RUTLEDGE AND CIVIL LIBERTIES

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"I believe in law. At the same time I believe in freedom. And I know that each of these things may destroy the other. But I know too that, without both, neither can endure . . . justice too is a part of life, of evolution, of man's spiritual growth. . . . Law, freedom, and justice—this trinity is the object of my faith."[1]

The above quotation from the pen of Wiley Rutledge expresses the faith of a great man, a great teacher, and a great judge. Rutledge possessed unbounded faith in democratic institutions, and abiding faith in his family, in his friends, in his law schools, and in his students. This faith, attended by a warmth and humaneness unique among men, created an interchange of complete confidence between Rutledge and those with whom he associated.

Rutledge expended himself widely in the affairs of the communities in which he lived. He was a close friend of all who knew him—community leaders, lawyers, churchmen, grocers, garagemen, former students and colleagues, law clerks; a list would run into the hundreds. His letter writing was as renowned as it was voluminous. Yet he remained without political ambitions, a man of great courage with high standards of honesty and ethics in all his relationships.

Intensely democratic, Rutledge stood for definite principles and actively supported many controversial issues of the day, such as the child labor amendment and the Roosevelt Court bill. The social and political views of Rutledge were his own and were not tied to or controlled by any group. His was an independent liberalism of the type of Senator Norris of Nebraska, with whom he had a long and close friendship. He greatly admired Norris, as well as Bryan, Wilson, and others. Of the Justices who had preceded him on the Supreme Court, he was most influenced by Marshall, whose bold innova-

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1. RUTLEDGE, A DECLARATION OF LEGAL FAITH 6, 9, 18 (1947). Rutledge states further:

> I believe therefore in justice. I believe in abstract justice, though I cannot define it. But in any legal sense I believe in it only as the source from which conceptions of concrete and legally relevant justice arise. I believe in concrete justice, in particular justice, and in the possibility of its growth and expansion. I believe in it as the end of legal institutions and in them as the means by which it may be achieved. I believe too in growth of the law and in this as the only means for making reconciliation between the conflicting forces and conceptions, separately considered, or order and freedom. Only thus may right accommodations in social living and the maintenance of stable, social relationships be fulfilled.

tions had welded together a federal system with a strong central government among many governments.[2] While he believed in the results reached by Holmes and Brandeis, he followed neither the philosophy nor judicial restraint of Holmes, nor the judicial craftsmanship of Brandeis.

Rutledge carried his independent liberalism with him to the bench. But this was not the guide to his conclusions. He studied each case extensively; the record and briefs were underlined and marked, and tips of pages were turned down for further use; the law clerk's memoranda received equally meticulous treatment; all this was followed by a careful reading of the cases, articles and books on the subject. By this time Rutledge was usually further from a decision in his own mind than at the beginning. Before he could formulate his conclusions, he had to begin writing, *living* the case. The parties, the witnesses, the attorneys, the judges—all who had played a role—were animated and brought on stage; the method was one of integrating the real problems of real people with the social problems involved. Occasionally, much of this procedure appeared in his opinions, making them seem labored, repetitive, and unduly lengthy. But for him this was the process of judging. His was not a legalistic, doctrinal approach, nor was he greatly influenced by precedents and legal principles independent of the problems of the case. His method was a fusion of the legal principles, findings, remedies, the whole of the judicial process, with his understanding of the problems of each case considered in the broad sphere of social policy.

Although Rutledge was a student of the commerce clause and a firm believer in a strong federalism, his faith in "law, freedom, and justice" was most noticeable in the cases involving civil liberties. The search of the individual for moral and spiritual, political and economic self-realization requires broad constitutional protections of speech, writings, and religious activities, and freedom to engage in political affairs and discussion. In addition, the dignity of the individual demands similar safeguards in each step of the criminal process. These shields Rutledge fought to give.

Freedom of Religion

Rutledge as a member of the United States Court of Appeals first judicially expressed his concern over religious freedom in *Busey v. District of Columbia*.[3] The case presented a comparatively new application of the con-

2. *Id.* at 35.

3. 129 F.2d 24 (D. C. Cir. 1942), *cert. granted,* 319 U. S. 735 (1943), *judgment vacated per curiam,* 319 U. S. 579 (1943) (Rutledge dissenting). See Edgerton, *Mr. Justice Rutledge,* 63 Harv. L. Rev. 293, 295 (1949), where Judge Edgerton of the Court of Appeals for the District of Columbia, who wrote the majority opinion in Busey v. District of Columbia, described the case as follows:

> We had the question whether a small license tax on the privilege of selling things in streets was constitutional in its application to nonprofit sales of religious tracts. The majority thought it so clearly constitu-

stitutional protections to religious liberty: whether a general licensing statute which imposed a flat tax could be applied to the distribution of religious literature in the public street. The Jehovah's Witnesses were engaged in worldwide religious proselytism, distributing religious books, magazines and pamphlets, in the streets and in house to house canvassing;[4] playing phonograph records in the streets, in public parks, and in private homes and apartments;[5] and holding public parades and meetings and assemblies.[6] The Witnesses were seeking small sums of money, but not profit; the amounts received were to be used exclusively for religious matters.

The *Busey* case was clouded with problems of statutory construction and whether the distribution constituted a sale. However, Rutledge in his dissent looked through those questions to the basic issue—constitutional validity. For him, such proselytizing constituted religious expression for these zealous people.[7] In the absence of a showing of fraud or of some serious immorality or injury to society, neither the courts, the legislature, the executive, nor any governmental body has the capacity to say what constituted "religion" for any individual or group. Rutledge saw clearly that the privilege of determining the form of one's religious expression was a vital part of his freedom.[8] The general public would have been shocked at the suggestion of licensing and taxing orthodox religious services. If such would have been a violation of the First Amendment, so was the license and tax on the evangelism of the Jehovah's Witness sect. Rutledge's broad vision shines clearly in the very beginning of these cases granting constitutional protection to those who go forth in the name of religion; for him the answer was clear—the distribution of religious literature could not validly be subjected to a license or tax. The power of government was to be narrowed to the protection of

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tional on precedent and principle that the opinion I wrote for the Court. as I now think erroneously, hardly concerned itself with the social interests involved. Rutledge was more functional. He thought the tax infringed freedom of the press and religion, and he filed an eloquent dissent.

4. Schneider v. New Jersey, 308 U. S. 147 (1939) (McReynolds, J., dissenting) (municipal ordinances prohibiting distribution of religious and other literature on public streets held invalid; likewise ordinances requiring police permits to distribute on public streets and canvass from house to house); Lovell v. Griffin, 303 U. S. 444 (1938) (ordinance prohibiting as a nuisance distribution of literature within city without first obtaining written permission of city manager held invalid on its face).

5. Cantwell v. Connecticut, 310 U. S. 296 (1940) (state statute forbidding solicitation of money for religious use without a certificate from a state official, who had discretion to grant or withhold approval, held previous restraint on the free exercise of religion and invalid).

6. Cox v. New Hampshire, 312 U. S. 569 (1941) (reasonable regulation of streets for parades and processions to protect public use and convenience upheld; reasonable or nominal license fees to cover administrative and police expenses also held valid).

7. Busey v. District of Columbia, 129 F.2d 24, 37 (D. C. Cir. 1942), (Rutledge. J., dissenting).

8. *Ibid.*

streets and other public areas for the general use. Broader restrictions could not be justified.

On June 8, 1942, the Supreme Court upheld convictions of Jehovah's Witnesses for the distribution of religious literature without a license in three cases from three states.[9] Mr. Chief Justice Stone, in dissenting, was substantially in accord with the views expressed by Rutledge in the *Busey* case. Stone looked upon the license fees as a tax on the privilege of disseminating ideas;[10] such regulations could be made a ready instrument for destruction of the rights underlying the First Amendment.[11] If a license tax were supportable at all, it was only because a solicitation of funds was involved. But the flat fees and the possibility of multiplying these in cities throughout the country made abridgment of religious expression an inevitable consequence, notwithstanding the solicitation of funds.[12]

The cases affirming the restrictions on the proselytizing of the Jehovah's Witnesses were short lived. On February 15, 1943, the day Rutledge took his seat as Associate Justice of the United States Supreme Court, rehearing was granted.[13] The resignation of Mr. Justice Byrnes and the appointment of Rutledge provided the margin for reversal.[14] The Court split sharply in these cases.[15] The essence of the majority's position was that the form of

9. Jones v. Opelika, 316 U. S. 584 (1942) (Stone, C. J., Black, Douglas, and Murphy, JJ., dissenting). The grounds of the majority opinion were essentially two: (1) the fact that the Jehovah's Witnesses used the streets to disseminate their religion: The privilege of expressing one's ideas "may be limited by action of the proper legislative body to times, places and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order . . . the proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism. . . ." *Id.* at 594; (2) the commercial aspects of the Jehovah's Witnesses dissemination of religion: "When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing." *Id.* at 597.

