MR. JUSTICE WILEY BLount RUTLedge AND QUESTIONS OF PUBLIC POLICY:
A STUDY OF DISCRETION AND OBJECTIVITY IN JUDICIAL DECISION-MAKING

DISSERTATION
Presented in Partial Fulfillment of the Requirements for the
Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

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INTRODUCTION

Many recent students of the American judicial process at the Supreme Court level (such as Jack W. Peltason, Glendon Schubert, Walter F. Murphy, and Stuart Nagel) state that political scientists should concern themselves with the role of the Court in the formulation of public policy rather than with the traditional doctrinal analysis with which the lawyer concerns himself. Such suggestions constitute a change in emphasis within the field of public law although not an innovation, as a glance at the literature (in Chapter I) will show. Beginning with the work of Plato (in his Statesman) and Aristotle (in his Nicomachean Ethics), students of government and politics have addressed themselves to the question of how much "law" and how much "discretion" are appropriate in the exercise of the judicial function.

within a political system. Workers in the field, from the time of its inception at Columbia University in 1880 to the present, have concerned themselves with the policy role of the Court, although they did not ordinarily refer to their subject matter in these contemporary terms. An excellent, recent effort to put the ancient controversy of "a government of laws" versus "a government of men" in modern perspective is Wallace Mendelson's *The Supreme Court: Law and Discretion*.

The chief purpose of this study is to examine judicial policy-making at the Supreme Court level by an investigation in depth of the work of one Justice of the United States Supreme Court (from the beginning of his career to the end), to identify, as far as possible, the policy considerations in his work as a judge. To accomplish this purpose, an effort was made to select an individual Supreme Court Justice for whom an acceptable working hypothesis could be made that there were in his judicial behavior patterns identifiable factors that could be related to judicial policy-making and for whom there was available evidence to test that hypothesis. After various preliminary surveys of individuals and working materials, it was decided to focus the investigation on the work of Wiley Rutledge who was appointed to the Court by President Roosevelt in 1943 and served until his death in 1949.

There were several reasons for the selection of the work of Wiley Rutledge for examination. First, a preliminary survey of his writings, addresses, and other public utterances produced evidence

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5 e.g., Edward S. Corwin, Charles Grove Haines, James Allen Smith, Gustavas Meyers, Carl B. Swisher, Roscoe Pound, Benjamin N. Cardozo, Karl Llewellyn, etc.

that: (a) he was deeply concerned with the course of public policy; (b) his first concern, philosophically, was with the advancement of the public good; and (c) he thought that the law and its devices were mere instrumentalities for advancing that public good. Second, his judicial career was limited (although during an important period) thereby making it possible to produce a thorough-going analysis of his work. Third, preliminary evidence suggested that the chief reason for the appointment of this comparatively unknown law teacher to the Court was the opinion that he would be a dedicated adherent to the policy values held by the appointing authority. (Indeed, had he not been expected to act in a particular fashion as a policy-maker, he probably never would have been appointed.) Fourth, there appeared to be available evidence with which to measure the realization of these expectations.

This type of investigation necessarily involves the utilization of a multi-criteria approach and a number of methods are employed: (1) a careful socio-economic background analysis (of the type often associated with the work of John R. Schmidhauser) involving the accumulation of biographical data (after the fashion of such traditional studies as those by Charles Fairman, Carl Swisher, and Alpheus Mason); (2) a necessarily rigorous doctrinal analysis of the total judicial output of Justice Rutledge (including all 157 written opinions and all judicial votes in non-unanimous decisions); (3) an application of bloc analysis to determine judicial alignments (after the fashion of C. Herman Pritchett's rudimentary tools and the more refined models of Glennon Schubert); (4) a consideration of role perception by inference from Justice Rutledge's numerous writings and statements both before and after
appointment (as is currently associated with work by Theodore Becker and Schubert); (5) the application of "capability analysis" as employed by Walter F. Murphy to determine the range of choice in fact open to a policy-oriented Justice; and (6) the use of private papers and manuscripts to add more light to the intricacies of the judicial decision-making process.

As Walter F. Murphy suggests, in order to formulate theories of judicial behavior we must know more than how judges act. We must also be able to answer at least two other questions: (1) what range of choice is actually open to the policy-oriented Justice? and (2) how may possible choices be expressed? Murphy notes that except for a few excellent judicial biographies such as those by Swisher and Mason which are rich in sensitivity to the political context of the judicial function and point clearly to some of the extra-legal influences on judicial decisions, political scientists have done little to answer these questions. This study, like those of Swisher and Mason and like the recent study by J. Woodford Howard of Mr. Justice Frank Murphy, is aimed at providing some at least preliminary answers to these questions.

Finally, there is this word on leading source materials. Justice Rutledge's 157 written opinions (including 62 majority opinions,

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7 Elements of Judicial Strategy, p. 3.


41 concurring opinions, and 54 dissenting opinions) are the principal source material used in this study. There is also his series of lectures published in 1947 in book form under the title, *A Declaration of Legal Faith*, as well as his other statements in various articles and addresses which are listed in the Bibliography. Also, an attempt is made to follow the lead of Walter F. Murphy, David Danelski, and J. Woodford Howard in making all possible use of the available private papers of Justices, principally here, the papers of Frank Murphy and Felix Frankfurter whose relationships with Rutledge are the most potentially illuminating. The Rutledge papers themselves, their value still unknown, remain in family hands and have not yet been made available to students of the Roosevelt Court members. Finally, judicial votes, while not rigidly eschewed as a data source, are used subject to the restriction prescribed by Pritchett. This is the recognition that unanimous decisions are nearly valueless as guides to an understanding of judicial motivation because the case so decided is most likely one in which the issue is either (1) an issue on which the law is so clear that any exercise of judicial discretion is completely foreclosed, or (2) an issue on which reasonable Justices could come to divergent conclusions but did not do so because their respective values were so similar as to lead them all to the same answer. Thus, only

11 *Lawrence: University of Kansas Press, 1947*.


13 *Mr. Justice Murphy: A Political Biography*.

14 See the review of Clement E. Vose of Howard's *Mr. Justice Murphy* in *American Political Science Review*, 63(1969), 1287-1288. The acquisition and utilization of these and other papers remain a goal for future research.
nonunanimous decisions are utilized in this study because "there is genuine assurance that the result was influenced by judicial preferences as to public policy. For here we see judges, working with an identical set of facts and with roughly comparable training in the law, coming to different conclusions." Accordingly, judicial votes in nonunanimous decisions are used here as a final data source supplying a series of yes and no votes on a variety of issues.


16 There is the further admission, however, that even nonunanimous decisions may not give an adequate clue to judicial motivation if the Justices happen to be playing strategic games with their votes.
CHAPTER I

THE TASK OF THE COURT AND ITS JUSTICES IN THE POLICY PROCESS

The Supreme Court as Policy Maker

Does the Supreme Court of the United States "sit like a kadi under a tree dispensing justice according to considerations of individual expediency" and unlimited judicial discretion? or is it a body of aloof, bearded gentlemen in black robes who do not make law but merely find it and who objectively apply the agreed-upon rules and precedents of the law to individual situations? Although such characterizations of the Court and its functions have appeared from time to time in the interpretations of its observers, neither of the above questions can be accurately answered in the affirmative. Certainly the Court does not always behave as if it were, as Hamilton said it should be, "bound down by strict rules and precedents which serve to define and point out its duty in every particular case that comes before it." It is, perhaps, inevitable, as Bishop Hoadly said, that judges make law in the process of interpreting it. And as long as law remains one of the

19 Hoadly wrote in the 18th century: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them". Quoted in Jerome Frank, Courts on Trial (New York: Atheneum, 1963), p. 294.
most familiar means of formalizing public policy, the judicial office in the United States will inevitably involve political, i.e., policy-making, power. The value of legal realism in stripping the process of judicial decision-making of all illusion, however, is sometimes lost in the often accompanying cynicism which assumes that all judges desire to bend the law to their individual whims. Such assumptions fail to "depict even dimly the subtleties of the judicial process", and carried to their ultimate conclusion would find "every member of the modern Supreme Court guilty of fraud, hypocrisy, or foolishness."

The desire of public law scholars to come to grips with these subtleties of judicial decision-making and policy-making has led them to adopt a number of different approaches in their work. Although the development of these theoretical approaches to research has not been evolutionary in any strictly sequential sense, it has followed a rather crude chronology.

When the School of Political Science was created at Columbia University in 1880, its purpose was stated as "to give a complete general view of all the subjects of internal and external public polity, from the three-fold standpoint of History, Law, and Philosophy." Law, however, was the senior partner, and when the courses in the school were separated into departments in 1890, it was the Department of Public

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Law and Jurisprudence to which the political science courses were allocated. The leading members of the department, who held joint appointments in the Law School, were Frank Goodnow, Munroe Smith, and John Bassett Moore. During the same period, however, a second set of influences was at work in public law at Princeton University where Woodrow Wilson was approaching the subject matter with a social science/humanities orientation instead of the Columbia legalistic approach. This shift away from legalism was evident in the work of the two leading figures in the next period of public law scholarship, Edward S. Corwin and Charles Grove Haines, though both followed the still traditional methods of history. Corwin gave his major attention to the political history of the Supreme Court, to general analysis, and to the powers of the Presidency in such works as The Constitution of the United States: Analysis and Interpretation, The Commerce Power Versus States Rights, The Twilight of the Supreme Court, Total War and the Constitution, and The President: Office and Powers, 1787-1957.

Haines also put his principal interest in constitutional history as in The Role of the Supreme Court in American Government and Politics,


1789-1835,\textsuperscript{29} and The Role of the Supreme Court in American Government and Politics, 1835-186\textsuperscript{4}.\textsuperscript{30} He also provided an historical analysis of the developmental use of judicial review by American courts in The American Doctrine of Judicial Supremacy.\textsuperscript{31} The work of Goodnow, Smith, Moore, Wilson, Corwin and Haines was rewarded in each instance by election to the presidency of the American Political Science Association.\textsuperscript{32}

During this same period of public law scholarship, a standard history of the Supreme Court was written by Charles Warren in his The Supreme Court in United States History,\textsuperscript{33} and an alternative interpretation, written from the point of view of American progressivism, was provided by James Allen Smith in The Growth and Decadence of Constitutional Government.\textsuperscript{34} A more radical view was provided by Gustavas Myers who employed a version of Marxism to reinterpret the Court's decisions as made with a view to the justices' economic self-interest, in his History of the Supreme Court of the United States.\textsuperscript{35}

Essentially, however, the traditional public law preoccupation was with the judicial product, i.e., legal doctrine, and its method was a lawyer-like analysis of the content of Supreme Court opinions. It

\textsuperscript{29}(Berkeley: University of California Press, 1936).


\textsuperscript{31}(New York: Macmillan, 1914).

\textsuperscript{32}Pritchett in Irish, p. 192.

\textsuperscript{33}3 vols. (Boston: Little Brown, 1922-1923).

\textsuperscript{34}(New York: Holt, 1930).
largely assumed a decision-making model similar to that most recently stated by Richard A. Wasserstrom in *The Judicial Decision*, \(^{36}\) i.e., an explanation of judicial decision-making on the basis of deductions from a formal, logical model.

Our use of the past tense in dealing with the traditional approach is, in a sense misleading. Although that approach probably commanded the allegiance of a majority of public law scholars only until about 1948, \(^{37}\) many traditionalists are still at work. The methods of history and philosophy continue to have relevance for some while others continue to produce creditable constitutional commentary and analysis. Two outstanding histories currently available are Carl B. Swisher's *American Constitutional Development*, \(^{38}\) and Robert McCloskey's *The American Supreme Court*. \(^{39}\) An analysis grounded on the philosophical doctrine of Leo Strauss is Walter Berns' *Freedom, Virtue and the First Amendment*. \(^{40}\) Currently available commentary and analysis can be found in *The Quest for Equality* by Robert J. Harris, \(^{41}\) and *The Constitutional Right of Association* by David Fellman, \(^{42}\) and *Search and Seizure and the...* \(^{36}\) (Stanford: Stanford University Press, 1961).


\(^{38}\) (Boston: Houghton Mifflin, 1954).


\(^{40}\) (Baton Rouge: Louisiana State University Press, 1957).

\(^{41}\) (Baton Rouge: Louisiana State University Press, 1960).

Supreme Court, by Jacob W. Leidenski.

As Pritchett points out, however, substantial disillusionment concerning the Court's non-political status began to emerge in the early twentieth century with the invalidation of the income tax in 1895, of the New York ten-hour law in 1904, of the federal child labor act in 1918, and of the District of Columbia minimum wage for women in 1923. This disillusionment was soon reflected in the writings of various exponents of sociological jurisprudence, perhaps the most popular of which was Benjamin N. Cardozo's *The Nature of the Judicial Process*, and in the works of the legal realists such as Jerome Frank's *Law and the Modern Mind*, which brought Freudian psychology to the attention of the legal profession, and Karl N. Llewellyn's *The Bramble Bush*. From these influences it was soon apparent, if it

44 Pritchett in Irish, pp. 196-197.
48 Adkins v. Childrens Hospital, 261 U.S. 525 (1923).
49 (New Haven: Yale University Press, 1921).
50 (New York: Coward-McCann, 1930).
had not already been so, that judges do something more than look up law in the case books.

