drawn, his opinions will be a persistent force in the evolving experiment of democratic living.