10. *Id.* at 602.

11. *Id.* at 607, 608.

12. *Id.* at 604, 609, 617.

13. Petition for rehearing granted in Jones v. Opelika, and in three other cases, 318 U. S. 796 (1943).

14. Jones v. Opelika, 316 U. S. 584 (1942), *judgment vacated,* 319 U. S. 103 (1943) (Reed, Roberts, Frankfurter, and Jackson, JJ., dissenting).

15. In the flat license cases, Murdock v. Pennsylvania, 319 U. S. 105 (1943) (Reed, Frankfurter, Roberts, and Jackson, JJ., dissenting), without disagreeing as to the high place of religion under the First Amendment the dissenting Justices refused to accept such broad areas of freedom for such wide scale proselytism. Two of the reasons given were (1) that a city may charge those who use its facilities to help bear the cost, even when those facilities are used for the dissemination of ideas; and (2) "oppression" of religion of the Jehovah's Witnesses sect should not be assumed but proved by a factual showing.

The majority, at least by dictum, would have allowed a tax related to the services rendered or a "nominal" fee for the service, but it was its collective judgment that the effect of the flat tax was to constitute suppression, or at least potentially so, of the type of religious evangelism engaged in by the Jehovah's Witnesses sect. The majority also recognized the distinction between religious and commercial advertising through distri-

evangelism used by various sects—preaching their Gospel in public places and in thousands upon thousands of homes in an effort "through personal visitations to win adherents to their faith"—holds "the same high estate under the First Amendment as [does] worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press."[16]

Mr. Justice Jackson in a dissenting opinion emphasized the abusiveness of the literature criticising other religions and the great numbers who engaged in the house to house canvassing, both of which tended to cause disruption. He concluded that the cities should be permitted to regulate.[17] But for the moment, the activity of the Jehovah's Witnesses was religion and entitled to protection as such. Although the majority did not question the sincerity or integrity of the practices of the sect, they recognized that not all conduct could be made a "religious rite and by the zeal of the practitioners [be] swept into the First Amendment."[18]

Rutledge's role in the Jehovah's Witnesses cases continued with his opinion in *Prince v. Massachusetts*.[19] A state statute prohibited minors from selling newspapers or magazines or from carrying on any trade in the streets. A mother's offense was "permitting" her ward, a girl of nine years, to distribute religious literature in the streets. The state court held this to be in violation of the statute. Mr. Justice Rutledge, who favored extensive enlargement of First Amendment freedoms to the resulting limitation on the powers of the states, nevertheless determined the state's interest in the protection of the welfare of children to be greater in this instance than the freedom of religious expression.[20] The state interest was also greater than parental authority.[21] This judgment was by no means easy in view of the

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bution of pamphlets. Murdock v. Pennsylvania, *supra* at 110, 111. *Accord,* Valentine v. Chrestensen, 316 U. S. 52 (1942); Jamison v. Texas, 318 U. S. 413, 418 (1943). In Martin v. Struthers, 319 U. S. 141 (1943) (Frankfurter, Reed, Roberts and Jackson, JJ., dissenting), a municipal ordinance prohibiting any person to knock on doors or otherwise summon to the door the occupants for the purpose of distributing handbills was held invalid as applied to the religious dissemination of the Jehovah's Witness sect. The Court's opinion was narrowed to protect the resident owner from receiving those he warns to stay away. In Douglas v. Jeannette, 319 U. S. 157 (1943) (Jackson, J., concurring), jurisdiction of a United States District Court was upheld, without diversity or allegation of $3,000 in controversy, to determine the constitutional validity of a municipal ordinance, requiring license and tax, but not upheld to exercise the equity power of a federal court because there was no showing of irreparable injury "both great and immediate." Douglas v. Jeannette, *supra* at 164.

16. Murdock v. Pennsylvania, 319 U. S. 105, 109 (1943).

17. Douglas v. Jeannette, 319 U. S. 157, 166 (1943).

18. Murdock v. Pennsylvania, 319 U. S. 105, 109 (1943).

19. Prince v. Massachusetts, 321 U. S. 158 (1944) (Jackson, Roberts and Frankfurter, JJ., concurring on different grounds; Murphy, J., dissenting).

20. *Id.* at 165.

21. *Id.* at 166

previous Jehovah's Witnesses cases.[22] The rights of children to freedom of expression of religious beliefs and of parents to give their children religious training in schools had been recognized previously.[23] But considerable state regulation for the welfare of children must also be recognized, even to the extent of taking precedence over religious expression and over a parent's right to guide his child.[24] The state's power over the child in such instances is greater than that over the adult; the justifications are greater.[25]

A weakness which may be attributed to Rutledge's opinion is the failure to give recognition to the "clear and present danger" principle in order to determine the line where the protected area of religion ends and state power begins. As Rutledge himself so clearly defined the application of the principle in *Thomas v. Collins,*[26] two determinable factors are required—a state interest so paramount that if not recognized grave dangers to society would result; and the occurrence of such dangers being imminent. Were these requisites present in this case?[27] Perhaps to safeguard the community welfare from certain harms is so patently paramount to the public interest there is no necessity of assaying justification under the "clear and present danger" test. If so, judicial determination then becomes a weighing of society's interest against the necessity of preserving inviolate the First Amendment freedoms, a part of democracy's underlying foundation. To maintain this foundation the Court must require that infringing statutes have something more than a "rational basis." This does not mean that snake charming or mail fraud need ever be protected as religious rites.[28] Yet, when the circumstances do not concern the obvious, the Court faces an anomaly. It does not want to determine what is for the community's welfare; neither can it determine what constitutes "religion"—this must necessarily be left for the individual. However, these are the factors which must be measured and assayed to define the sacred areas of religious freedom and the restraints on the processes of

22. Douglas v. Jeannette, 319 U. S. 157 (1943); Martin v. Struthers, 319 U. S. 141 (1943); Murdock v. Pennsylvania, 319 U. S. 105 (1943); Jones v. Opelika, 319 U. S. 103 (1943).

23. Board of Education v. Barnette, 319 U. S. 624 (1943) (state could not make the flag salute ceremonies in public school compulsory when it interfered with religious beliefs of Jehovah's Witnesses); Pierce v. Society of Sisters, 268 U. S. 510 (1925) (state could not require all children to attend secular public school); Meyer v. Nebraska, 262 U. S. 390 (1923) (state could not prohibit all languages but English taught in primaries).

24. Prince v. Massachusetts, 321 U. S. 158, 166 (1944).

25. *Id.* at 167, 168.

26. Thomas v. Collins, 323 U. S. 516, 530 (1945).

27. "If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child. . . . The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect." Prince v. Massachusetts, 323 U. S. 171, 174 (1944) (Murphy, J., dissenting).

28. *Id.* at 166.

government.[29] Cases and precedents, doctrines and principles, and even history—these are of little real help. Each case brings new circumstances, and out of these the Court must add to the structure of democracy. Wisdom and understanding, philosophy and statesmanship, such as Rutledge demonstrated in the Jehovah's Witnesses cases, will serve to produce lasting impressions.

Freedom of Speech

Rutledge's contribution to free speech and assembly is highlighted by a competent and noteworthy opinion in *Thomas* v. *Collins*.[30] Involved was the validity of a particular application of a Texas statute requiring union organizers to register before soliciting membership within the state.[31] R. J. Thomas, president of the United Auto Workers, had scheduled an address before an assembly of Houston oil refinery employees. A restraining order, issued ex parte only a few hours before the address, enjoined Thomas from solicitation, unless he registered with the Secretary of State. This was understood to forbid also the speech and assembly. During the speech in support of the labor movement, Thomas invited one nonunion man to join the Oil Workers Industrial Union. The judgment of the state court, holding Thomas in contempt, considered the whole speech and assembly to be "solicitation"; hence, it could not be upheld as based on the single invitation.[32]

Rutledge, after a careful analysis of the record, significantly showed that Thomas was in Texas for one purpose only—to make a public address which had been widely advertised. Specifically decided was whether the registration statute could be validly applied to one speaking at a peaceful assembly on the benefits of the union movement. By so restricting the issue and holding only the particular application invalid, Rutledge was able to preserve the

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29. See Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811 (1950).

30. 323 U. S. 516 (1945) (majority: Rutledge, Black, Douglas, and Murphy, JJ., with Jackson, J., concurring; dissenting: Roberts, J., with Stone, C. J., Reed, and Frankfurter, JJ.).