The policy-making role of the Court became even more apparent in the New Deal era when the Roosevelt Court first approved the socio-economic aims of the "political branches", and later showed itself capable of a new "libertarian activism" just as discretionary as the old "economic activism" of earlier years. Thus, since 1948, political scientists in public law have been involved in a searching reappraisal of their field. Their task has been to develop "a theory of democratic government and judicial review, and a corresponding fram of reference for research, which would accommodate the participation of an activist court in the making of public policy."\(^{52}\) For many public law scholars, the need to explain the courts as formulators of public policy has necessitated the consideration of the entire political context in which the judicial function is performed. This approach, pioneered by Jack W. Peltason in his *Federal Courts in the Political Process*,\(^{53}\) has become labeled the "process approach."

The process approach is fundamentally a political sociology of the judicial function. A judge is perceived as "in the political process" and his activity as "interest activity not as a matter of choice but of function."\(^{54}\) His participation in the political process

\(^{52}\)Pritchett in Irish, p. 198.


\(^{54}\)Peltason, p. 3.
is perceived as not growing out of his personality or philosophy but out of his position. "A judge who defers to the legislature is engaging in interest activity just as much as the judge who avowedly writes his own preferences into his opinions," Although the unit of analysis for the process approach is the social group, few political scientists have actually undertaken a systematic analysis of interest groups and the judiciary. An excellent example of one who has, however, is Clement E. Vose, who, in his Caucasion Only, describes the process by which the NAACP successfully brought the restrictive covenant issue before the Court. Generally, political scientists who use the process approach have worked in a broader context. Outstanding examples are David Danelski's attempt to explain the appointment process in his A Supreme Court Justice Is Appointed, a study of President Harding's choice of Pierce Butler, and Walter F. Murphy's Elements of Judicial Strategy, a "capability analysis" and game theory approach to explaining the "policy-oriented Justice." Other widely read books utilizing the process approach include Henry J. Abraham's The Judicial Process, John R. Schmidhauser's Constitutional Law in the Political Process, and Murphy and Pritchett's

55 Ibid.
60 (Chicago: Rand McNally, 1963).
Courts, Judges, and Politics. 61

The Justices as Political Actors

It was, perhaps, inevitable, that the perception of the Supreme Court as a formulator of public policy would lead to a greater interest in the policy positions of its individual members. "If judges have a substantial amount of discretion in deciding cases, then it is important to know the motives and value systems which influence their exercise of discretion. . . . If the law is the way judges behave, then judicial behavior is a key to the law." Accordingly, political scientists in public law have begun to study what they call, simply, "judicial behavior." The work has proceeded along both empirical and normative lines.

The empirically-oriented judicial behavior movement began, if we can pinpoint a particular time, about 1948, with the publication of Pritchett's The Roosevelt Court, 63 followed in 1954 by his Civil Liberties and the Vinson Court. 64 Pritchett's principal contribution in these two books was to develop the technique of "bloc analysis" to analyze voting alignments, a technique later refined by Glendon Schubert in his Quantitative Analysis of Judicial Behavior. 65 Also

62 Pritchett in Irish, p. 207.
65 (Glencoe, Ill.: The Free Press, 1959).
central to the judicial behavior movement has been social background analysis, and attitude analysis. The assumption of attitude analysis is that if we can determine what the content of a Justice's attitudes is and measure it, we can explain and predict his votes simultaneously and accurately. The principal method of attitude analysis employed has been the Guttman scalogram. This method is described by Schubert in his Judicial Policy-Making and employed in his The Judicial Mind. It has also been used by other subscribers to the Schubert school of judicial behavioralism such as Harold J. Spaeth and John R. Schmidhauser. A more recent and much broader approach to judicial behavioralism is Stuart Nagel's The Legal Process From Behavioral Perspective.

The literature on judicial behavior from a normative perspective has been no less fertile and inventive however. Indeed, Wallace Mendelson notes an important, possible relationship when he asserts that "behavioral techniques" are afterall a "by-product of libertarian


(Glenview, Ill.: Scott, Foresman, 1965).

(Evanston, Ill.: Northwestern University Press, 1965).

(Unidimensionality and Item Variance in Judicial Scaling," Behavioral Science, 10 (1965), 290-304.


(Homewood, Ill.: Dorsey Press, 1969).
activism, "Neo-Behavioral Approach," 603.


disinterested application of constitutional norms, not by transient personal policy preferences. Thus he pleads for the "principled decision," i.e.,

one that rests on reasons with respect to all the issues in the case, reasons that in their generality and then neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or a state, those choices must, of course, survive. 78

As noted above, the response to Wechsler's plea has been voluminous. The precisely opposite point of view is taken, for example, by Charles E. Clark.79 The distinction between objectivity (i.e., "decisions based on general principles widely applicable") and subjectivity (i.e., "decisions based on the ad hoc equities or gut reaction of the judge") is, argues Clark, "not altogether apt" because it suggests a preference for objectivity which is "not within the realities," Clark concludes that "we need the unprincipled decision...to mark judicial progress." Marshall's decisions in Gibbons v. Ogden 80 and McCulloch v. Maryland 81 he argues, were clearly "unprincipled decisions" in the best tradition, a "part of our glorious heritage," without which "the Supreme Court would have been lessened in authority, and our government hampered and restricted."

78 Ibid., 19.


80 22 U.S. (9 Wheat.) 1 (1824).

81 17 U.S. (4 Wheat.) 316 (1819).
For Clark, the safeguards against "government by judiciary" are:
(1) "intelligent criticism of judicial activity such as we are getting in the best law reviews," and (2) "a constant concern for the selection of judges with a sophisticated knowledge of their attributes as human beings." A number of other scholars have adopted more moderate positions in delicately steering the narrow path between Scylla and Charybdis, including M. P. Golding, Louis H. Pollak, and the teams of Arthur S. Miller and Ronald S. Howell, and Addison Mueller and Murray L. Schwartz.

The classic problem of objectivity and discretion is put in the broader context of the ancient distinction between "a government of laws" and "a government of men" by Wallace Mendelson in his The Supreme Court: Law and Discretion. Mendelson reminds us that it was Plato, in his Statesman, who asked whether it is "more advantageous to be subject to the best man or the best laws." Plato could not choose the rule of law because, as he observed, laws are by definition general rules; this is their essence and their weakness.

Generality deals with averages, and falters before the complexities of life. As Plato put it: "A perfectly simple principle can never be applied to a state of things which is the reverse of simple." Thus for Plato, the law's generality and rigidity are at best far inferior to the discretion of the philosopher-king, who, in his pure wisdom, would render real justice by giving each man his due—not the due of some imaginary average man.

Our choice of "a government of laws," on the other hand, was anticipated by Aristotle who argued, in his *Nicomachean Ethics*, that "passion perverts the minds of rulers, even when they are the best of men." But "law is reason unaffected by desire. . . .intelligent without passion." It is true, Aristotle admitted, that even if law is universal, it is not possible to make a correct universal statement about all things. In those cases in which it is necessary to speak universally but not possible to do so correctly, the law must take the usual (or average) case, though it is not ignorant of the possibility of error. Thus our adoption of the catchphrase, "a government of laws," does not meet the basic difficulty, a difficulty not met either, as Mendelson points out, by our written Constitution.88

The Founding Fathers knew that they could not prescribe details of policy for an undefined and expanding future. Thus they wrote in generalities and sometimes even in calculated evasion. "They avoided strait-jacketing precision. Their forte was the suggestive, open-

87See *Madison's Federalist*, No. 51.

88Mendelson, *Law and Discretion*, p. 3.
ended hint,"89 We have since found it necessary, therefore, to synthesize the wisdom of Plato and the wisdom of Aristotle. Having rejected the philosopher-king for "a government of laws," we bring him back into limited service—and name him judge.90 Since as Holmes put it, "general propositions do not decide concrete cases," judges must. And the great issue of our time has become: how much law and how much judicial discretion are appropriate in the decision of a concrete case. For some, such as Charles E. Clark, judicial discretion, the judge's subjective response to the stimulus of the case, should be praised not condemned. For Clark, "a government of laws" is a "hoary apothegm which needs to be supplemented by a fuller expression. . . . a government of laws as maintained, fortified, and enriched by the good decisions of intelligent men."91 Others, however, would find it "most irksome to be ruled by a bevy of Platonic Guardians."92 The debate, of course, goes on. And the nature of the judicial function within this context of discretionary political choice, must be more fully explained. Accordingly, as stated in the introduction, there follows an examination of the capacity of the Court to influence the formulation of public policy, by an investigation in depth of the entire judicial career of Mr. Justice Wiley Rutledge.

89Ibid.

90Ibid., p.2.


CHAPTER II

SOCIO-ECONOMIC BACKGROUND ANALYSIS OF A POLICY-ORIENTED JUSTICE: WILEY RUTLEDGE

Youth and Education

The lives of public men in America are frequently embellished by biographers and other commentators to satisfy what they perceive to be the public preference or liking in biography. Thus, there is the tendency to romantically characterize Wiley Rutledge as the poor and struggling son of a fundamentalist Baptist minister who came out of the mountains of Kentucky and Tennessee to become one of the Supreme Court's great civil libertarians, always exhibiting the firm conviction of moral righteousness which was the product of his breeding. However, while such incidents of his early environment may help to explain something about his judicial style (such an explanation is attempted below in this chapter), the most notable aspects of Rutledge's youth are their rather ordinary character.

Wiley Blount Rutledge, Jr. was born on July 20, 1894 in Cloverport, Kentucky, a small village of fifteen hundred people along the south bank of the Ohio River in Breckenridge County. Very little information is obtainable about his father's family; data on the early Rutledges begins largely with his grandfather, Thomas, who worked at making and repairing barrels and casks in Sequachie Valley of eastern Tennessee. Thomas Rutledge fathered eighteen
children, nine from each of two marriages, the youngest of which, born in 1861, became the Justice's father. Wiley Rutledge, Sr. received his primary and secondary education in the local schools of the western Tennessee farmlands where he was raised, before going on to the Baptist Theological Seminary in Louisville, Kentucky. It is now only a natural matter of speculation whether these Tennessee Rutledges were of the same lineage as the notable South Carolina Rutledges, one of whom, John Rutledge, served as Associate Justice on the first United States Supreme Court (1789-1791) and was appointed by President Washington to succeed John Jay as Chief Justice in 1795, though his recess appointment was rejected by the Senate. Wiley, Jr. always contended that he was probably neither a direct descendent of nor collaterally related to the North Carolina Justice.

Wiley Rutledge Sr.'s first pastorate as a Baptist minister was in the village of Mt. Washington, near Louisville, and here he met and married Mary Louise Wigginton, the third of four children born to George Washington Wigginton and Georgia Lovell. The newly married couple soon moved to Cloverport where the young preacher had accepted a new pastorate and rode circuit. Wiley, Jr. was the first issue born of the Rutledge-Wigginton union followed by the birth of a sister, Margaret, three years later. When Wiley was nine years old his mother died after contracting tuberculosis. His father eventually remarried, joining with Tamsey Cate of Cleveland, Tennessee.

to whom were later born Ivan and Dwight Rutledge and a daughter who was born and died between the births of the two brothers. 94

At the age of seven, Wiley, Jr. moved with his parents to Asheville, North Carolina where his father had again accepted a new pastorate. But with the death of his mother only two years later, Wiley returned with his family to Cloverport where he spent the remainder of his youth until 1910 when he entered the small Presbyterian preparatory school of Maryville College in Maryville, Tennessee. His youth had been relatively uncomplicated and commonplace. In school, he played football and had excelled on the debating team. He had always enjoyed hiking and had spent a great deal of time trout fishing. His, indeed, had been the "small town" environment of Kentucky, North Carolina, and Tennessee. In socioeconomic terms, he had come from a "middle income society" living the life of a minister's boy and practicing especially the virtues of respectability, frugality, and simple living. 95 Although he was now to leave the simplicity of his father's times and environment, he would continue to exhibit the moral fervor of his religious background. The Reverend Rutledge was a dedicated clergyman with an uncomplicated, doctrinaire belief in the literal infallibility of the Scriptures. Whatever distance Wiley, Jr. was to journey from this time and place, it can at least be said, as was ob-

94Ibid., p. 4.


served of him by his eulogist, the Reverend A. Powell Davis, at his memorial service in All Souls' Unitarian church in Washington:

"(Wiley Rutledge) learned early that the one great distinction in human life is between right and wrong, and that, although the battle between them may never be ended, each of us who would take his part in the world must choose his side. . . ." 97

In 1912, Wiley, Jr. entered the college division at Maryville where he met and fell in love with his Greek teacher, Annabel Person whom he later married. He left Maryville in 1913 to take his senior year's work at the University of Wisconsin, and was graduated with the A.B. degree at the age of twenty in 1914 with majors in chemistry and the classics. It was during the spring of his senior year that his father remarried and informed his son that he could no longer financially support him, compelling Wiley, Jr. to give up his hope of attending the University of Wisconsin Law School. Instead, he went to Bowling Green, Kentucky to live with an aunt and to attend the business college there. After a few weeks of brushing up on his shorthand he left for Bloomington, Indiana where he entered the Indiana University Law School and supported himself by teaching business subjects and coaching basketball in the high schools of Bloomington and Connersville. 98

Under this double strain, Wiley contracted influenza in the summer of 1916 and further tests disclosed that he had incipient tuber-


98 Harper, Justice Rutledge and the Bright Constellation, p. 10.
culosis. He was forced to leave Indiana and spend nearly a year recuperating in the mountains of North Carolina near Asheville in the state sanitarium. Toward the end of that period, he received a telegram inviting him to teach business subjects in the high school in Albuquerque, New Mexico. He consulted with Annabel who was then visiting him in Asheville, and they decided to be married immediately, accept the offer, and move West. Wiley, Sr. performed the ceremony on August 28, 1917. Annabel, a tenth generation American and the youngest of four children, was accustomed to associating with men of the bench and the bar. Her uncle had sat on the Supreme Court of Michigan for several years and her brother was a lawyer in Lansing, Michigan as well as a Republican Congressman from the Wolverine State. Her assistance and understanding were invaluable to Wiley throughout his life.