See notes, 25 B. U. L. REV. 151 (1945); 33 CALIF. L. REV. 465 (1945); 45 COL. L. REV. 465 (1945); 14 FORDHAM L. REV. 59 (1945); 33 GEO. L. J. 227 (1945); 21 IND. L. J. 61 (1945); 43 MICH. L. REV. 1159 (1945); 30 MINN. L. REV. 204 (1946); 20 NOTRE DAME LAW. 336 (1945); 19 TENN. L. REV. 494 (1946); 31 VA. L. REV. 691 (1945).

31. The statute's purpose was to require paid union organizers to file with the state secretary of state and secure an organizer's card stating his name and his labor union affiliations. The state courts were given power to issue restraining orders, injunctions and any other writs or processes appropriate to enforce the provisions of the Act. Additional enforcement proceedings included civil penalties not exceeding $1,000 against the union for violations, and misdemeanor penalties against the union or organizer not to exceed $500 and/or confinement not to exceed 60 days. A labor organizer was anyone receiving remuneration for solicitation of union memberships. 323 U. S. 516, 519 n.1 (1945); *Ex parte* Thomas, 141 Tex. 591, 174 S. W.2d 958 (1943).

32. 323 U. S. 516, 529 (1945).

state statute and at the same time to uphold, indeed enlarge, the protections of free speech and free assembly.[33]

Rutledge then turned to the determination of a standard.[34] Registration requirements for solicitation had previously been held invalid where there was discretion in public officials to deny the application; but there had been implications that nondiscretionary registration might be compatible with the First Amendment prohibitions.[35] However, the requirement of registration of the speaker in conjunction with enforcement machinery necessary to make the statute effective would constitute substantial regulation of speech and assembly. Thus, the Court drew "the line" so as not to say that registration for identification of the speaker could never be required; but certainly it could not be done without a showing of grave and immediate danger to the state. This, of course, called for an application of "clear and present danger"; restrictions of the democratic freedoms of the First Amendment demand for justification "the gravest abuses, endangering paramount interests" and "clear support of public danger, actual or impending."[36]

Determination of such a line of demarcation places a duty on the Court "to say where the individual's freedom ends and the State's power begins."[37] The approach is inherently subjective since it requires balancing the degree of injury to the state with that to the individual.[38] Upon which side of the line each case will fall depends much upon the complexion of the Court. Likewise, much depends upon the social and political conditions of the time. Thus Rutledge employed what may be called a psychological approach, but an influential one, viz: the "clear and present danger" principle places a heavy burden on the government to justify infringement of the freedoms that hold a preferred place in the minds of most judges.[39] This is the guide for the Court in applying the limitations of the First Amendment freedoms.

THREE SIGNIFICANT DISSENTS

Three outstanding opinions of Mr. Justice Rutledge are dissents: the New Jersey school bus case, *Everson* v. *Board of Education;*[40] the case of the

33. *Id.* at 541, 542. *See* A. F. of L. v. Mann, 188 S. W.2d 276, 279 (Tex. 1945) (statute continued in force).

34. Thomas v. Collins, 323 U. S. 516, 529 (1945).

35. *See* Cantwell v. Connecticut, 310 U. S. 296, 305 (1940); Manchester v. Leiby, 117 F.2d 661, 664 (1st Cir. 1941).

36. Thomas v. Collins, 323 U. S. 516, 530 (1945).

37. *Id.* at 529.

38. Antieau, *supra* note 29, at 840.

39. See the debate between Mr. Justice Frankfurter and Mr. Justice Rutledge in Kovacs v. Cooper, 336 U. S. 77, 89, 106 (1949), over giving the First Amendment freedoms a preferred position.

40. 330 U. S. 1, 28-74 (1947).

Japanese general convicted of war crimes, *In re Yamashita;*[41] and the John L. Lewis contempt case, *United States* v. *United Mine Workers.*[42]

The First Amendment says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The prohibition clause has been incorporated in the due process clause of the Fourteenth Amendment, in effect making it applicable to the states. The result has been increased protection and freedom for those engaged in the dissemination of religion. State and local authorities are now required to perform their public duties so as to neither discriminate against nor censor the activities of religious minorities.[43]

The *Everson* case turned the Court to the establishment clause which had been left substantially dormant throughout the history of constitutional litigation.[44] An established church has not been known in this country since Massachusetts disestablished the Congregational Church in 1833.[45] However, numerous instances of public support for religion—in the form of tax and other statutory exemptions—have continued in this country; many of them are so well accepted and so much a part of American life that they no longer cause dissension nor substantially favor one religion over another.[46]

The controversy in the *Everson* case concerned state support of religious schools. A township board of education in New Jersey appropriated school funds for the transportation of children to the public schools and to the Catholic parochial schools within the township. *McCollum* v. *Board of Education,*[47] in the 1947 October Term, concerned the union of sectarian education with secular education in the public schools and brought into question the constitutional validity of "release time"—the release of children from secular instruction provided they attend sectarian instruction.[48]

41. 327 U. S. 1, 41-81 (1946).
42. 330 U. S. 258, 342-385 (1947).
43. See p. 533 *et seq. supra.*
44. In Bradfield v. Roberts, 175 U. S. 291 (1899), a taxpayer sought to enjoin an expenditure of tax funds by the District of Columbia to construct an isolation ward on the property of a hospital operated under the auspices of the Roman Catholic Church. Mr. Justice Peckham barely referred to the establishment clause of the First Amendment. The Court looked upon the hospital as "simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church." In Elliott v. White, 23 F.2d 997 (D. C. Cir. 1928), the taxpayer who sought to enjoin the payment of salaries to chaplains of the Senate, House of Representatives, Army, and Navy was held to have no standing to sue. Cochran v. Board of Education, 281 U. S. 370 (1930), involved the appropriation of state funds for free textbooks to all school children. The attack was against the purchase of school books in non-public schools and use of public funds for private purposes in violation of due process. No question was raised as to a violation of the establishment clause.
45. See Sutherland, *Due Process and Disestablishment,* 62 HARV. L. REV. 1306, 1309 (1949).
46. See Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation,* 14 LAW & CONTEMP. PROB. 144 (1949).
47. 333 U. S. 203 (1948).
48. *Id.* at 207

The evolution of education from the sectarian of the colonial period to the completely nonsectarian public school of the present day is a social phenomenon of an ever-changing democratic society. This has not been "a sudden achievement nor attained without violent conflict."[49] The withdrawal of tax funds from the church school and the resulting increased support of public schools have occurred with growing momentum during each passing decade.[50] The elimination of sectarian teaching from public schools presents a similar story. These developments came in the face of fierce sectarian opposition.[51] However, they were inevitable in the growth of a democracy striving both for unity and for freedom of the individual. The preservation of public education from the irreconcilable pressures of sectarianism made strict confinement of public schools to secular education a necessary requisite of a free society. Public education has become a unifying force, not a dividing one. The concomitant is to preserve for the individual freedom to work out his own religious beliefs and to save his conscience from censorship or control. To preserve this freedom, the expression of religious beliefs must be withdrawn from the vicissitudes of political and religious controversy.[52]

The development of completely secular instruction in the public school does not portend a society disinterested in religion nor a decline in the significance of religious beliefs and their expression. These are left to the individual, his home and his church. Nevertheless, the deletion of sectarian instruction in the school combined with a decline in religious training in the home has caused many sincere people grave concern. Not every sect is able to maintain its own parochial school where sectarian instruction can be intermixed with the secular, without the resulting strife and destruction of freedom.[53] The attempt to alleviate the consequences of such a wholesale withdrawal of sectarian instruction has taken many forms. The *Everson* and *McCollum* cases present examples—financial aid from tax funds for parochial schools, and the "release time" union of sectarian with secular education in the public schools. The question raised was whether such measures constituted a "union" of church and state in violation of the establishment clause of the First Amendment.

Mr. Justice Black in writing for the majority in the *Everson* case held the payment of the bus fares not a contribution to religion nor to religious educa-

49. Frankfurter, J., in McCollum v. Board of Education, 333 U. S. 203, 217 (1948) (Mr. Justice Frankfurter's opinion in the *McCollum* case is masterful).

50. *Id.* at 214-217.