Wiley was very active in Albuquerque for the next three years not only teaching classes but also acting as Secretary to the Board of Education. But he never gave up his hope of becoming a lawyer. In 1920, drawn by its therapeutic climate, Wiley and his young wife moved to Boulder, Colorado, where he continued to teach high school courses while attending the University of Colorado Law School. These years of hard work confirmed his total recovery from tuberculosis, and finally, in 1922, he earned an LL.B.

It is only natural to speculate as to the impact of these early times as a minister's son and sickly but aspiring law student on Wiley Rutledge's future years as a scholar and a judge. Here was a midwesterner
from a professional, lower middle class environment who evinced a boldness of spirit when hit by illness and who toiled to receive an education in spite of poverty. This is certainly a background likely to provide one with a better conception of the average man's plight and problems, to add fuel to one's dormant desire to give all men an equitable stake in the world, and to adjust the differences between the strong and the weak. It is further possible to infer that Wiley's religious background reinforced by an acquaintance with the classics accounts for what turned out to be a profound sense of integrity and a zealous faith in a moral world order, while his study of chemistry conceivably firmly implanted in him a bias for an empirical approach to matters and made him wary of the delusion of labels and of the uncertainty of generalizations. At least one writer has since explained Rutledge's position in civil liberty cases and... his emphasis on facts in state regulation and taxation cases in terms of these influences.

Whatever was behind him now gave way to a future as lawyer, scholar, administrator, and judge.


100 Levitan, 395 n 10.
Early Career

Immediately upon completion of his law school courses, Rutledge practiced law for two years in Boulder, with the firm of Goss, Kimbrough, & Hutchinson. In 1924, he took a full time position as Associate Professor of Law at his alma mater, the University of Colorado, where he remained for two more years before being taken by Chancellor Herbert S. Hadley, who had also been at Boulder, to Washington University in St. Louis. Rutledge became first Acting Dean in 1930, then Dean of the Law School in 1931. His next and last academic position before beginning his judicial career was as Professor of Law and Dean at the State University of Iowa where he served from 1935 to 1939.

As W. Willard Wirtz has pointed out, these fifteen years (1924-1939), broken into three periods, each of which "included inevitable long months of breaking into new circumstances, offered too little time for the kind of building which, in the field of legal education, posterity identifies as monumental." This may in part explain why no major treatise or casebook resulted from his scholarship and why his contributions to the law reviews were less than those of his colleagues. As an administrator, Rutledge, again, did not

103 See list of Rutledge's published works, articles, addresses, and book reviews in the Bibliography.
distinguish himself with the kinds of accomplishments usually accompanying renown. He did, both at Washington and Iowa, make a few minor changes in course offerings. Under his regime, again both at Washington and at Iowa, the public law programs were enlarged, the law review programs were accorded particular emphasis, and a number of courses were changed from elective to required status. Although these few accomplishments may appear greater than what is ordinarily expected during such brief tenures as Rutledge served both at Washington and Iowa, they probably most accurately reflect only a propensity for experimentation, which Rutledge exhibited throughout the years, and a willingness to allow individual faculty members to test their various pet projects. All in all, Rutledge was not an extraordinary administrative planner.

He did, however, give his support to the developing challenge of jurisprudential realism. His years as a law school administrator during the thirties were years of serious reaction in the field of legal education to the conceptualisms which characterized earlier periods of juristic thinking, a reaction catalyzed in 1930 with the publication of Judge Jerome Frank's *Law and the Modern Mind*. The challenge was to a mode of legal thought emphasizing the role of deductive logic for assumed major premises. Realism was a plea, instead, for an emphasis on the element of uncertainty in law, on the part played by the personal characteristics of the judge, and on the factual aspects of the

104 Wirtz, 445.
issues. In legal education, realism meant the attempt to replace the stereotype Harvard casebook with new teaching materials and fresh approaches, an attempt carried forward by such scholars as Cook, Bohlen, and Llewellyn. Rutledge's experience and disposition allowed him to be particularly hospitable to these new trends.\textsuperscript{105} While at Iowa, he initiated a program in which the class in criminal law sat each week with members of the Department of Psychiatry, and he launched a summer school for police officers which was one of the first of its type in the country.\textsuperscript{106}

As an academician, however, Dean Rutledge's major contribution probably came neither as a writer nor as an administrator but as a classroom teacher. He taught, at one time or another, a wide variety of courses: Torts, Bills and Notes, Partnership, Criminal Law, Damages, Private Corporations, Suretyship, Insurance, Agency, Conflict of Laws, Domestic Relations, Business Associations, Problems in Personal Jurisdiction, and Judicial Process and Administrative Law.\textsuperscript{107} He was a "tough" teacher, often regarded as severe and uncompromising. His discussions started from the cases which he assumed had been read. His

\textsuperscript{105} Harper, Justice Rutledge and the Bright Constellation, p. 15. It is interesting to note that Willard Wirtz interprets Rutledge's position here a bit differently. Wirtz argues that Rutledge exhibited an anomalously (in the face of his reformed nature) "conservative pedagogy" showing a clear preference for "casebooks" over "collections of materials" and for "conceptualism" as against "functionalism." See Wirtz, 447.

\textsuperscript{106} ibid.

\textsuperscript{107} Forrester, 516.
method was Socratic—searching, relentless questioning—sporadically followed by lectures tying together loose ends. He had little interest in the unprepared student, but he always made time for what he judged to be legitimate disagreement and debate. The result was an exhaustive exploration of detail, extraordinary thoroughness and conscientiousness. He insisted both on an incisive analysis of the cases and on a thorough appreciation of the real social and economic issues they often concealed. 108 Reflecting, perhaps, personal doubts about his own adequacy and ability to be understood, Rutledge's classes were not only highly disciplined and thorough but also occasionally repetitive. As Willard Wirtz has observed: "It was an unusual semester when the class in Corporations got past page 200, and it is part of the folklore at Iowa that when, just before the term ended, Rutledge was called to the bench, his successor instituted 100-page-a-day assignments to insure the students' having what he deemed an adequate exposure to the subject." 109

Still, Rutledge's contribution as a teacher should not be underestimated. He emphasized attention to not only the history and evolution of concepts but also their relationship to contemporary events. He had a highly-matured view as to the broad purpose of education, exhibiting over and over his belief that law school is not only a place where young men are preparing for life but also already taking part in it. Thus, his tendency to interweave concepts with current

108 Wirtz, 445.
109 Ibid., 446.
events was aimed not only at illuminating the concept but also at making the discussion part of the students participation in what was happening around him. I think it is not too much to say that Rutledge, the teacher, gave his students a broad basis for understanding as well as a basis for rigorous doubt, a thorough grounding in the rules of law as well as an appreciation of the place of law in a democratic society. And although students as witnesses may not be the best judges of the quality of their teachers, they are often the only judges, and of Wiley Rutledge, the best of them seem to agree—he was an inspiring if not brilliant teacher who believed in "humanizing" the rules of law and regarding students as people. Professor Harry W. Jones of the Columbia Law School who once studied under Rutledge has the following recollections:

The Dean always ran what we used to call a "tight" law school class. There was no nonsense, and no lightness in his presentation. I remember very well that the atmosphere was one of distinct nervous tension as students strained to follow the Dean's searching and unrelieved course of questioning. . . . (Although he was) terribly hard on unprepared students and on quibblers and bickerers, . . . (he always made an effort) to acquire an unbelievable amount of knowledge concerning the background, financial circumstances, and individual objectives of every member of the law school student body. . . . He felt things deeply and was capable of profound indignation at injustice or unfairness of any kind.110

Clearly, Dean Rutledge was far too compassionate to be a strict disciplinarian. He never imposed his views on his students and rarely missed a chance to be helpful. And it is probably accurate to conclude that what some students initially interpreted as toughness, rigidity,

110 Quoted in Brant, 428.
and anger was little more than a misinterpretation of his passion for perfection. It is widely recorded that the Dean established close and lasting ties with large numbers of his students. Many of them later visited with him in his Supreme Court chambers, and scores of them corresponded with him until his death. This is hardly the record of a mediocre teacher.

While Rutledge's sympathy for the socio-economic aims of the New Deal was evident during these years only in his extra-academic activities, his devotion to individual freedoms, particularly the freedom of expression, became manifest immediately upon his arrival at Iowa in 1935. According to the account of liberal journalist Irving Brant, faculty members possessing progressive views had allegedly labored under some considerable fear of speaking their ideas in public. The tacit tenet was: "Think whatever you want but keep silent about it or else we may lose the financial support of the legislature and of the private foundations." But the new Dean would not be so restricted. He spoke up repeatedly at various social gatherings and before city service clubs expressing his support for the New Deal. Soon the tradition of fear was broken and Rutledge turned his attention to the University he had just left. When he heard about the suppression of student pacifist demonstrations at Washington University, he forwarded a critical editorial on this matter from the Des Moines Register to St. Louis.

111 ibid., 427.
112 Infra, Section "Extra-Academic Activities," this Chapter.
and stated his hope that its reproduction there would make the citizens aware of the nation-wide harm being done to the University's reputation. He appeared proud to note that similar anti-war demonstrations at Iowa had provoked no official statement of condemnation or restraint from the administration.

The accounts of these two episodes are taken from an article by St. Louis journalist Irving Brant who, as will become clear below, played a critical role in Rutledge's eventual appointment to the Supreme Court. Mr. Brant's piece, although breezy and informative, often takes on the character of a eulogy and his anecdotes are almost always colored by the nature of his admittedly liberal political philosophy. But while these factors must be noted as a mild disclaimer to the pure validity of his data, it can still be asserted, at minimum, that Dean Rutledge exhibited during his academic years a decided bent for freedom as against authority. This is not to say that he saw no room for accommodation in the order-freedom complex. Indeed, that accommodation he then and always saw as essential. But in terms of priority, freedom came first.

**Extra-academic Activities**

As a teacher of law, Rutledge repeatedly expressed his dissatisfaction with the "impersonalness" of legal education. And he saw that same quality in the legal profession itself. The law student must be made aware, he argued, of his professional obligation to community service; and, for Rutledge, this meant that law schools must design
their curricula so as to train not "artisans" but "architects" for which all democratic societies yearn. On this point, Rutledge taught his lesson by example through the personal performance of countless public services.

He was a member of the American, Iowa, St. Louis, and Johnson County, Iowa, Bar Associations and became a leader in their various public service programs aimed at sponsoring new legislation, organizing discussion groups, and establishing student forums. He worked tirelessly as Commissioner of Uniform State Laws for Missouri from 1930 to 1935 and for Iowa from 1937 to 1939. He was active in the St. Louis Commission for Social Justice along with such notables as Bishop Scarlett and Rabbi Isserman. In this capacity, Rutledge became involved in innumerable cases of injustice receiving public notice, most particularly in the maintenance of civil liberties for the faculty and students of Washington University. He was further active in the Masons and served as president of the Iowa City Rotary. He belonged to Alpha Sigma Phi, Phi Alpha Delta, and Delta Sigma Rho fraternities and sustained his membership through regular participation. In Iowa, he even taught Sunday School for a couple of years.

Among his extra-academic activities, however, none were so potentially predictive of his future behavior as Supreme Court Justice than his various speeches and articles in support of the socio-economic aims of the New Deal which began to receive public attention in 1933. In that year, the American Bar Association met in St. Louis and President Clarence E. Martin delivered an address strongly endorsing the Supreme Court's decisions in the child labor case of *Hammer v. Dagen*
hart, and the subsequent child labor tax case of Bailey v. Drexel Furniture Co. Rutledge grew more and more distressed with each of Martin's assertions, and a month later he offered a stinging rebuttal in an address before the St. Louis Social Science Research Council, subsequently published in the Social Science Review. The Court, Rutledge argued, had given up its historic position in defending the breadth of federal power in the field of commerce and taxation simply in order to prevent social reform. And as if this were not bad enough, he went on to charge, the Court was continuing to expose its political bias by refusing to apply the same narrow logic of Dagenhart and Drexel to other cases which involved the same problems of federal power and did not relate to social issues. Then he added:

Social progress in the form of national legislation is faced constantly with the three hurdles of so-called "natural rights", "State rights", and "republican institutions." Behind these legal and political dogmas of the eighteenth century, all forms of commercialized greed have sought to establish their interests beyond the reach of governmental control. They are the sheep's wool in which the institution of human slavery was legally clothed; the guise under which railway combinations and other forms of trusts sought freedom from national restraint in order to establish national monopoly; the shield behind which vast power combinations seek similar freedom today; the basis upon which workmen's compensation acts, minimum wage laws, laws regulating hours of labor, and all other forms of legislation in the public interest have been resisted.

Stated not in this negative but in a positive sense, Rutledge's

113 247 U.S. 251 (1918).
114 259 U.S. 20 (1922).
support for vigorous federal action to buffet the problems of the period was revealed later in 1933 in another warning: "If our national government is without the power to control production, to place limits upon the scope and methods of unfair competition and to regulate all phases of industrial and commercial life which fundamentally affect these problems, the only alternative is continuance of the economic disorder with which we have struggled for four years." 116

Rutledge was no less energetic in his condemnation of holding companies and in expressing his sympathies with the small business man. In a society increasingly dominated by the industrial machine and the corporation, he said in 1934, the powers of government must be used to bring the development of corporate power, which he admitted was inevitable, under control, and to emancipate labor from the status of "corporate serfs." 117 And in 1935 he wrote:

There is no doubt that the holding company is the most pliable and facile instrument for the concentration of wealth and economic power which history has devised. . . . Within twenty-five years it has assembled into national systems eighty per cent of all power distributed in the United States. In the power field it has issued more than two billion dollars in securities, controlling thereby investments of ten billion dollars in operating companies. Prior to 1929, a single company with $750,000,000 capitalization had control of corporations with over three billion dollars in assets, and capitalists dominated the holding company with less than

116Quoted on the occasion of Rutledge's appointment to the Supreme Court in a review of his various utterances in the St. Louis Globe Democrat, January 12, 1943.

$300,000,000 are investment. The holding company has accomplished what the "corner," "the pool," and the "trust" of previous generations sought but were unable to achieve.

Although pronouncements of this type were certain to cause some raised eyebrows particularly among the conservative business men, financiers, and lawyers, to whom they were most often addressed, none of them had as significant an impact as Rutledge's reaction to the "Triple A" decision of 1936. In the presidential campaign of 1932, Franklin Roosevelt had vowed to restore agriculture prosperity, and in 1933 the Congress passed the famous Agricultural Adjustment Act which, in essence, provided for a processing tax to be levied on such basic commodities as wheat, corn, and cotton; and the funds thus accumulated were to be used for payments to farmers in return for the farmers' promise to reduce crop acreage. Although the scheme worked reasonably well for a couple of years, its constitutionality was challenged in 1935 when the receiver of a processor, Butler, refused to pay the tax. In a 6-3 decision, the Court voted against the tax, Justice Roberts writing for the majority with Justices Cardozo and Brandeis joining in Justice Stone's dissent.

Roberts argued that the powers reserved to the states by the Tenth Amendment prevented Congress from using the taxing and spending

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118 St. Louis Post Dispatch, May 15, 1935.
power to regulate activities such as agricultural production which traditionally belonged to the states. Although the taxing and spending power may be used for any purpose relating to the general welfare, he continued, this power does not include the authority to pass legislation to achieve a purpose not specifically enumerated in Article I. "The word (tax) has never been thought to connote the expropriation of money from one group for the benefit of another," he concluded.

On the same day when the Court's decision was announced, January 6, 1936, Wiley Rutledge was scheduled to address the Cathedral Luncheon Club, a group of business and professional men, in St. Louis. Only a few hours before he was to speak, newspapers hit the streets with the news of the Court's decision in Butler. Although lengthy excerpts were reprinted from Roberts' majority opinion, there was only the brief comment that Justices Stone, Cardozo, and Brandeis had dissented, not followed by any extracts from the minority side. Rutledge decided to discard his prepared text and to address himself extemporaneously to what he considered the bold and unsupported assertions in Roberts' opinion.

The majority, Rutledge charged, did little more than declare the invalidity of the act. It did not come to grips with the content of "the general welfare" nor did it even acknowledge the possibility that agricultural production might, under some conceivable circumstances, have some relation to it. It implied, but offered no support for the proposition that agricultural production is a matter reserved to the states and thus denied to the federal government. In Rutledge's view, the power of Congress to levy an excise tax upon the processing
of agricultural products was clearly constitutional; the Congressional authority to spend public money in aid of farmers was clearly provided for in its power to levy taxes to "provide for the . . . general welfare." The majority view, that the tax was invalid because it infringed on state power, Rutledge argued, was merely an attempt to read into the Constitution a proposition that would further guarantee the kinds of socio-economic policies which the members of the majority preferred. This he condemned as a consideration of the wisdom of legislation rather than of its constitutional validity and thus a violation of the principles of judicial self-restraint. Interestingly, Rutledge's impromptu speech paralleled, almost to the point, the arguments made in Justice Stone's dissent which he did not have the opportunity to read until the next day.

The Iowa Dean made speeches of this kind not to gain public attention (he had no personal political ambitions) but rather to state, as an informed citizen, deeply felt opinions on the proper course of governmental policy. Nevertheless, pronouncements as intensely political as those made before the Social Science Research Council and the Cathedral Luncheon Club were certain to earn notice. One particularly influential person who noticed was liberal journalist Irving Brant. That account comes next. . . .
CHAPTER III

THE POLITICS OF APPOINTMENT

Early Consideration

In the victorious aftermath of Wiley Rutledge's appointment to the Supreme Court in 1943, Irving Brant, who had been working in St. Louis during Rutledge's tenure at Washington University and who was an avid supporter and intimate confidant of President Franklin Roosevelt, received the following letter from one of the new appointee's long-time friends, Luther Ely Smith: "It is very clear to me that the first requisite of anyone desiring to become a member of the Supreme Court is to look around and see if he numbers among his friends an Irving Brant." That Brant numbered among Rutledge's friends, or at least admirers, was clearly the incipient and sustaining force behind the nomination.

According to all available data, the story begins in February, 1936 when Brant received a chance to inform Roosevelt about Rutledge's impromptu dissent from the Butler decision in his January 6th speech in St. Louis. Brant recounts that Roosevelt then asked him to prepare

121Quoted in Harper, Bright Constellation, p. 43.
a dossier on Rutledge for the President's private files.\textsuperscript{122}\textsuperscript{41a} The timing of this request is of some importance because it would appear to cast doubt on an assumption sometimes made that Rutledge's support for Roosevelt's Court-enlargement bill was the act which first prompted the mention of his name as a possible appointee. In fact, the Court-enlargement episode was still a year in the future, and any awareness on Rutledge's part of possible judicial appointment was nearly three years away. In any case, Brant worked at compiling the dossier for the next two years (1936-1938) before finally submitting it to the President. In the interim, the Court fight ensued.

The Court bill met some of its strongest opposition in Republican Iowa where the newspapers, bar associations, and even some elements of the Democratic party stood in nearly solid opposition. Dean Rutledge was not without misgivings with respect to some of the arguments being made for the bill, but he sympathized with and approved of its purpose. He was convinced that the prevailing conservative line would become irrefutable Constitutional doctrine unless soon reversed. Thus, when asked by a Roosevelt Administration official to testify favorably before the Senate Judiciary Committee, Rutledge agreed to do so. Perhaps naively, the Dean did not anticipate the violent reaction which his support for the bill would provoke in the Iowa legislature. The \textit{Des Moines Register} reported the possibility that Rutledge's position would bring about the defeat of a state appropriations bill for University salaries. In the wake of this report,

\textsuperscript{122}Brant, 434.
Rutledge informed his friend, University President Gilmore, that he intended to testify before the Senate in favor of the Court bill and that if such action of his part was likely to jeopardize the salaries of his colleagues, he would be willing to resign his post. Gilmore, although a conservative man himself, was quite tolerant, a quality Rutledge admired. He told the Dean to go ahead and testify but not to resign.

As it turned out, Rutledge was never called to testify, and the crisis blew over as the Court began to reverse its field. Rutledge now felt that the bill should be dropped since the need for it had dissipated. Although his advice was not now heeded, his selfless support for the bill had won for him some indebted friends in Washington.

Brant, meanwhile, continued to compile the dossier. Occasionally, he would write to Rutledge under the pretense of some other objective. On February 15, 1938, for example, Brant told Rutledge, in a letter, that he was doing a study of the relationship between law deanships and constitutional expositions, and he requested that Rutledge provide him with citations of his articles and addresses on the Constitution. Rutledge replied: "Unfortunately I have never had the pleasure of teaching constitutional law, and, quite honestly, I make no special pretentions to any competence in that vast field."

Brant, of course, was not dissuaded. He continued to prepare his digest of Rutledge's articles, addresses, and correspondence which he finally submitted to

123Quoted in Harper, p. 28.
Roosevelt in November of 1938. He had not pushed for Rutledge’s appointment when the first two vacancies occurred because he though that “political conditions were unfavorable.” Justice Van Devanter’s seat had gone to Hugo Black in 1937 and Justice Sutherland’s seat to Stanley Reed early in 1938. But now a successor to Justice Cardozo was required and Brant went to work.

As Robert Dahl has shown, President Roosevelt, at first, had unusually bad luck in receiving opportunities to make Supreme Court appointments. Over the entire history of the Court, on the average one new justice has been appointed every twenty-two months. Thus a president can expect to appoint about two new justices during one term of office. Generalizing over the entire history of the Supreme Court, the probabilities are about one out of five that a president will make one appointment to the Court in less than a year, one out of two that he will make one within two years, and three out of four that he will make one within three years. But Roosevelt had to wait four years to make his first appointment (Black), the odds against this long a wait are four to one. It is probably reasonable to speculate that had the President had even average luck, the famous Court fight, may never have occurred. As it turned out, of course, Roosevelt’s luck soon changed. In addition to Black and Reed, he was able to appoint, in the next four years (1939-1943), six other new justices (Frank-


125 Ibid., 285.
further, Douglas, Murphy, Byrnes, Jackson and Rutledge) and to elevate Justice Stone to Chief Justice, so that by 1943 only Justice Roberts remained from the Hoover era. It is within this context of judicial appointment that Brant kept the Rutledge name before the eyes and ears of those with the power to choose.

When Cardozo's seat opened up in late 1938, Brant finally gave his dossier on Rutledge to Roosevelt. Brant was aware that Felix Frankfurter had the inside track on the Cardozo vacancy, and not wishing the presentation of Rutledge's name to produce any clash with the possible Frankfurter appointment, he included in the dossier an endorsement of Frankfurter and a suggestion that the desire to balance the Court geographically by appointing a "westerner" (a tactic urged by some Administration people, notably Attorney General Cummings and James Farley) be put off until later. Roosevelt sent copies of the dossier, excluding identifying references, to a number of his advisers. All replied with favorable endorsements for the man they did not then know was Rutledge.

Brant continued to work behind the scenes. On November 12, 1938, he wrote to Rutledge, still keeping it a secret that the Iowa Dean himself was under consideration, telling him that Roosevelt was leaning toward Frankfurter and requesting that Rutledge endorse Frankfurter as a means of showing "western" support for the Harvard law professor. Rutledge replied with unrestrained praise for Frankfurter and noted that no one from the West, with the possible exception of Texas' Joseph

126See Table 1, next page.
Table 1.

THE COURT ROOSEVELT MADE, 1937-1943

(The Court as Constituted in 1932)

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(The Court as Reconstituted in 1943)

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C. Hutcheson, Jr., was even close to Frankfurter's stature. On November 30, still without any knowledge on Rutledge's part, Brant wrote to Colorado University President George Norlin and asked for a Western endorsement for Rutledge, just as he had asked Rutledge to endorse Frankfurter. Norlin responded affirmatively. 127

Inside the Administration, the choice had apparently come down to either Frankfurter or Rutledge by mid-December. 128 But even those who were impressed with Rutledge were thinking largely to a future appointment. They had every reason to believe that Frankfurter would be a good appointee, and they wanted to avoid any harm that a two-man contest for the vacancy might produce. At this point, Brant finally informed Rutledge that he, himself, was under serious consideration. Rutledge again responded with high praise for Frankfurter and modestly stated his lack of interest in actively seeking support for his own appointment.

Roosevelt was still undecided. A few days after Christmas, he telephoned Frankfurter who has related the story as follows:

The phone rang, long distance, and there was the President of the United States, and he said that another suggestion had been made to him, and he wanted to know what I thought of it: Dean Wiley Rutledge of the Law School of the University of Iowa, what did I think of him? I said, "I don't know him. I've never met him and therefore I have no opinion, but if you want me to find out from people whose judgement I have confidence, what they think about it, it's very easy for me to do so because all the law professors are now meeting

128 Brant, 434.
in Chicago..." I then got on the phone and got hold of T.R. Powell in Chicago... and I told him absolutely nothing about the inquiry of F.D.R. and the Supreme Court, but I put to him the questions on which I wanted light on Wiley Rutledge which would reveal the intellectual and moral content of the man. He knew Rutledge somewhat. I said, "You ask fellows like Lloyd Garrison and so on—just wrestle around and call me back collect and tell me what the results of your inquiries are..." Powell called me back and gave me a very detailed report, detailed estimate, assessment as to why he liked Rutledge's qualities and potentialities on the basis of which I wrote a memorandum to the President the upshot of which was that if I had to act on the information my net inquiry had fished up I would think that Rutledge was qualified for the Court and would be a properly appointed man.129

Soon before this exchange, Attorney General Cummings resigned, and his successor, Frank Murphy, swung the weight of his office behind Frankfurter.130 Nebraska Senator George W. Norris also joined with support for Frankfurter. Whatever the final determining factor, Roosevelt sent Frankfurter's nomination to the Senate on January 5, 1939.