51. *Ibid.*

52. Board of Education v. Barnette, 319 U. S. 624, 638 (1943).

53. Parochial school education is constitutionally protected. Pierce v. Society of Sisters, 268 U. S. 510 (1925); see Everson v. Board of Education, 330 U. S. 1, 27, 46, 51 (1947) ("separation of church and state" prohibits state aid as well as state interference).

tion.[54] The State of New Jersey merely provided funds for a general program to assist the parents, regardless of their religious beliefs, to secure the transportation of their children safely and expeditiously to and from accredited schools whether public or parochial.[55] Transportation services were analogized to police and fire protection for the safety of the children.[56]

Mr. Justice Rutledge, in dissenting, wrote an opinion that will continue to influence the building of the structure for a democratic society. For him the use of state tax funds for transportation was "opening the door" to a union of church and state. It was as much a contribution by the state for religious education as a payment of the children's tuition.[57] This was not "a little case over bus fares."[58] "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."[59] "The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions."[60] Such a use of public funds means that each taxpayer contributes to "the propagation of opinions which he disbelieves."[61] "That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation."[62]

The most significant portion of the Rutledge opinion however is his use of history to presently interpret the establishment clause. Thomas Jefferson's statement that the purpose of the First Amendment was to build "a wall of separation between church and state" was illuminated to mean complete separation.[63] Rutledge's principal authority, however, was James Madison's

54. Everson v. Board of Education, 330 U. S. 1, 16-18 (1947).
55. *Id.* at 18.
56. See Jackson, J., dissenting, for a different interpretation of the record and state statute. *Id.* at 18-28.
57. *Id.* at 48.
58. Rutledge, J., *id.* at 57.
59. *Id.* at 53.
60. *Id.* at 54.
61. *Id.* at 45, 60.
62. *Id.* at 60.
63. This statement was made by President Jefferson in a letter to a Baptist Association at Danbury, Connecticut, sent on January 1, 1802. The first sentence of the second paragraph of the letter read as follows:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence the act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, *thus building a wall of separation between church and State.* (Italics supplied.)

Quoted in Sutherland, *Due Process and Disestablishment,* 62 HARV. L. REV. 1306, 1310 (1949); O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 286 (1949).

historic *Memorial and Remonstrance Against Religious Assessments,* written in 1785 to oppose a bill pending in the Virginia Assembly which would levy a tax to support "teachers of the Christian religion."[64] It was supported by Patrick Henry and other prominent men of the time.[65] The opponents of the bill were led by Jefferson and Madison.[66] In addition to the writing of the *Remonstrance,* which played a large role in the defeat of the bill of 1785, Madison was a co-author of the religious clause of the Virginia Declaration of Rights of 1776;[67] he is credited with being the first to propose that religious freedom be made a protected, inherent right rather than a mere principle of tolerance;[68] and as a member of the First Congress he introduced the first draft of the Bill of Rights.[69]

The interpretation of the Constitution through history is necessarily a highly subjective process. However, the Court must look to many sources before giving life and meaning to its broad clauses. By analyzing the background of the First Amendment, particularly the views of Jefferson and Madison, and the history of religious and public schools, Rutledge interpreted the Amendment to mean that the legislature was prohibited from making any contributions from public funds to any or to all religions.[70] This competent utilization of significant sources provides the strength of Rutledge's dissent.[71]

The Rutledge dissent in *Everson v. Board of Education* carried the day in the *McCollum* case. The Court held that the use of the state's compulsory educational program to require attendance at either religious or secular classes constituted an amalgamation of the tax-supported school with religious education "to aid religious groups to spread their faith."[72] This, it was said,

64. Madison's document is set out in full as an Appendix to Rutledge's opinion, Everson v. Board of Education, 330 U. S. 63 (1946), as is Patrick Henry's bill to levy a tax for the teachers of the Christian religion, 330 U. S. 72 (1946).

65. Rutledge, J., dissenting, *id.* at 38; Corwin, *The Supreme Court as a National Board,* 14 LAW & CONTEMP. PROB. 3, 12 (1949).

66. Rutledge, *id.* at 35.

67. *Id.* at 34.

68. *Ibid.*

69. *Id.* at 39. Madison's draft provided: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed." 1 ANNALS OF CONGRESS 434 (1789).

70. Professor Corwin in his recent article on the *Everson* and *McCollum* cases says that Mr. Justice Rutledge's reliance on Madison's *Memorial and Remonstrance* to prohibit a state contribution to all religions is excessive. Corwin, *The Supreme Court as a National Board,* 14 LAW & CONTEMP. PROB. 3, 13 (1949). He reads Madison's conception of "establishment of religion" to prevent one religion from enjoying a preferred status which would carry with it the right to compel others to conform. *Ibid.* Rutledge's answer in his dissenting opinion is that any contribution to all as well as to one religion would eventually lead to the preference of the dominant religion or religions with the inevitable required conformance.

71. Mr. Justice Frankfurter adds greatly to these sources in his opinion in the *McCollum* case, 333 U. S. at 203, 212 (1948).

72. McCollum v. Board of Education, 333 U. S. 203, 210 (1948).

"falls squarely under the ban of the First Amendment."[73] "The great American principle of eternal separation between Church and the State" was violated.[74]

One of the great essays in the literature of the Supreme Court is Mr. Justice Rutledge's dissent in the *Yamashita* case.[75] Tomoyuki Yamashita was the commanding general of the Japanese Fourteenth Army group in the Philippine Islands. The Emperor broadcast his "imperial rescript," ordering his troops to accept the American demands of "unconditional surrender" on August 14, 1945, but Yamashita waited until September 2, 1945, the day of the formal surrender, to pass through his defense lines, descend from the hills, and present his sword to the American forces.[76] General Yamashita remained a prisoner of war from the date of his surrender until his execution on February 23, 1946. Less than one month after surrender, he was served with a charge of violating the laws of war. The charge read simply:

> Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines, and he, General Tomoyuki Yamashita, thereby violated the laws of war.[77]

On October 1, 1945, the members of the military commission and Yamashita's defense staff were appointed by the commander of the United States Army Forces in Manila. The arraignment took place on the eighth day of October, 1945, before the military commission of five American officers; the accused pleaded not guilty. A bill of particulars setting forth sixty-four specifications was filed at that time, describing in detail the crimes alleged to have been committed by the Japanese troops. The motion of the defense that the charge be made more specific was denied by the commission, but one for a continuance was granted. Trial began on October 29, 1945.

At the beginning of the trial the prosecution filed a supplemental bill of particulars containing fifty-nine items. The specifications in the two bills charged murder, massacre, rape, and pillage of innocent noncombatant civilians both in Manila and in the provinces; mistreatment, starvation, and murder of American prisoners of war and civilian internees; wanton devastation and

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73. *Ibid.*

74. Statement of Elihu Root, quoted in Mr. Justice Frankfurter's opinion in the *McCollum* case. *Id.* at 219, 231.

75. *In re* Yamashita, 327 U. S. 1 (1946).

76. REEL, THE CASE OF GENERAL YAMASHITA 12 (1949).

77. *Id.* at 32.

destruction of public, private, and religious property.[78] The defense was denied a continuance to study the additional specifications in the supplemental bill. The prosecution's case lasted until November 20, 1945—six days a week with night sessions—at which time the defense was granted the remainder of one day to prepare its opening statements.[79]

The evidence offered by the prosecution consisted of witnesses and documents testifying to atrocities committed by Japanese troops during the seige of the Philippine Islands. Some of it was introduced through testimony of witnesses who had been tortured or raped but much was in the form of affidavits secured by Army investigators who worked for months securing the necessary data. Some specific examples of the evidence will show the terribleness of it as well as the difficulties faced by the defense.

A Filipino resident of Batanes Island, where three captured American fliers had been executed, testified that a Japanese captain had told him that the admiral in command of the Island had, in turn, informed the captain that he, the admiral, had received a telegram from General Yamashita ordering all prisoners of war to be killed. The commission admitted the testimony over the objection that it was hearsay and also cut short cross examination as to the details of the alleged conversation between the witness and the Japanese captain.[80]

The Manila atrocities were studded with rape and sex orgies. Yamashita's defense to the charge of responsibility was that he had ordered the Japanese Army to abandon Manila; that by the time the atrocities occurred all but 1,600 army troops had been evacuated. Twenty thousand naval troops placed under his command on January 8, 1945, had also been ordered to leave but had remained under a conflicting order from the naval command to destroy the harbor, docks, and naval headquarters. The crimes in Manila were committed in February in the face of approaching superior numbers of American forces.[81]

Mass executions of families and groups committed in the outlying provinces were directed and supervised by Japanese officers in command of local garrisons and were ostensibly for the purpose of wiping out Philippine guerrillas who had become quite active upon the arrival of American forces. General Yamashita had issued an order for the destruction of armed guerrillas. A Japanese colonel testified he gave the orders for the mass executions but there was no evidence in the record that Yamashita had ordered atrocities. The prosecution's case was based on the proposition that the outrageous atrocities under Yamashita's command were so extensive that he either knew or should have known of them and therefore was to be held responsible.[82]

78. *Id.* at 91.
79. *Id.* at 80.
80. *Id.* at 99.
81. *Id.* at 102.
82. *Id.* at 107.