Rutledge's position with respect to future vacancies, however, had been greatly enhanced. The fact that he stood solidly behind Frankfurter, the fact that he asked Senator Gillette (who had written an endorsement for him at the request of friends in Iowa) to withdraw his endorsement because it might militate against the appointment of Frankfurter, the fact that he endorsed Fifth Circuit Court Judge


Hutcheson in case a westerner was to be considered—all these things were well publicized (and well received) in Washington, thanks to Irving Brant.

Six weeks after Frankfurter's appointment, Justice Louis Brandeis retired. Roosevelt asked his new Attorney General, Frank Murphy, to prepare dossiers on seven possible appointees: Yale law professor and SEC member, William O. Douglas; Washington's Senator, Lewis B. Schwellenbach; Wisconsin Law School Dean, Lloyd Garrison; Judge Harold M. Stephens of the Court of Appeals, District of Columbia; Judge Sam A. Bratton of the Tenth Circuit; Judge Hutcheson; and Rutledge. Stephens, Bratton, and Hutcheson apparently generated little excitement among the President's advisers. Garrison was considered clearly qualified but only partially "available" in the sense that his eastern origin did not meet the "west-of-the-Mississippi" criterion.

That left Douglas, Murphy's first choice, Rutledge, Murphy's second choice, and Schwellenbach, the early leader. Schwellenbach lost his own cause, however, when he irritated President Roosevelt by voting against a federal judgeship nominee in Virginia whom Virginia's Senator Carter Glass opposed. Although 72 other Senators also voted against the nominee simply as a matter of "Senatorial courtesy", Roosevelt took Schwellenbach's vote personally, seeing the episode as a vote of confidence between himself and Senator Glass.

131 Harper, p. 33.
132 Howard, p. 192.
133 Harper, p. 34.
Thus it came down to Douglas and Rutledge. On March 10, 1939, Brant wrote to Roosevelt: "(The main task ahead) is to win back Justice Stone to the liberal wing . . . . Of the men under consideration I think that Rutledge is the one who would perfectly reinforce Frankfurter in winning Stone back." Further, Rutledge had strong support from Colorado which appeared to fit the demand for a westerner, while Douglas's long residence in Connecticut appeared to make it difficult to nominate him as a "State of Washington man." But here Senator Norris again played a pivotal role although it did not work out as he planned. Norris favored Rutledge, but he told Roosevelt he would support Douglas, but that if his name was sent to the Senate it should be as a resident of Connecticut. Brant concluded that "this subordination of the call for a westerner swung the President to Douglas."^135

On March 15, Murphy telephoned Rutledge. He told him that he was "still in the picture" but wondered whether, in the event the nomination went to someone else, Rutledge would accept an appointment to the United States Court of Appeals for the District of Columbia. Rutledge felt that one alternative was to respond with an "all-or-nothing" ultimatum. But after discussing the matter with his family and with Iowa colleagues Philip Meechem and Willard Wirtz and Washington University colleague, Ralph Fuchs, Rutledge decided that the selection had probably already been made anyway and to agree to accept either post.

^134 bid.
^135 Brant, 436.
On March 20, 1939, Roosevelt nominated Douglas for the Supreme Court and, on March 21, nominated Rutledge for the Court of Appeals. Rutledge's nomination was easily confirmed. The only Senator on the Judiciary subcommittee dealing with the nomination who spoke out against him was Utah's Senator King, but here he was more than adequately protected by Senator Norris. Rutledge took his seat on May 2, 1939.

Four Years on the Court of Appeals

In a number of ways, Rutledge exhibited as a member of the Court of Appeals for the District of Columbia many of the qualities which were later to characterize his opinions on the United States Supreme Court. As indices of how he might behave as a Supreme Court Justice, his opinions for the Court of Appeals served those who would support his nomination quite accurately. Through all of his writing there ran an intense interest in protecting the rights of the individual. As one of his colleagues on the Court of Appeals, Judge Henry W. Edgerton, later observed, Rutledge's "social philosophy and his alertness to promote it" in his written opinions was always an evident characteristic of his judicial style.136 In Wood v. United States,137 for example, the appellants had been convicted of robbery. Guilty pleas, allegedly made at the preliminary hearing in police court, were accepted without

137128 F. (2d) 265 (1942).
informing them of their constitutional privilege against self-incrimination and admitted in evidence against them at the trial. Rutledge's majority opinion reversed and remanded the case on the ground that the evidence was not admissible. For Rutledge, the sanctity of a fundamental constitutional protection was great enough to risk freeing a guilty man.

In another case involving individual freedoms, *Busey v. District of Columbia,* the appellants were members of Jehovah's Witnesses who had been convicted of selling religious tracts in the streets without paying a small license tax. The majority thought the tax clearly constitutional on precedent and principle. Judge Edgerton wrote for the majority what he later considered an "erroneous" opinion which did not concern itself with the social interests involved.* Rutledge was more functional. He believed that the tax infringed freedom of the press and religion and he filed an opinion in dissent:

This is no time to wear away further the freedoms of conscience and mind by nicely technical or doubtful construction. Everywhere they are fighting for life. War now has added its censorships. They with other liberties, give ground in the struggle. They can be lost in time also by steady legal erosion wearing down broad principle into thin right. Jehovah's Witnesses have had to choose between their consciences and public education for their children. In my judgement, they should not have to give up also the right to disseminate their religious views in an orderly manner in the public streets, exercise it at the whim of public officials, or be taxed for doing so without their license.

*138* 29 F. (2d) 24 (1942).

*139* Edgerton, 295.
It is of importance to note that while the Supreme Court soon upheld a similar tax in *Jones v. Opelika*, it later voted, on the day Rutledge took his seat on the Supreme Court, to rehear the case, and finally reversed itself with Rutledge casting the deciding vote.\(^\text{140}\)

Rutledge also made his mark in racial discrimination cases. He was the first judge on the District of Columbia Court to question the established rule that restrictive covenants on real estate were enforceable by injunction. In *Hundley v. Gorewitz*,\(^\text{141}\) the majority held that the covenant in question was no longer enforceable because of changes in the character of the neighborhood, but restated its belief in the validity of such covenants in general. Rutledge wrote the following brief concurring opinion:

> I concur in the result for the reason that is such a covenant as is involved in this case is valid in any circumstances, as to which I express no opinion, it is not valid or enforceable in the conditions shown on the present record and stated in the opinion of the court.

Just as *Busey* was later overturned in *Opelika*, the doctrine Rutledge questioned here was also later overturned by the Supreme Court in *Hurd v. Hodge*.\(^\text{142}\)

Rutledge, however, was no absolutist. While he refused to construe the Constitution so as to oppress the weak, he also refused to construe it so as to protect the wicked.\(^\text{143}\) In one interesting case there was the question whether a district court could correct a mistake

\(^{140}\) Forrester, 520.

\(^{141}\) 132 F. (2d) 23 (1942).

\(^{142}\) 334 U.S. 24 (1948)
and change sentences to run consecutively, rather than concurrently, after the prisoner had left the courtroom and entered the elevator. Rutledge's opinion rejected the defendant's plea of double jeopardy under the Fifth Amendment:

The Amendment contemplates the protection of two interests. It looks of course to the protection of the person charged with crime. But it does not require this at the cost of ignoring entirely the interest of the community in protection from criminal activities.

And in another case involving double jeopardy, Rutledge objected to the "same or different evidence" test which, he argued, might result by its technical application in freeing a guilty man. "That test is useful", he said, "to spell out the elements of the crimes charged, and therefore to disclose what, if any, difference exists between them." Then he wrote:

If there is none that ends the matter. But if difference is disclosed there is in my view always another step which must be and is taken either intuitively or with deliberation. That is to weigh the difference to determine whether it is substantial or too minor to be material for purposes of double jeopardy. The court must evaluate as well as spell out the differences, and determine whether the element it affects is sufficiently important in relation to other elements involved in both crimes to justify refusal to apply the constitutional protection.

In the field of labor law, Rutledge displayed a favorable attitude toward labor and consistently upheld the rights of the working man. In Balinovic v. Evening Star Newspaper Co., he dissented from the ma-

144 Rowley v. Welch, 114 F. (2d) 499 (1940).
146 113 F. (2d) 505 (1940).
majority opinion holding an employer not liable for a negligent injury caused by its employee while using the employer's automobile to chase a traffic violator at the command of a policeman. Rutledge argued that an individual, commandeered by a policeman to chase criminals, is liable for negligence, and that it is only logical that a corporation be not excused from this duty when its employees are so commandeered. This tendency to broaden the sphere of liability, particularly where a corporation is involved was also exhibited in Workman's Compensation cases. Rutledge also tended to approve the power of the administrative machinery of government to protect the rights of the working man. In International Association of Machinists v. N.L.R.B., there was involved an order of the N.L.R.B. requiring the employer company to cease giving effect to an alleged contract with the A.F. of L. unit for a closed shop. The A.F. of L. petitioned the court to set aside the order. Rutledge upheld the N.L.R.B. on the ground that the contract was invalid since the employer assisted in the consummation of it by unfair practices directed against the C.I.O. unit. The Board, he argued, has the discretionary power, short of arbitrariness, to decide what is an appropriate bargaining unit, and while the bargaining unit in this case (toolroom employees) would ordinarily be appropriate, it is not so here because of the unfair labor practice used by the employer.\(^{149}\)

147 Hartford Accident and Indemnity Co. v. Cardillo, 112 F (2d) 11 (1940).

148 110 F. (2d) 29 (1939).

149 This case also serves to illustrate Rutledge's liberal attitude toward evidence. The unfair practices question upon which this case turned was largely evidential, i.e., whether or not the employer helped the A.F. of L. unit secure a majority of the tool room employees, thus discriminating against the C.I.O. unit. In deciding that it did, Rutledge ignored the strict and technical rules of evidence and wrote nearly 14 pages, didactically discussing the evidence he deemed relevant.
Throughout his tenure on the Court of Appeals, Rutledge displayed a liberal, cooperative attitude toward administrative agencies. In *Dow v. Ickes*, concerning the Interior Secretary's statutory powers to regulate salmon fishing in Alaska, he wrote:

> It is true that courts have the power to order an executive or administrative official to perform executive or administrative functions in certain instances, when he has wholly declined to do so. But they have no power to direct him as to the manner in which his discretion shall be exercised. When it appears, therefore, that the official has exercised his judgment, even though erroneously in the view of the court, relief ordinarily cannot be granted.\(^{150}\)

At the same time, however, Rutledge remained concerned for due process. In a case involving the Federal Communications Commission,\(^{151}\) for example, the National Broadcasting Co. contended that the F.C.C. had modified the broadcasting license of another network's station which resulted in producing electrical interference in the broadcasts of one of NBS's stations. This change, it was argued, had been made without sufficiently complying with the constitutional requirements of due process. Rutledge agreed and remanded the case to the F.C.C. He wrote:

> The protections of due process do not disappear because the substantive right affected is not a full-grown vested right like that in one's castle at the common law. . . (Thus) statutory rights in the nature of occupational license. . . are not unguarded against arbitrary administrative action. (They) may not be "property" for purposes of . . . \(^{150}\) *Dow v. Ickes*, 123 F. (2d) 909 (1941).

\(^{151}\) National Broadcasting Co. v. Federal Communications Commission, 132 F. (2d) 545 (1942).
substantive due process (but) procedural
due process protects them. . . notwithstanding
the broad rule-making power and discretion given
the Commission concerning the manner of conducting
business.

For Rutledge, the most important factor in the adjustment of le-
gal claims was the principle that "responsibility is commensurate with
power," whether the holder of power be the owner of a vehicle
commandeered by the police, a governmental agency, or, as in Georgetown
College v. Hughes, a charitable hospital. He insisted that
those exercising authority in a particular situation accept the respon-
sibility which that authority entailed when faced with developments
that called the authority into play. In Georgetown College, Rutledge
held that a charitable corporation is liable for injury negligently
caused by an employee acting in the course of duty. Judgements against
parties such as charitable hospitals are comparatively rare, and Rut-
ledge wrote one of his most searching opinions explaining his position.
Ray Forrester, has characterized it as "more than an opinion, a
treatise, research project, social document, and law review article
combined." Always thorough, Rutledge's opinions were often digressive
and didactic. Georgetown College was no exception. He first dealt
at length with the judicial confusion on the problem involved, and
then concluded:

152 Canon, 169.
153 30 F. (2d) 810 (1942).
154 Forrester, 532.
On the other hand, scholarly treatment outside the
court is almost uniform. There is general agree-
ment of such opinion in support of liability and
against immunity. Legal scholarship finds an
important function not only in research and in-
struction, but as the most effective agency for
constructive criticism of judicial thought and
action. Great names in law rest on this founda-
tion itself. . . Scholarly opinion has more than
merely persuasive effect. It is the safest guide
for jurisdictions where the question has not been
determined.