In addition there were charges of starvation and mistreatment of civilian internees and prisoners of war, and of executing prisoners of war as in the infamous Palawan incident. In December, 1944, one hundred fifty-one Americans were being used by the Japanese as construction laborers on an airfield on Palawan Island. After a number of American planes had been seen overhead, the prisoners were ordered into air raid shelters. Gasoline was poured into the shelters and ignited. Some of the trapped men were burned to death. Those who dashed into the open ran into a hail of machine gun bullets. Only nine men escaped by swimming to another island. The Japanese committing this outrage were of the air force and were not a part of Yamashita's command.[83]

The trial of General Yamashita ended on December 5, 1945. The verdict was guilty as charged; the sentence, death by hanging, was handed down on December 7, 1945.[84]

On application for habeas corpus,[85] the Supreme Court found there was authority to create the commission; the charge with the supplemental bills was adequate to make out war crimes; the reception in evidence of depositions and hearsay and opinion evidence did not violate the articles of war; and the failure to give notice to the protecting power was not contrary to the articles of the Geneva Convention. The proceedings were therefore lawful and there was no necessity of being concerned with matters going to the substance of due process. The details of the trial were for the reviewing authorities and not for the courts, and it was unnecessary to consider what due process might require in other situations, the intimation being that due process was not available to Yamashita.[86]

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83. *Id.* at 112-117.

84. The commission heard 286 witnesses who gave over 3,000 pages of testimony. The record itself ran to more than 4,000 pages and 483 exhibits. *Id.* at 168-175.

85. The defense counsel early in the trial petitioned the Philippine Supreme Court for habeas corpus on these grounds: (1) that since the civil courts were open and the area was under civil authority there was no constitutional power in the military commission; (2) that no notice had been given to Japan's protective power, Switzerland, as required by the Geneva Convention of July 27, 1929; and (3) that the use of unauthorized evidence, violating two congressional statutes and the basic guaranties of due process, invalidated the proceedings. *Id.* at 185-196. Petition for habeas corpus was denied by the Philippine Supreme Court on November 27, 1945. The defense counsel filed an original petition in the Supreme Court for habeas corpus dispatched by air from the Philippines on November 26. After the decision of the Philippines Court, defense counsel also filed a petition for certiorari. Both petitions were considered together. On December 20, 1945, the Court entered an order setting January 7, 1946, for oral argument. The Secretary of War sent General MacArthur a directive to stay the military proceedings. *Id.* at 197-201, 202-205.

86. *In re* Yamashita, 327 U. S. 1, 23 (1946):

> . . . we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied.

Mr. Justice Murphy's dissent was based on the inadequacy of the charge; there was a complete failure to connect the defendant Yamashita with personal guilt or responsibility for crimes committed by the Japanese troops. "Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer; hence he must be guilty of disregard of duty. Under that charge the commission was free to establish whatever standard of duty on petitioner's part that it desired."[87]

However, the essence of the charge was that the atrocities were the result of the failure of General Yamashita to control the officers and troops under his command. The findings of the commission relied on the great number and continuousness of such outrages and their supervision by Japanese soldiers of all ranks. Unless the Yamashita conviction was to reflect merely the state of Japanese culture, it had to be based on the violation of a general standard of duty and responsibility for military commanders.[88] Had the military commission and the judge advocate comprehended this legal justification for the charge, they would not have included in the record offenses committed by officers and troops under other Japanese military commanders. If Yamashita's conviction could be taken to indicate the recognition of an affirmative responsibility in military commands to prevent barbarism in modern warfare, his life might not have been taken in vain.[89] It is a saddening realization that the case failed even to point toward this goal.

Rutledge's dissent shows the extent to which the trial of Yamashita fell below the standards of Anglo-American legal traditions. For him, it was "the basic standards of trial which, among other guaranties, the nation fought to keep;" it was the responsibility of the Court to see that military justice shall not "be above or beyond the fundamental law or the control of Congress."[90] He expressed his reluctance to dissent in a case with such national and international implications:

> Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.
>
> More is at stake than General Yamashita's fate. . . . It is not too early, it is never 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. It can become too late.[91]

87. *Id.* at 40.

88. Fairman, *The Supreme Court on Military Jurisdiction*, 59 HARV. L. REV. 833, 869 (1946).

89. *Cf.* Murphy, J., dissenting 327 U. S. 1, 35 (1946); Fairman, *supra* note 88, at 869.

90. *In re* Yamashita, 327 U. S. 1, 42 (1946).

91. *Id.* at 41.

Rutledge was in complete disagreement with the majority on all counts except as to authority in the Army to try Yamashita for violations of the laws of war. General MacArthur's directive that the commission "shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man,"[92] was in the opinion of Rutledge a violation of at least two articles of war.[93] Since its very creation was in violation of congressional statutes, the commission appointed never acquired valid jurisdiction to try Yamashita.[94] Rutledge also thought the arbitrary denial to defense counsel of adequate time to prepare its case constituted such a "wide departure from the most elementary principles of fairness" that it "vitiated the proceeding."[95] But he saved his stronger feelings to dissent from the implication that the requirement of a fair trial under due process had no application to Yamashita. "Not heretofore," said Rutledge, "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."[96] The language used by Rutledge in the following passage vividly expresses his tenacious observance of the constitutional traditions of his country.

> . . . I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At the bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen. . . .[97]
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> I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through

92. *Id.* at 48 n.9.

93. *Id.* at 61. Article 25 provides in part as follows: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital. . . ." 41 STAT. 792 (1920), 10 U. S. C. § 1496 (1927). The majority held Article 25 not applicable to the trial of an enemy combatant by a military commission for violations of the law of war. *In re* Yamashita, 327 U. S. 1, 19 (1946). The same was held for Article 38, which provides in part as follows: "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial . . . military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States. . . ." 41 STAT. 794 (1920), 10 U. S. C. § 1509 (1927).

94. *In re* Yamashita, 327 U. S. 1, 56, 61 (1946).

95. *Id.* at 61.

96. *Id.* at 79.

97. *Id.* at 42

> any process of trial. . . . Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.[98]

Perhaps Rutledge was fighting for the impossible in his *Yamashita* dissent.[99] His fight was for the nation to rise to his ideals of democracy in its treatment of a defeated enemy. He fought the same fight for minority groups, for persons accused of crime—for all, without consideration of race, creed, or color. "The gap between his understanding and the nation's performance is the measure of stature to which he rose and of the distance we must travel if humanity is indeed to achieve its destiny."[100]

The John L. Lewis contempt case, *United States* v. *United Mine Workers*,[101] "became a *cause célèbre* the moment it began."[102] The case arose when a coal shutdown had the productive facilities of the country almost completely paralyzed. The Government had seized the mines under the War Labor Disputes Act.[103] The district court had entered a temporary restraining order against the Union and Lewis prohibiting them from carrying into effect a strike notice. Violations of the order caused the parties to be held in contempt.[104] The Court upheld the contempt decree over the defendant's contentions that the Norris-LaGuardia Act withdrew jurisdiction from federal courts to issue temporary restraining orders in labor disputes, including cases to which the Government was a party.[105] The combining of civil and criminal contempt was also upheld by the Court.

Rutledge's dissent accords with Mr. Justice Frankfurter's opinion that the Norris-LaGuardia Act withdrew the power of the federal courts to issue injunctions in labor disputes even under Government seizure.[106] If the district court lacked this power it could not issue a temporary order to preserve the status quo while determining jurisdiction. For in labor disputes the effect of such orders "is generally not merely failure to maintain the status quo pending final decision on the merits. It is also most often to break the strike, without regard to its legality or any conclusive determination on that account, and thus to render moot and abortive the substantive controversy."[107] The underlying policy of the Act prohibiting restraining orders in labor disputes applies as much to one issued to determine jurisdiction as to

98. *Id.* at 81.
99. For him, "the Constitution follows the flag." *Id.* at 47.
100. Fuchs, *Wiley B. Rutledge*, 7 NAT'L B. J. 393, 397 (1949).
101. 330 U. S. 258 (1947).
102. *Id.* at 342.
103. *Id.* at 322.
104. *Id.* at 266, 267.
105. *Id.* at 307.
106. *Id.* at 307, 312-328, 343-351.
107. *Id.* at 353.

any other. Certainly the power of the district court to issue a temporary order to preserve the status quo is subject to congressional control. Since Congress had excluded such jurisdiction in all cases involving labor disputes, no federal court had power to punish for contempt "the violation of such an order issued in contravention of Congress' command."[108]

Rutledge expressed his opposition intensely to the proposition drawn out of *United States* v. *Shipp*,[109] by the majority and Mr. Justice Frankfurter, that contempt proceedings are nonetheless valid when based on an order later determined to have been issued without power in the issuing court.[110] He considered that the development of such a principle nullified the historic protections in habeas corpus jurisdiction.[111] And the First Amendment liberties especially would be vulnerable to such inherent power in the courts.[112]

A principal part of Rutledge's dissent protested the admixture of criminal and civil contempt in the same proceedings.[113] "In some respects matters of procedure constitute the very essence of ordered liberty under the Constitution."[114] The sharp differentiation in the protections surrounding the two proceedings prohibit their being "hashed together in a single criminal-civil hodgepodge."[115] The procedural safeguards of the Bill of Rights which are not inconsistent with criminal contempt—the privilege against self-incrimination, presumption of innocence, right to counsel, proof beyond a reasonable doubt, and others—are applicable thereto.[116] These would not be preserved if trial and punishment for criminal contempt were an interchanging part of proceedings for civil contempt. "One who does not know until the end of litigation what his procedural rights in trial are, or may have been, has no such rights."[117]

Rutledge recognized that "beyond this controversy as a whole [lay] still graver questions."[118] They involved the opposing claims concerning the right to strike and the power of the Government to keep the nation's economy going. Rutledge observed that under "a government of laws and not of men," as we possess, power must be exercised according to law and not according to the dictates of one or a group; but "government, including the courts, as well as

108. *Id.* at 363.
109. 203 U. S. 563 (1906).
110. A limitation exists where no substantial inquiry can be made into the existence of a power "that has unquestionably been withheld." United States v. United Mine Workers, 330 U. S. 258, 310 (1947).
111. *Id.* at 354.
112. *Id.* at 352.
113. *Id.* at 363-376.
114. *Id.* at 363.
115. *Id.* at 364.
116. *Id.* at 371-375. Rutledge, J., dissenting: ". . . all of 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." *Id.* at 374.
117. *Ibid.*
118. *Id.* at 385.

the governed, must move within its limitations."[119] While the crisis was grave Congress had neither acted, nor authorized the courts to act, in Rutledge's judgment. History will uphold Rutledge, a pillar of strength whom a grave political crisis did not bend.

FAIR TRIAL PROTECTIONS

The right of an accused to a fair trial was ever on Rutledge's judicial conscience.[120] For him the trial and punishment of men placed the gravest responsibility on the judiciary to preserve enlightened standards of procedural fairness in each stage of the criminal process. Rutledge's concern in this matter was evident in his work on the Court of Appeals. In *Boykin* v. *Huff*[121] he was most solicitous of an indigent defendant's right of appeal, holding that an informal letter by the accused was sufficient to perfect his appeal;[122] and in *Wood* v. *United States*[123] he held the admission in evidence of a plea of guilty taken at a preliminary hearing before a committing magistrate to be in violation of the constitutional privilege against self-incrimination.[124]

During the past ten-year history of the Supreme Court, review of the states' criminal process cases has taken on a "new significance" in constitutional litigation.[125] Rutledge played a leading role in this dramatic struggle over redefining minimum standards to be followed in the administration of criminal justice. He ranked with the "great liberties of speech and the press and religious freedom" the "elemental protections thrown about the citizen

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119. *Ibid.*

120. See Rockwell, *Justice Rutledge on Civil Liberties,* 59 YALE L. J. 25, 28 (1949).

121. 121 F.2d 865 (D. C. Cir. 1941), 27 IOWA L. REV. 133 (1941), 14 ROCKY MT. L. REV. 69 (1941), 27 WASH. L. Q. 272 (1942).

122. The affirmative duty of the court in such circumstances to properly inform the accused of his statutory right of appeal and other basic rights was vigorously asserted by Rutledge. Boykin v. Huff, 121 F.2d 865, 870 (D. C. Cir. 1941).

123. 128 F.2d 265 (D. C. Cir. 1942) (Groner and Edgerton, concurred), 42 COL. L. REV. 1358 (1942), 30 GEO. L. J. 791 (1942), 28 IOWA L. REV. 136 (1942).

124. The plea taken at preliminary hearing by the committing magistrate was admitted in evidence at the trial "as a confession." A plea of guilty made at arraignment and later withdrawn is inadmissible in the federal courts. Wood v. United States, 128 F.2d 265, 269 (D. C. Cir. 1942); Kercheval v. United States, 274 U. S. 220 (1927). The application of the privilege against self-incrimination to a plea at either stage of the criminal process is criticized for its unorthodoxy in Morgan, *The Law of Evidence,* 1941-1945, 59 HARV. L. REV. 481, 524-5 (1946); discussed also in Levitan, *Mr. Justice Rutledge,* 34 VA. L. REV. 526, 529 (1948).

Rutledge was also of the view that the accused was entitled to counsel at the preliminary hearing. Wood v. United States, *supra* at 271. If he was without counsel "the fairer practice . . . would advise the accused in all cases, before permitting him to speak as a volunteer, of his right to counsel and would warn him that he need not speak and, if he does, it is at his peril." *Id.* at 277. See Fuchs, *Judicial Art of Wiley Rutledge,* 28 WASH. L. Q. 115, 131-3 (1943).

125. For an excellent article covering the field in full, see Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court,* 46 MICH. L. REV. 868 (1948).

charged with crime" which secure "fair play to the guilty and vindication for the innocent."[126]

The Court's struggle over the applicable standard of review of the states' criminal processes reached a climax in *Adamson* v. *California*.[127] The case concerned the validity of a California statute allowing the district attorney and the court to comment on the defendant's failure to testify and explain or deny the incriminating evidence introduced against him.[128] The Court first considered the case in its broader aspect—a question of policy as to the basic structure of the Constitution, whether the Fifth Amendment's proscription that no person "shall be compelled in any criminal case to be a witness against himself" constituted a specific limitation on the power of the states under the

126. Yakus v. United States, 321 U. S. 414, 487-8 (1944) (Rutledge, J., dissenting).

127. 332 U. S. 46 (1947).

128. *Id.* at 48. The defendant was convicted of murder in the first degree for which he received the death penalty. In addition, he was charged in the information with former convictions for burglary, larceny, and robbery. He answered that he had "suffered the previous convictions" which under California statute prevented allusions to those convictions to the jury. However, in accordance with the statute's interpretations, if the defendant after answering affirmatively to the charges alleging prior convictions, takes the witness stand to deny or explain away other evidence, the commission of the prior crimes may be revealed to the jury on cross-examination to impeach his testimony; this of course forces the defendant to run one of two risks, having his prior offenses disclosed to the jury or having the jury draw harmful inferences from the uncontradicted evidence that can only be denied or explained by the defendant. *Id.* at 49.

On the broad policy question, the majority of the Court relied on Twining v. New Jersey, 211 U. S. 78 (1908), and Palko v. Connecticut, 302 U. S. 319 (1937), to hold that the proscription against self-incrimination in the Bill of Rights was not a part of privileges and immunities or of due process under the Fourteenth Amendment, and the circumstances of the case did not violate due process to which the defendant is entitled from the Federal Constitution. Mr. Justice Frankfurter supported the majority opinion on the view that since the question has once been determined and the country has once experienced that determination, the Court should not change its interpretation. Obviously as a matter of policy he also agrees with the determination. Mr. Justice Black in his dissenting opinion stated that the Court almost uniformly bound itself by "history," and history as of the time of the Fourteenth Amendment showed that at least some of its promoters were of the opinion that the Bill of Rights was to be made binding on the states. Mr. Justice Rutledge and Mr. Justice Murphy agreed that the specific guaranties of the Bill of Rights should be carried over intact into the due process clause of the Fourteenth Amendment. But that was not a limitation on its interpretation. While it is true that history adds to the understanding and may be a guide to the Court's interpretation, it is certainly not binding. In his article in 2 STAN. L. REV. 5 (1949), Professor Fairman arrays much historical detail to show that history does not prove that the Bill of Rights was to be incorporated in the Fourteenth Amendment. Professor Fairman safely does not question the fact that his historical array may not also show lack of proof of the negative, that the Bill of Rights was *not* to be incorporated in the Fourteenth Amendment. Neither does he use the result of his investigation to attack the Court's incorporation of the First Amendment in the Fourteenth. In the judgment of many there is little, if any, basis for Professor Morrison's "distortion charge" in *Does The Fourteenth Amendment Incorporate The Bill of Rights,* 2 STAN. L. REV. 140, 162 (1949). There are reasons supporting the majority view which should make unnecessary embalming them with charges against the good faith and the good judgment of the Justices who reach the opposite result. There are also good reasons in support of the dissenting view. See Green, *The Bill of Rights, The Fourteenth Amendment and The Supreme Court,* 46 MICH. L. REV. 869 (1948).