This was Rutledge the scholar acting as Rutledge the judge.155

Clearly, Rutledge's opinions while on the Court of Appeals spoke
out for the "growth of the law." He not only favored the development
of the administrative process, which had a real effect on the evolution
of the judicial process, but also felt that it was the function of
courts to "utilize every means (outside and inside the decision law of
the court) to search out the roots of currently accepted ratio deci-
dendi so that logical applications of a growing law might be found
to fit the needs of justice in the present era."156 As demonstrated
by Georgetown College, he felt that if present applications were
based on fallacies, the law should be shifted to more solid principles.
The purpose of the law should be to serve as the fortress of liberty
for all individuals in every aspect of their social and economic rela-

155 In a 1942 article in the American Bar Association Journal
(251-255) entitled "The Appellate Brief," Rutledge further manifested
his past as law teacher when he wrote: "I suggest quite earnestly the
more frequent and general citation of law review materials. By this
is meant the notes and comment as well as the articles."

156 Canon, 169.
In all, Wiley Rutledge wrote 102 opinions while on the Court of Appeals for the District of Columbia: eighty-seven majority opinions, six concurring opinions, and nine dissenting opinions. While the practice thus gained in writing opinions probably helped ease his later transition to the Supreme Court, it was not the only valuable experience he gained in those four years. It furnished him also with practice for contests in the conference room and with the ability to disagree without offending thus maintaining pleasant personal relations.

The District of Columbia Court of Appeals contained during his years there two strong New Dealers, Rutledge and Henry White Edgerton, two moderate New Dealers, Fred M. Vinson and Justin Miller, and two conservatives, Harold H. Stephens and Chief Judge D. Lawrence Groner. Although these six men were generally quite congenial, Rutledge soon observed that in selecting panels of three, Groner never put him and Edgerton on the same case if it dealt with controversial socio-economic issues. Usually, his colleagues in such cases were the two conservatives or one conservative and one moderate. In the latter cases, the conference often became a struggle to win over the middle man. And as Brant has observed, Rutledge developed and refined the ability to win over, or even convert, the third member of the panel in most instances. Rutledge had become an adept mental boxer.

157 See Appendix I.

158 These "labels" are Brant's, 437.
The Appointment and the Expectations

When Wiley Rutledge was appointed to the District of Columbia Court of Appeals, the Washington Star commented that he was "recognized as an authority on matters affecting the western section of the country, such as Indian problems, water rights, and land cases." Rutledge, of course, was in truth not particularly specialized in any of these areas, and even if he were they were not problems likely to plague the District of Columbia court. However, the information prompting this comment was in all likelihood furnished by Attorney General Frank Murphy's office, and Murphy was already grooming Rutledge for promotion to the higher bench. He knew that these were exactly the subjects on which western Senators had been demanding expert knowledge in the Supreme Court.

The path to promotion was further facilitated by the creation of four new vacancies on the Supreme Court during Rutledge's tenure on the Court of Appeals. Justice Butler died on November 3, 1939, and Attorney General Murphy was appointed to his seat. Both Chief Justice Hughes and Justice McReynolds retired in 1941. Justice Stone was elevated to the Chief Justiceship. South Carolina's Senator James F. Byrnes and Attorney General Robert H. Jackson were appointed to fill the two vacancies. All this made Rutledge's appointment more politically practical since Roosevelt would otherwise have hesitated to appoint three "law school men" in succession, having appointed Frank-

159 Washington Star, March 22, 1939.
160 See Brant, 436.
furter (Harvard) and Douglas (Yale) in succession in 1939. It was now possible to nominate Rutledge both as a law school man, since there had been three intervening appointments, and as a judge. None of Roosevelt's other seven appointees had any prior judicial experience.

The opportunity for Roosevelt's eighth and last appointment came in October, 1942 when Justice Byrnes retired from the Court to become Director of War Mobilization. The most prominently mentioned possible appointees were Judge Learned Hand of the Second Circuit Court of Appeals, Senator Alben Barkley of Kentucky and Rutledge. There were also minor movements for Solicitor General Fahey, Dean Acheson, and Judge Parker of North Carolina. Rutledge's support came largely from the law faculties of Colorado, St. Louis, and Iowa, and from those whom Irving Brant had urged to write to Roosevelt requesting Rutledge. He also received some support from numerous western Senators. Barkley too had strong support in the Senate. Hand was apparently the candidate of Chief Justice Stone and Justice Frankfurter.

oriented Justice, since he must share decision-making power with eight other Justices, must first confront the problem of securing at least four additional votes for the results he wants. After determining a strategic plan to obtain a majority in the broad context, he may well employ a number of tactics to solidify the arrangement: capitalizing on personal regard; persuading on the merits; bargaining; threatening; and (since it is much easier for him to join in opinions with a Justice whose policy goals are similar to his own) voicing an opinion on the selection of new personnel. Some judicial efforts have been successful, others have not. Justice Samuel F. Miller,¹⁶³ Justice Henry B. Brown and Chief Justice Melville W. Fuller¹⁶⁴ all tried it with some success, but the one who was in perhaps the best position to influence appointments and who made the most systematic efforts along these lines was Chief Justice William Howard Taft.¹⁶⁵

In the course of Rutledge's appointment, these tactics first came into play after the Byrnes vacancy. On the first two occasions of Rutledge's possible appointment (which went instead to Frankfurter

¹⁶² Murphy, pp. 37, 43, 73-78.


¹⁶⁵ Taft's role is described particularly well in Danelski, A Supreme Court Justice is Appointed, with respect to the appointment of Pierce Butler and in Walter Murphy, "Chief Justice Taft and the Lower Court Bureaucracy," Journal of Politics, 24 (1962), 453.
and Douglas in 1939), Chief Justice Hughes was in no position to
exercise his influence and made little effort to do so. But now,
Stone was Chief Justice and Frankfurter too was on the Court, and the
two of them pushed for the appointment of Hand.166

Stone's first move was to urge Roosevelt to appoint a man with
judicial experience, preferably a competent Federal judge. Roosevelt
responded by asking Stone to submit some acceptable names. Stone
suggested Rutledge of the D.C. Court, Sam A. Bratton of the Tenth
Circuit, and Hand of the Second Circuit. He made it clear, however,
that Hand, who "would greatly strengthen the Court," was his top
choice, and that Hand's appointment would make him "very happy."167
Frankfurter too brought pressure from many sources in support of Hand's
appointment.168 But in the end, although he was clearly the "runner
up", Hand was rejected by the Administration. While Roosevelt saw no
real faults in Hand, he apparently rejected him largely for two reasons:
(1) Hand was almost seventy years old and Roosevelt had earlier vowed
to appoint no Justice over the age of sixty; and (2) the President re­
sented what he felt was "organized pressure" on behalf of Hand, pressure
which he told a friend he could trace back to a member of the Court.169

166Murphy, Judicial Strategy, p. 77.
167A.T. Mason, Harlan Fiske Stone: Pillar of the Law (New
168Frankfurter also supported, in the event that Hand was unac­
cetable, Solicitor General Fahey and Dean Acheson whom Irving Brant
suggested Frankfurter "thought he could control." Letter from Brant
to Luther Smith; See Harper, p. 38.
169Murphy, Judicial Strategy, pp. 77, 218 n 21.
The other candidates were soon dismissed, Bratton, Fahey, Acheson and Parker because of lack of widespread support, and Barkley because of age and "geography." Drew Pearson was probably correct when he wrote in his "Merry-Go-Round" for November 6, 1942 that although Roosevelt was extremely fond of Barkley and valued his service in the Senate, he felt Barkley handicapped by his age, 65, and by the fact he came from Kentucky. There was already one Justice on the Court from Kentucky (Reed) and another from Alabama (Black) making two southerners in all.\(^{170}\) There were none, however, from west of Ohio, and this worked in Rutledge's favor.

There were, in fact, a number of things now going for Rutledge\(^{171}\) Attorney General Francis Biddle, who apparently had no desire to go on the Court himself, and who had urged Roosevelt not to appoint Hand because of his age,\(^{172}\) gave full support to Rutledge. He asked his assistant Attorney General, Herbert Wechsler now of the Columbia University Law School, to make a study of Rutledge's more important opinions on the Court of Appeals. Wechsler did so and gave Rutledge a top rating. Meanwhile, support was growing for Rutledge among some members of the Court itself. John P. Frank, former law clerk to Justice Black,


\(^{171}\)Rutledge himself apparently preferred Judge Parker. In letters to friends he argued that there ought to be a Republican on the Court, "and besides" he said, "Parker was the victim of a grievous injustice when the Senate rejected him in the Hoover Administration." Brant, 438.

\(^{172}\)Francis Biddle, In Brief Authority (New York: Doubleday, 1962); and Biddle, "The Wartime Cabinet," American Heritage (June, 1962), 76.
has related the following account in a letter to historian Fowler Harper:

I recall the day on which Attorney General Biddle came up to the Court to ask some of the Justices their opinions as to who would be the most desirable addition. I remember that he called on Justices Black, Douglas and Murphy. My impression at that time was that those were the only Justices he called on, although conceivably there were others. However, I expressly remember the day he came to call on those three. Each expressed the hope that Rutledge would be appointed. At least some of them had very carefully reviewed all of his work on the Court of Appeals up to that time.173

In addition, there is evidence that Chief Justice Stone, once he was convinced that Hand was probably out, gave his support to Rutledge (at least as opposed to Barkley who by then was Rutledge's primary opponent for the seat) because of his desire to see a judge rather than a Senator appointed.174

Beyond the support Rutledge apparently had both within the Administration and among some Court members, there was the multitude of endorsements received daily by the President and the Attorney General. Brant, of course, was hard at work securing letters of recommendation from various friends, lawyers, and educators in Colorado, Missouri, and Iowa.175 Interestingly, Roosevelt did not interpret this massive


174 Walter Murphy, "In His Own Image," 1961 Supreme Court Review, 159, 191 n.

175 Brant chose his letter writers carefully. Notable among them were Luther Ely Smith, prominent St. Louis lawyer, and John C. Prior, President of the National Conference of Commissioners on Uniform State Laws.
support to be the result of "organized pressure" as he did in Hand's
case. This is probably partly because Brant made it a point to con-
vince Roosevelt that Rutledge was not actively seeking the seat, in-
deed, even discouraging those who were promoting him, and partly be-
cause Roosevelt himself was convinced that he had to appoint "some-
one with geography" which Rutledge had. Roosevelt was further pleased
with the prospect of elevating a lower Federal judge, a tactic hereto-
fore ignored, and when some Rutledge supporters in the Administration
learned that Thurman Arnold was ready to accept a possible Rutledge
vacancy on the Court of Appeals, Roosevelt made his decision. The
opportunity to make two such appointments at once brought him around,
in the end, to Rutledge.176

His nomination was announced on January 11, 1943, and confirmed
by the Senate on February 8th after only the slightest struggle and the
minimum of excitement. In the press, the comment was almost unanimously
favorable with the Washington News177 the New York Times178 and
Time Magazine179 leading the list of supporters. Notable among the
few dissenters was the New York Herald Tribune which deplored the
"academic cast ... already too pronounced on the Court."180

176Brant, 438.
177January 12, 1943.
178January 12, 1943.
179January 18, 1943.
180January 12, 1943.
In the Senate the response was also laudatory. Again there was concern in some quarters over Rutledge’s support for the court-packing plan, and North Dakota’s Republican Senator Langer, the only Senator to actively oppose the nomination, added a second ground for disqualification, the fact that Rutledge came from Iowa, “the home of Harry Hapkins.” But Rutledge was nevertheless easily confirmed. On January 31, the Judiciary Committee approved the nomination 11 to 0 with four abstentions. As noted above, he was confirmed by the whole Senate a week later, and on February 15, 1933, took his seat on the Supreme Court.

181 Quoted in Harper, p. 43.

182 In addition to Langer, the abstainers were Republicans Ferguson of Michigan and Revercomb of West Virginia, and Democrat Wheeler of Montana.

183 It is perhaps appropriate to footnote here a letter sent by Frankfurter to the newly appointed Rutledge. It is cited by Walter Murphy as an example of the tactic of “increasing personal regard” by charming a junior brother. Frankfurter wrote: “You are, I am sure, much too wise a man to pay attention to gossip even when it is printed. And so I depart from a fixed rule of mine—which Lincoln’s life has taught me—not to contradict paragraphs. I do so not because I think for a moment that the silly statement that I am ‘opposed to’ you for a place on this Court has found any lodgment in your mind but to emphasize it as a striking illustration of sheer invention parading as information. The fact of the matter is that the opposite of that baseless statement could much more plausibly be asserted.” The objective of the tactic, says Murphy, is to make the new Justice more disposed to trust his brother’s judgement or at least more disposed to compromise without rancor. Whether this was Frankfurter’s intention cannot be known, and if it was, whether he succeeded can be observed accurately only by reference to the subleties of the relations between the two Justices discussed in the forthcoming chapters. Murphy, Judicial Strategy, p. 49.
As David Danelski has observed, "the future is always to some extent a dimension of man's perception of the present," When a new appointment is made to the Supreme Court it is the appointee's expected activity on the Court—his arguments in conference, his votes, his opinions—that, for friends and enemies alike, give meaning to the appointment. That activity Danelski has labeled the "consequences" of appointment, but such consequences (as Danelski has shown for Pierce Butler and as may be similarly demonstrated for other appointees) are not always easy to predict. Let us consider some examples.