Fourteenth Amendment.[129] In 1908 *Twining* v. *New Jersey*[130] had held that the privilege against self-incrimination was not one of the "privileges or immunities of citizens of the United States" protected against abridgment by the states.[131] However, the growth of the Constitution through the integration of the Bill of Rights with the Fourteenth Amendment has moved ahead many strides since the *Twining* case.[132] Then, not one of the specific provisions of the Bill of Rights was so incorporated through constitutional interpretation.[133] Since 1925, the Court has been in substantial accord that the freedoms of the First Amendment constitute due process limitations on the states through the Fourteenth Amendment.[134] But the integration of the "fair trial" protections of the Fourth, Fifth, Sixth, and Eighth Amendments continues to be most pressing.[135]

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129. *Id.* at 49-54.

130. 211 U. S. 78 (1908) (opinion of the Court by Moody, J.; Harlan, J., dissenting).

131. By coincidence the *Twining* case also concerned an instruction to the jury that they might draw an inference unfavorable to the defendant for his failure to testify to explain or deny the evidence tending to incriminate him. The Court did not decide the question of whether such an instruction violated the privilege against self-incrimination, however; the question did not involve a "federal right" because "the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." *Id.* at 90-91, 114.

132. The attempted limitation of the powers of the states by the National Government's Bill of Rights is a well known history. Congressman James Madison's original draft of the Bill of Rights, as he introduced it in the First Congress, made the First Amendment applicable to the states. His original proposal of the First Amendment provided that "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The speech protection was added in the House but the Senate deleted the application to the states. Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 430, 433-435 (1926).

The litigation history which has developed in stages is set out in full in Warren's article. It begins in 1833 with Chief Justice Marshall's cryptic opinion in Barron v. Baltimore, 7 Pet. 243 (U. S. 1833). Litigation continued over the application of the Bill of Rights directly to the states until 1907. Warren, *op. cit. supra* 436. Beginning with the Slaughter House Cases, 16 Wall. 36 (U. S. 1873), litigation continued as to whether the specific provisions of the Bill of Rights constituted privileges and immunities of the United States. *See, e.g.,* Maxwell v. Dow, 176 U. S. 581 (1900), denying the possibility that the Fourth, Fifth, and Sixth Amendments granted rights which were "privileges and immunities of citizens of the United States." The next stage in the litigation may be called the "liberty" and "property" stage, the substantive due process approach that since "liberty" included "property" it also included the Bill of Rights. See, Meyer v. Nebraska, 262 U. S. 390 (1923); Pierce v. Society of Sisters, 268 U. S. 510 (1925).

133. Warren, *supra* note 132, at 439.

134. Gitlow v. New York, 268 U. S. 652, 666 (1925) (Sanford, J., writing for the Court: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); De Jonge v. Oregon, 299 U. S. 353, 364 (1937); Grosjean v. American Press Co., 297 U. S. 233, 243, 244 (1936); Near v. Minnesota, 283 U. S. 697, 707 (1931); Stromberg v. California, 283 U. S. 359, 368 (1931); Fiske v. Kansas, 274 U. S. 280, 286 (1927); Whitney v. California, 274 U. S. 357, 373 (1927) (Brandeis, J., concurring).

135. See Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court,* 46 MICH. L. REV. 869 (1948).

The incorporation of these protections into the Fourteenth Amendment has been most influenced by the opinion of Mr. Justice Cardozo in *Palko* v. *Connecticut*.[136] His approach, which is the guiding principle followed by the Court today, was based on an essential dichotomy; i.e., some of the first ten amendments are completely incorporated into the Fourteenth and others not at all. The basis for the dichotomy was not new,[137] but in the *Palko* case it was raised to an exalted prominence in the constitutional scheme and channeled particularly to avoid binding the states with the criminal process protections. In the judgment of Mr. Justice Cardozo and his Court[138] these were not of sufficient importance to the underlying foundations of democratic government to override the constitutional policy of the Court to narrowly limit its function in reviewing the validity of the states' governmental processes.[139] The criminal process protections were of weaker construction than the First Amendment freedoms: while they "may have value and importance," "they are not of the very essence of a scheme of ordered liberty;" and "to abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[140]

The core of Cardozo's interpretation now is clear: double jeopardy at the hands of the state, though it falls within the Fifth Amendment's specific proscription, does not violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[141] It is also clear that the very purpose of the "dichotomy of fundamentalism" was to delimit the Court's power and that of the National Government over the states with regard to double jeopardy. Again, it is clear that this was based on a subjective judgment: the worth of the rights of an individual accused of crime was less than First Amendment freedoms.[142] Thus the Court refused to expand the growth of criminal process protections and, at the same time,

136. 302 U. S. 319 (1937). Defendant was tried for murder in the first degree, found guilty of murder in the second degree and sentenced to life imprisonment. Under a statute permitting the state to appeal upon any question of law, the state appealed; the judgment was reversed; and on re-trial defendant was convicted of murder in the first degree and sentenced to death. Defendant contended (1) that this was double jeopardy prohibited by the Fifth Amedment and (2) that the right against double jeopardy embodied in the Fifth Amendment was protected against the states by the due process clause of the Fourteenth Amendment. The Court almost ignored the first contention. While it did not decide the second contention as a holding, which was only that the statute was constitutional, the dicta makes it doubly clear that the answer to the second contention would have been in the negative. Green, *supra* note 135, at 870-872.

137. Palko v. Connecticut, 302 U. S. 319, 325 (1937); Frankfurter, J., concurring in Adamson v. California, 332 U. S. 46, 65 (1947).

138. Palko v. Connecticut, 302 U. S. 319, 325 (1937).

139. *See* discussion by Frankfurter, J., dissenting, Board of Education v. Barnette, 319 U. S. 619, 646, 648-650 (1943).

140. Palko v. Connecticut, 302 U. S. 319, 325 (1937).

141. *Id.* at 328; Herbert v. Louisiana, 272 U. S. 312, 316 (1926).

142. Palko v. Connecticut, 302 U. S. 319, 325 (1937).

retained a basis for giving the First Amendment freedoms precedence over conflicting state policies.[143]

The records of many cases coming to the Court during the past decade show a decided lack of appreciation of the meaning of the democratic process in a sizeable portion of the police administration in this country.[144] The sharp divisions in the Court over the results of these cases have resulted primarily from differences in values—whether these constitutional protections thrown about an individual accused of crime are necessary to the preservation of democracy as the Justices individually know and feel it, and to a greater or less extent as we ourselves know and feel it.[145] Rutledge made it plain that he regarded these elemental protections to be the absolute minima for the democracy he knew, the democracy for which he and his country were striving.[146] His was not a narrow, grudging recognition, but a broad, protective recognition, by one filled with pride that his country, his democracy, placed the highest premium on the dignity of the individual, even one accused of crime against his own society. Some may call this humility, others a humaneness, and perhaps some a softness; whatever it is—it is the best out of which democracy is built. And democracy arises only out of its people.

Rutledge's position was one of extended enlightenment, giving the full protection of each of the Bill of Rights' privileges and freedoms to all accused in all courts.[147] There was no watering down of any one of these, whether it was the right to counsel,[148] the privilege against self-incrimination,[149] freedom

143. *Ibid.*

144. *See, e.g.,* Watts v. Indiana, 338 U. S. 49 (1949); Malinski v. New York, 324 U. S. 401 (1945).

145. *Compare,* the opinion of the Court by Roberts, J., in Betts v. Brady, 316 U. S. 455, 474 (1942) *with* the dissenting opinion of Black, J. See also letter to New York Times, August 2, 1942, by Benjamin V. Cohen and Erwin N. Griswold:

> Most Americans—lawyers and laymen alike—before the decision in Betts v. Brady would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our own Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in Betts v. Brady would not wish their decision to be used to discredit the significance of that right and the importance of its observance.
>
> Yet at a critical period in world history, Betts v. Brady dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law.

Quoted by Douglas, J., in Bute v. Illinois, 333 U. S. 640, 671 n.1 (1945).

146. Rutledge, J., dissenting in Wolf v. Colorado, 338 U. S. 25, 47 (1949).

147. *See, e.g., In re* Yamashita, 327 U. S. 1, 41 (1946) (Rutledge, dissenting).

148. Rutledge upheld the right to counsel in all the cases decided by the Court during the period.

Claim sustained; Rutledge voted with the majority: Uvegas v. Pennsylvania, 335 U. S. 437 (1948); Townsend v. Burke, 334 U. S. 736 (1948); Wade v. Mayo, 334 U. S. 672 (1948); Von Moltke v. Gillies, 332 U. S. 708 (1947); Rice v. Olsen, 324 U. S. 786

from coerced confessions,[150] right to trial by jury,[151] right to be free from unreasonable searches and seizures,[152] or freedom from cruel and unusual punishment.[153]

All these protections have been channeled into a "fair trial" concept as the requisite of due process, a development which was inaugurated in *Betts* v. *Brady*.[154] The concept, applied to the right to counsel cases, for example, requires a determination by the Court from the circumstances of each case whether the accused was so prejudiced or the trial was so arbitrary or unfair as to fall below the standards of due process of law.[155] Some of the circumstances considered are the age of the accused, his education and experience, the complexities of his defense and his capacity to understand his predicament, the seriousness of the offense involved, especially whether capital or noncapital, and whether the court informed him of his rights and gave him assistance.[156] While this approach qualified the *Palko* case, the philosophy of a majority of the Court remained the same: whether the "trial is offensive to the common and fundamental ideas of fairness and right."[157]

In the confession cases the problem is principally one of determining the degree of unfairness in the treatment of the defendant from the circumstances surrounding the taking of the confession. In *Ashcraft* v. *Tennessee*,[158] it was the secret, continuous examination for at least thirty-six hours before the statement was taken which made the taking and admitting of the confession a violation of due process. In *Malinski* v. *New York*,[159] it was the secret detention for three days, wrongful delay in arraignment and the opportunity which that affords for extortion of confessions which, in combination, were below the requisite standards for due process.[160] In *Watts* v. *Indiana*,[161] the defendant

(1945); House v. Mayo, 324 U. S. 42 (1945); Tompkins v. Missouri, 323 U. S. 485 (1945); Williams v. Kaiser, 323 U. S. 471 (1945).

Claim not sustained: Gryger v. Burke, 334 U. S. 728 (1948); Bute v. Illinois, 333 U. S. 640 (1948); Gayes v. New York, 332 U. S. 145 (1947); Foster v. Illinois, 332 U. S. 134 (1947); Carter v. Illinois, 329 U. S. 173 (1946); Canizio v. New York, 327 U. S. 82 (1946).

149. Claim not sustained: Adamson v. California, 332 U. S. 46 (1947) (Black, Douglas, Murphy and Rutledge, JJ., dissenting); Feldman v. United States, 322 U. S. 487 (1944) (Black, Douglas and Rutledge, JJ., dissenting).

150. Claim sustained: Turner v. Pennsylvania, 338 U. S. 62 (1949); Watts v. Indiana, 338 U. S. 49 (1949); Haley v. Ohio, 332 U. S. 596 (1948); Malinski v. New York, 324 U. S. 401 (1945); Ashcraft v. Tennessee, 322 U. S. 143 (1944).

151. See, e.g., *In re* Oliver, 333 U. S. 257 (1948); Ballard v. United States, 329 U. S. 187 (1946).

152. See, e.g., Harris v. United States, 331 U. S. 145 (1947).

153. Francis v. Resweber, 329 U. S. 459 (1947).

154. 316 U. S. 455 (1942).

155. *Id.* at 473.

156. See, e.g., Williams v. Kaiser, 323 U. S. 471 (1945).

157. Betts v. Brady, 316 U. S. 455, 473 (1942).

158. 322 U. S. 143 (1944).

159. 324 U. S. 401 (1945).

160. *Id.* at 419.

161. 338 U. S. 49 (1949).

was arrested on a Wednesday and held without arraignment, without the aid of counsel and without advice as to his constitutional rights until the following Sunday; when not being interrogated he was held in solitary confinement in a cell with no place to sit or sleep except on the floor; and the confession taken in such circumstances was held to be far below due process requirements.[162]

Finally, in *Wolf* v. *Colorado*,[163] the Court was presented with the question of whether the Fourth Amendment's specific protection against unreasonable searches and seizures constituted a limitation on the states' processes. That is, whether the specific constitutional protection against unreasonable searches and seizures fell on the fundamental—freedom of speech, press, religion, establishment of religion—side of the dichotomy of the *Palko* case, or whether it fell on the flimsy—double jeopardy, self-incrimination, trial by jury, cruel and unusual punishment—side. The opinion of the Court "re-essays" that due process conveys "neither formal nor fixed nor narrow requirements" and that "due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."[164] With these verbal justifications out of the way for limiting the application of criminal process protections under the Fourteenth Amendment, the Court took its first big step since 1932, when in *Powell* v. *Alabama* it held that the Sixth Amendment's requirement to assistance of counsel was protected against state denial.[165] "The security of one's privacy against arbitrary intrusion by the police . . . 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."[166] And the specific Fourth Amendment protection of individual freedom falls on the fundamental First Amendment side of the *Palko* dichotomy, and is protected against all governments.

But the victory for individual liberty is not so great as it might seem. A rule of evidence provides severe limitations. If the state affirmatively sanctions such "police incursion into privacy" the Constitution is violated and remedies are available to make the protection effective.[167] But if state officers make "incursions into privacy," which are later held "unreasonable searches and seizures," the use of the evidence so secured against the defendant is not a violation of either the Fourth or Fourteenth Amendments. The federal practice is to hold such illegally obtained evidence inadmissible, but this, we

162. *Id.* at 53.
163. 338 U. S. 25 (1949).
164. *Id.* at 27.
165. Powell v. Alabama, 287 U. S. 45 (1932).
166. Wolf v. Colorado, 338 U. S. 25, 27 (1949).
167. *Id.* at 28.

are told, is a matter of judicial policy not included within the Fourth Amendment's protections.[168]

Rutledge, Murphy and Douglas dissented from this last qualification.[169] Rutledge opened his dissent with a coda:

> 'Wisdom 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.[170]

And he restated his position that "all the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment."[171] He welcomed the fact that the Court, "in its slower progress toward this goal," found the Fourth Amendment's protections to be "implicit in the concept of ordered liberty."[172] The Amendment without a protective sanction is "a dead letter" reduced to a "form of words." And for him the use of the fruits of the illegal searches and seizures would be as much a violation of the freedom indispensable for a democratic society as the search itself.[173]

Those who know of Rutledge's contribution to civil liberties will consider this article but a superficial introduction. They will know too that much is omitted; the deportation and denaturalization cases are significant.[174] Rutledge's feelings about these were strong indeed. In *Schneiderman* v. *United States* he wrote a concurring opinion to express what was "at the bottom of the case."[176]

> Immediately we are concerned with only one man. . . . Actually, though indirectly, the decision affects millions. If, seventeen years after a federal court adjudged him entitled to be a citizen, that judgment can be nullified and he can be stripped of this most precious right, by nothing more than reexamination upon the merits of the very facts the judgment established, no naturalized person's citizenship is or can be secure.[177]
>
> No citizen with such a threat hanging over his head could be free. If he belonged to 'off-color' organizations or held too radical, or, perhaps, too reactionary views, for some segment of the judicial palate, when his admission took place, he could not open his mouth

168. *Id.* at 28-33, 39.
169. *Id.* at 40, 41, 47.
170. *Id.* at 47.
171. *Ibid.*
172. *Id.* at 47, citing Palko v. Connecticut, 302 U. S. 319, 325 (1937).
173. *Id.* at 48.
174. Klapprott v. United States, 335 U. S. 601, 616 (1949) (Rutledge, concurring); Knauer v. United States, 328 U. S. 654, 675 (1946) (Rutledge, dissenting); Baumgartner v. United States, 322 U. S. 665, 678 (1944) (separate opinion of Murphy, Black, Douglas and Rutledge); Schneiderman v. United States, 320 U. S. 118, 165 (1943) (Rutledge, concurring).
175. 320 U. S. 118 (1943).
176. *Id.* at 165.
177. *Id.* at 165-166.

> without fear his words would be held against him. For whatever he might say or whatever any such organization might advocate could be hauled forth at any time to show 'continuity' of belief from the day of his admission or 'concealment' at that time. Such a citizen would not be admitted to liberty. His best course would be silence or hypocrisy. This is not citizenship. Nor is it adjudication.
>
> It may be doubted that the framers of the Constitution intended to create two classes of citizens, one free and independent, one haltered with a lifetime string tied to its status.[178]

Rutledge is gone; taken in the prime of his influence as Justice, teacher, and friend. His Faith lives on: a Faith which added its unmeasured quota to democracy and surrounded the individual with his full share of freedom "to make living a hopeful experience."

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178. *Id.* at 167.