Content analysis of Pierce Butler's pre-Court speeches revealed to Danelski that some of his leading values were patriotism, freedom, morality, and laissez-faire. In the context of appointment politics, however, these values were perceived in a variety of ways. Let us take the case of William A. Shaper, who had been dismissed from the University of Minnesota Political Science Department during World War I as a "rabid pro-German," as an example. Butler had voted for that dismissal as a regent of the University. He had, as a regent, the reputation of not countenancing even the suspicion of disloyalty on the part of any employee of the University. Understandably, then, Shaper would agree that patriotism was one of Butler's values, but he would deny that Butler valued freedom. As it turned out, Shaper was partially correct and partially in error. In fourteen nonunanimous cases that presented substantive issues of freedom (such as freedom of speech or conscience), Butler voted for the individual only 29 percent of the time compared with the majority's score of 50 percent. In many of

184 Danelski, A Supreme Court Justice Is Appointed, p. 180.
these cases a competing value was present. For example, in Schwimmer v. United States, Butler held that a woman was not entitled to become a citizen of the United States because she could not swear to bear arms in defense of the country. Here the competing value apparently was patriotism. In these cases, then, the expectations were realized. But, contrary to expectations, Butler was the Court's champion in procedural due process cases between 1923 and 1939. In sixteen nonunanimous criminal cases involving due process, he voted for the defendant 75 per cent of the time, compared with the majority's score of only 44 per cent. Indeed, in the famous case of Paiko v. Connecticut, he stood alone in dissent.

Similar errors in expectation can be illustrated by noting the appointments of the man who immediately preceded Rutledge on the Court (omitting Byrnes' brief tenure) and of the man who immediately followed him. President Wilson, by most standards a "liberal," apparently confused James C. McReynolds' zeal for anti-trust law enforcement with liberalism and chose a conservative when he wanted a liberal. President Truman selected Sherman Minton, a New Deal Senate whip, and got another (by most criteria) relatively conservative Justice. Although

185 279 U.S. 644 (1929).
187 Danelski, pp. 16-17, 180-184. It must be admitted, of course, that Butler performed pretty much according to expectations in defending big business and "tradition." Danelski, pp. 186-190.
Truman, himself, may not have been fooled, there were many who expected Minton to follow closely in the steps of his predecessor, Rutledge. He did not.

As for Wiley Rutledge, whose judicial career this study is all about, the "consequences" of his appointment must await the analysis of the remaining chapters. But the expectations can be rather clearly catalogued.

As a lawyer, legal scholar, and law school administrator, Rutledge might be thought to hold in high regard the values of law, order, justice, and tradition. Adherence to these values was apparently among the expectations of the American Bar Association and the National Lawyers Guild both of which gave unanimous and unequivocal support to his appointment. As also a judge, Rutledge exhibited on the Court of Appeals a tendency to write lengthy opinions which, though seldom mired in legal technicalities, were almost always precise but expository. In substance, Rutledge's opinions illustrated his belief in a "growing law" and a definition of democracy which "logically required" both "the growth of the welfare state" and profound respect for the dignity of the individual.

The expectation that his opinions for the Supreme Court would reflect these same values is evident in the following comment made on the occasion of his appointment by the American Bar Association Journal:

Wiley Rutridge is ... a listening judge, tolerant of contrary viewpoints, unhurried at arriving at conclusions and resourceful in maintaining them. He
is a skillful technician in legal
writing and his skill is purposefully
devoted to the evolution of a dynamic
law. He is . . . committed, among
other things, to the proposition that,
under the Constitution, the general
welfare is as much a concern of the
Federal government as the common
defense . . . 189

His academic background was also taken into consideration, cer­
tainly, by some of his opponents who, as noted above, thought that aca­
demic influences within a Court already containing three former law
professors (Stone, Frankfurter, and Douglas) were "too pronounced."
Finally among his supporters in the Senate and the Administration there
was the certain expectation that he would continue to exhibit on the
supreme bench the kinds of socioeconomic views expressed in his various
pro-New Deal speeches of the 1930's. These same expectations were, of
course, uppermost in the minds of his opponents, notably Senator Langer.

Wiley Rutledge's appointment to the Supreme Court in 1943 was
at once a political yet strikingly nonpolitical choice by President
Roosevelt. It was nonpolitical in the senses that Rutledge: (1) had
not actively sought the post; (2) had, in fact, attempted to discourage
those who wanted to support him; (3) was not, and never had been, a
holder of political office; (4) had no political party support; and (5)
could claim no reward for party services.190 Yet it was a distinctly
political selection in that Rutledge was politically "available" both
"geographically" and by reason of his qualification as having "judicial

189Quoted in Harper, p. 42.
190See Brant, 434.
experience." Certainly, he was thought of as a defender of the New Deal. And just as certainly he was considered, for that time and place, a "liberal." Newsweek quoted him as saying; "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." And Time Magazine concluded: Rutledge "is a staunch believer in the liberal interpretation of the Constitution's general welfare clause. He once said, 'What good is law unless it serves human needs?'"

We will now attempt to measure the realization of these expectations.

CHAPTER IV

JUSTICE RUTLEDGE AND THE PROBLEM OF FEDERALISM

The Primacy of Federalism

In the present period of "preferred freedoms," "procedural safeguards," and, simply, the emphasis upon civil liberties generally, it is easy to forget that the Court deals also with other important areas of constitutional jurisprudence. One such area which was of primacy in the jurisprudence of Wiley Rutledge consists of the concept of federalism.

Federalism is defined in a number of different ways. There are those who emphasize its legal quality. "A federal polity is necessarily a legal polity," noted Roscoe Pound. 193 Hence the usual textbook definition runs something as follows: "A federal system is one which the powers of government are divided up, some being allotted to a national government and some to each of the smaller political units which we call states." 194 Others argue that the essential nature of federalism is to be sought for not in the shadings of legal and constitutional terminology but in the forces—economic, social, political, cultural—that

193 Quoted in Mason and Beany, p. 105.
have made the outward forms of federalism necessary. Hence federalism is sometimes also defined as "a device by which the federal qualities of a society are articulated and protected . . . . (It is) an attempt to solve a certain kind of problem of political organization." 195 Still others go beyond both the legal and the organizational aspects and define federalism as "a mode of political activity that requires certain kinds of cooperative relationships through the political system it animates." 196

But whatever the approach, the fact remains that the United States is organized in a dual system in which governmental powers are distributed between national and state authorities, that the distribution of such powers agreed upon in the Constitution has not averted conflict, and that the perpetual problem of defining the precise scope of national and state power has been left largely to the Supreme Court. Indeed, for Wiley Rutledge, the federal judicial power was an important weight in the balancing of national and state powers in the federal scheme, and "he did not hesitate to advocate its use in safeguarding the supremacy of the national government . . . ." 197

Thus, while Justice Rutledge will probably be best remembered for his opinions in cases involving the civil and political rights of

197 Canon, 176. This should not be taken to mean however that he did not see the value of the states in the federal plan. Indeed, he insisted that they play a distinctive role, as will be shown in the discussion of the commerce clause, below.
the individual, he also made a substantial record as an ardent proponent of federalism. He clearly believed that the principle of federal union, "with power adequate for the common need" offered the only hope for the survival of American democracy.198 Significantly, he also saw federalism as the key to world peace. He possessed a nearly Wilsonian passion for world order through law and tended to draw parallels between the overarching structure created by the Framers in 1786 and its possible replication on the international level in the post World War II era of 1946.199 He firmly believed that both the nation and the world could be held together by "written constitutions" and "parchment barriers." His favorite poet, Walt Whitman, appended the following parenthetical question and an answer to one of his shorter poems written near the end of the Civil War:

Were you looking to be held together by lawyers?  
Or by an agreement on a paper? Or by arms?  
Nay, not this world, nor any living thing will so cohere.200

For Rutledge, however, the federal system developed at Philadelphia belies Whitman's answer. The creation of the federal union was "the greatest work in statecraft ever done by a single generation" and one that, given "hardheaded hopefulness and faith in humanity" could be re-


plicated in the international sphere.\textsuperscript{201}

That Rutledge would become an eager exponent of federalism when appointed to the Supreme Court was not, however, an "expectation" easy to predict. While on the Court of Appeals, he dealt only once with a case involving commerce clause ramifications, and then only peripherally.\textsuperscript{202} Never, during those four years, did a case so claim his attention as to entail an exposition of the federal principle. His only book, \textit{A Declaration of Legal Faith}, the main portion of which is devoted to "The Commerce Clause: A Chapter in Democratic Living," was not published until 1947.\textsuperscript{203} Thus, except for one book review written in 1942, there was little in his pre-Court years upon which to predict his position in federalism cases. In that book review, he wrote:

\begin{quote}
Not federalism as a principle, but federalism founded upon local units adequate for their day but not shrunken by mechanical revolution below capacity for effective legal and social control of the significant forces of our day is the reason for replacement of states rights by bloc power; farm bloc, labor bloc, cotton bloc, silver bloc, these are the new units of localism in the federal structure ... The domestic front cannot be left to localized control. It is a part of the external front. So are the railroads and airlines and busses and trucks. So are the radio, the telephone, the telegraph.\textsuperscript{204}
\end{quote}

\textsuperscript{201}\textit{ibid.}, 630-631.


\textsuperscript{203}This book is a compilation of lectures delivered at the University of Kansas on December 2-4, 1946. The first lecture deals with the paradoxical relationship between "freedom" and "law". The others, though, deal extensively with the commerce clause. He does not merely paraphrase his judicial utterances but supplements them with respect to matters on which he never expressed himself judicially. Thus dealing below with his philosophy of the commerce clause, I will make what use I can of his statement in this slender volume.

These brief statements are all that we have from Rutledge on federalism during his pre-Court years. Yet he turned out to be a passionate champion of that principle and of that "uniquely federal instrument," the commerce clause. He was to later conclude:

I have stated my belief in the federal principle, rooted in our own experience. It has made this nation great and at the same time has kept the country democratic. Not perfection of greatness or of democracy, but a continuing process of perfecting both, has been achieved. In this the commerce clause has had a powerful, if administratively intricate, part.

It may seem strange to think of a purely commercial power as one of the foundations of democratic institutions. But in my judgement this is just what the commerce clause has turned out to be. It is inherently a federal device. And such a plan, by its very division of powers, creates a safeguard perhaps not otherwise obtainable against wholly autocratic actions. A democratic nation must have a government endowed with powers sufficient to meet its external and internal needs. These today necessarily must be large. But there is safety now, as there was when our fathers acted and The Federalist was being written, in distributing those powers so that they may not be concentrated altogether in one place.

His Philosophy of the Commerce Clause

The original purpose of the commerce clause, in Justice Rutledge's view, was to create a unified nation. The Annapolis Convention was called, he believed, to "secure freedom of trade, to break down the barriers to its flow."

Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the

206 *Declaration of Legal Faith*, p. 33.

207 *Ibid.*, pp. 74, 75-76.
proximate cause of our national existence down to today. As evils are wont to do, they dictated the character and scope of their own remedy. This lay specifically in the commerce clause. No prohibition of trade barriers as among the states could have been effective of its own force or by trade agreements. It had become apparent that such treatise were too difficult to negotiate and the process of securing them was too complex for this method to give the needed relief. Power adequate to make and enforce the prohibition was required. Hence, the necessity for creating an entirely new scheme of government. 208

This belief that the laws of the states imposing obstructions on their reciprocal intercourse was one of the prime evils under the Articles of Confederation and hence a barrier which the Constitution was principally designed to remove, has become a tradition. Albert S. Abel has labeled it a "myth," albeit a "venerable myth," probably "originating in some of Marshall's bold dicta in Brown v. Maryland 209 and matured by a concatenation of federally minded historiography, the outcome of the Civil War, the integrating economic and social impulses that have dominated the American scene, and its own uncritical repetition." 210 But be it venerable myth or historical fact, it is today,

208 Ibid., pp. 25-26.

209 In Brown v. Maryland, 12 Wheat. 419, 446 (U.S. 1827), Marshall wrote: "It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress." As Abel has noted, however, this statement was made in connection with foreign commerce but has been generalized so as to embrace interstate commerce and subsequently cited without observing the distinction.

Abel admits, probably as necessary as it is traditional. Whatever the basis, Rutledge subscribed to this economic interpretation of the history of the commerce clause, and this interpretation had a profound effect upon his approach to commerce clause problems. Unlike in the area of civil liberties, where his approach clearly had a natural law base, his approach to the commerce clause was pragmatic, functional, based upon the "balancing-of-interest" principle. Thus, the original purpose of the commerce clause (to create a unified nation) having been attained, Rutledge saw no reason for extending its limitations upon state action any more than was actually necessary. It was, after all, a "two-edged instrument" with effects upon both the power of Congress and the power of the states. We will consider first Rutledge's treatment of the negative content of the commerce clause, i.e., as a potential limitation on state regulatory and taxing authority.

A comprehensive view of state regulations encroaching on inter-state commerce must include three major variants: (1) where Congress has not spoken; (2) where Congressional legislation is somehow related to the state regulation in question but is mute as to the acceptability

211 Infra, Chapter V.


213 This is one of the Justice's favorite metaphors repeatedly used in: Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) and Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).
of the latter; and (3) where Congressional legislation speaks assentingly of state regulation. The first was more or less solved in 1851 by the famous case of Cooley v. Board of Wardens and the solution has remained essentially unchanged although application of the Cooley doctrine often requires a difficult manipulation of complex combinations of facts. The second has been largely a problem of interpretation, and no formulation has yet received the nearly universal acceptance of the Cooley doctrine, although under the concept of supersedure, once Congress has occupied a field, wholly consistent state legislation is devitalized. The third also has involved troublesome issues of interpretation, and of the three variants, has received the least adequate development in legal theory. Justice Rutledge, at one time or another, came to deal with all three variants.

Variant #1. In the Cooley case, a state pilotage law requiring that vessels leaving Philadelphia pay a one-half fee if a pilot were not hired, was declared valid against the charge that it conflicted with the national commerce power. Justice Benjamin R. Curtis fashioned the following formula as the basis for the decision: Subjects national in scope admit only of uniform regulation and require Congressional legislation in the absence of which the states cannot act; subjects local in character do not require uniform regulation and the states may legislate until Congress, by acting on the same subject, displaces the state law. Justice Rutledge adhered, doctrinally, to the

214 See Abel, 508.
215 12 How. 299 (U.S. 1851).
Cooley formula, appreciated its significance, and wrote two opinions amplifying his attitude toward state regulations where Congress was silent: Robertson v. California, and Bob-Lo Excursion Co. v. Michigan.

In the Robertson case, there was involved a state law requiring all insurance agents of foreign as well as domestic insurers to be licensed for the protection of the public. The law also penalized the writing in California of policies with companies not admitted to do business there. Robertson had been indicted and convicted for having written policies in California as an agent for an unadmitted Arizona mutual. The apparent intent and effect of the law was to exclude from the California insurance market unqualified mutuals (i.e., mutuals without certain prescribed reserves).

The case presented a particularly difficult problem for the Court. The Congress had not legislated with respect to insurance because of the supposed limitations set down in cases from Paul v. Virginia (upholding a state act requiring all insurance companies to obtain a license before issuing policies with the state) to United States v. South-Eastern Underwriters Association (ruling that insurance is commerce thus overturning the 75-year old precedent).

Following

216 See Mandeville Island Farms, at 232.
217 328 U.S. 440 (1946)
218 333 U.S. 28 (1948).
219 8 Wall, 168 (U.S. 1868).
the latter decision, the Congress passed the McCarran Act handing back to the states the power to regulate and tax "the business of insurance ... in the public interest." But Robertson had been indicted before the passage of the McCarran Act and to rely on it as a means of sustaining the conviction might have produced ex post facto contentions. Rutledge also eschewed the police power argument, and relied upon the Cooley formula to uphold the state regulations. He argued that the community had a "special interest" in the "localized pursuit of this phase of the comprehensive process of conducting an interstate insurance business." He thus adhered to the "local diversity" element in the Cooley formula based upon the degree of local concentration. And, as was his tendency in nearly all cases of state regulation under the commerce clause, Rutledge gave special emphasis to "practical effects." In Robertson, he concluded: "The commerce clause is not a guarantee of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community." Rutledge refused to overlook the "practical effect" that, in the absence of some local control, the attendant evils of the sale of insurance interstate would go largely unchecked. As the result of the decision in Robertson and a companion decision in Prudential Insurance Co. v.

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221 59 Stat. 33 (1945).
222 See Abel, 509.
223 Mosher, 222.
224 ibid.
where Rutledge was again the Court's majority spokesman, the power of the states to regulate the business of insurance interstate is now settled doctrine.

The second case in which Justice Rutledge expressed his view of state regulation where Congress was silent, Bob-Lo Excursion Co. v. Michigan, like Robertson, involved a criminal prosecution under a state statute which he upheld over objections of commerce clause invalidity. The law, the Michigan Civil Rights Act, prohibited public conveyances from discriminating in service on grounds of race, creed, or color. Bob-Lo was engaged in the business of transporting tourists from Detroit to Bois Blanc, a Canadian island commonly regarded as a recreational annex to the city of Detroit. Company policy prohibited service to negroes and the case arose when a negro member of a mixed group to whom a block of tickets had been sold was refused transportation. There was no Congressional legislation bearing on the matter of racial discrimination by carriers.

Again Rutledge adopted the "local diversity" criterion. The business of transporting tourists from Detroit to Bois Blanc was, he said, such a "completely and locally insulated" part of foreign commerce as to be the primary concern of the state, and hence subject to state

225 U.S. 408 (1946). This case involved the validity of a license tax imposed by the state upon foreign insurance companies as a condition of transacting business within its boundaries. The McCarran Act was challenged here on the grounds that Congressional policy could not validate what was otherwise an unconstitutional levy (i.e., unconstitutional because it discriminated against interstate commerce in favor of local business.) Rutledge sustained the power of Congress to consent to state regulation, arguing that coordinated state and national action could "achieve legislative consequences...which...neither could accomplish in isolated action,"
regulation under the *Cooley* formula. Unlike the minority opinion, which automatically condemned the state regulation by relying on the qualitative, subject-matter test, Rutledge, typically, relied on the quantitative, balancing-of-interests approach. He recognized that "an interstate or foreign commerce enterprise ought not be subjected to a realized or gravely threatened clash of dissonant state regulations," but he concluded that this merely hypothetical possibility was entitled to little weight. He sustained the statute and the conviction.

(The part played by real policy considerations in Justice Rutledge's decision here is not known. But his point must at least be raised, especially in light of the Court's decision two years earlier in *Morgan v. Virginia*, in which Rutledge concurred in the result. There, the Court held invalid a state law segregating white and negro passengers on interstate buses as an "undue burden" on interstate commerce.)

What, then, did Justice Rutledge contribute to the development of this first variant of state regulation cases? Clearly, although he accepted the *Cooley* formula, he did not develop a distinct doctrinal exegesis. Given his determination to proceed on a case-to-case basis always giving the greatest emphasis to "practical effects," he could not construct a strict formula. He did believe that the "degree of lo-

> Written by Justice Jackson joined by Chief Justice Vinson.

> On commerce clause principles, this case could have gone either way. In *Morgan v. Virginia*, 328 U.S. 373 (1945), in which Rutledge concurred, the Court held that a state may not legally segregate white and negro passengers on interstate buses. But both Bob-Lo and Morgan involved, in addition to commerce clause elements the assertion of civil rights, an issue for which Rutledge felt the most intense concern.
cal concentration" was more important in determining the validity of
state policy than the kinds of policies in question, be they aimed at
requiring minimum standards of vocational competence and controlling
fraud, as in Robertson, or furthering sociological ideals of community
relations, as in Bob-Lo. But he recognized that simply accepting
the Cooley formula did not eliminate difficulties. Decisions will vary,
he argued, in accordance with "continuing difference in policy and in
judgement of effects." Solution rests finally in judgement rather than
reason. "Judges do not automatically agree upon what requires uniformi-
ty and what does not. Here too considerations of policy have swayed
their judgements." Rutledge's contribution was to clarify some of
the constituent factors which affect judgement with respect to state
action where Congress is silent.

Variant #2. Justice Rutledge contributed very little to the
solution of this second problem, the adjustment of cognate Congress-
ional and state legislation. He wrote no opinions for the Court on
this matter and his votes do not tell us very much. He did join in
Frankfurter's dissent in Hood v. Dumond which indicates a general
reluctance to read federal action as conflicting with state regulation.
He concurred in the result in Southern Pacific Co. v. Arizona and

228 Abel, 512.
229 Declaration of Legal Faith, pp. 72, 67.
231 325 U.S. 761 (1945).
later quoted from Stone's majority opinion there that "Congress has undoubted power to define the distribution of power over interstate commerce." 232 This may suggest that he accepted the superseding effect of federal legislation, but as Albert Abel points out, this is conjectural and, if true, indicates only that his reluctance to enlarge the field of Congressional occupancy was exceeded by his disinclination to find absence of a local interest. 233 Beyond this, we have only the statements in his Declaration of Legal Faith. There, he makes it clear that the consequence of supersedure ought to be curtailed by not imputing to Congress a desire to "occupy a field wide in extent so as very nearly to confine the doctrine's operation to the essential inconsistency predicted by the supremacy clause." 234 "When the basis for outlawing state action is conflict with Congress' declared policies within its field of primacy," he concluded, there must be "real and inescapable conflict." 235

Variant #3. In the area of co-operative federal-state control, Justice Rutledge was less reticent than on the matter of supersedure. Here the central issue usually was to what extent and on what theory would a state regulation be given effect when Congress spoke assentingly of the regulation. Rutledge followed, in every such case in which he took part, a harmonious pattern of decision aimed at sustaining co-ordi-

233 Abel, 513 n 99.
234 Ibid.
235 Declaration of Legal Faith, p. 71.
nated action. \textsuperscript{236} His opinions in \textit{Prudential Insurance Co. v. Benjamin} \textsuperscript{237} and \textit{Panhandle Pipe Line Co. v. Public Service Commission} \textsuperscript{238} are examples of this position. His guiding principle was to give to each regulating government the room for maximum affirmative operation.

In \textit{Panhandle Pipe Line}, the specific issue was whether the state had the power to regulate the direct sales of natural gas by an inter-state pipe line carrier to industrial consumers within the state, in view of the federal Natural Gas Act of 1945 which was aimed primarily at protecting consumers against exploitation. Rutledge did not try to find a way out of coming to grips with the real problem here—the nature and purpose of the statute involved. He might have considered a formalistic argument to save the state law because the gas piped into the state did come to rest or "broken bulk" before distribution in the state. \textsuperscript{239} But he rejected this approach and realistically accepted the fact that the sales were interstate commerce. He argued though that "Congress meant to create a comprehensive and regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority." The purpose of the act was to make the state regulation more effective "by adding the weight of federal regulation to

\textsuperscript{236} As demonstrated by the \textit{Robertson} and \textit{Bob-Lo} cases, Rutledge always enjoyed demonstrating, even in cases where Congress had been silent, that the state regulation in question was consonant with the direction of federal policy.

\textsuperscript{237} \textit{328 U.S.} 408 (1946), \textit{Supra.}, note 132.

\textsuperscript{238} \textit{332 U.S.} 507 (1947).

\textsuperscript{239} Mosher, 225.
supplement and reinforce it."

Rutledge saw as analogous the relationship between the McCarran Act and the insurance regulation in the Prudential Insurance case and the relationship between the Natural Gas Act and the sales regulation in the Panhandle Pipe Line case. In both instances, he viewed the federal law as contemplating continued state regulation unless and until Congress specifically preempted the field. In both instances, any possible diversity of regulation from state to state was no objection since Congress passed the laws "in contemplation of variances."\(^{240}\)

Rutledge's contribution in this third area of state regulation then was to pragmatically extend the Cooley principle by giving full play for state power to work in coordination with national power. This he did by advancing the theory that when Congress sanctioned state regulations, it was not giving to the states power which the Constitution denied them but was simply exercising its own power to regulate. Thus, he avoided and overcame the "either/or" logic of exclusion and introduced a new element to commerce clause thinking—a concept of federal synthesis.

Up to this point, we have left largely unmentioned Justice Rutledge's treatment of the taxing authority of the states. This is because taxing and regulating authority are often distinguished. Justice Felix Frankfurter, for example, has noted that state attempts to tax interstate commerce "have always been more carefully scrutinized and more consistent—

\(^{240}\) Abel, 516 n 118.
ly resisted than police power regulations of aspects of such commerce."\(^{241}\)

But in Justice Rutledge's broad concept, the taxing authority of the states was essentially a phase of their regulatory power.\(^{242}\) And, here, as in the various cases cited above, he exhibited a generally favorable attitude toward state authority in the commerce clause sphere. Always with an eye to "practical effects and considerations," Rutledge showed great sympathy for the revenue demands of the states. Brief mention of two important opinions in this area seems in order.

In *Freeman v. Hewit*, Justice Frankfurter's majority opinion rested on the classic "direct burden" subject-matter approach. In invalidating an Indiana gross income tax as applied to the sale of securities, Frankfurter wrote: "What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce."

While agreeing with the result,\(^{243}\) Rutledge wrote a concurring opinion challenging the "direct-indirect" test which he felt inherently restricted state taxing authority, and arguing instead for a "burden-in-fact" test which would concern itself with the practical question of how much a tax obstructed interstate commerce. He believed that invalidating a state tax simply because it fell "directly" on interstate commerce was unjustified unless it could be shown that the practical effect of the tax was to harm that commerce in a concrete manner.

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\(^{242}\) Mosher, 228.

\(^{243}\) He believed the tax to be invalid because it exposed interstate transactions to the risk of multiple taxation (i.e., he applied the "multiple burden" test).
In Nippert v. City of Richmond, however, this approach operated to the disadvantage of the state involved. Here, Rutledge rejected a municipal license tax on solicitors when it, in effect, resulted in a ban on out-of-state vending and discriminated against the itinerant merchant in favor of the local shop. Rutledge was not concerned with the label attached to the tax, i.e., one imposed on the "local incident of solicitation." He saw that in practical operation, if not in terms, the tax burdened out-of-state salesman more than local ones. Justice Douglas, joined by Justice Murphy in dissent, agreed that the tax "may . . . in practical operation, work to the disadvantage of this interstate business," but he refused to rely on the practical effect of discrimination to determine the issue without a "sure basis" of judgement. But Rutledge argued that competitive disadvantage spelled discrimination, and discrimination in turn meant inequality. Parity of treatment between local and interstate trade being the key concept in his philosophy of the commerce clause, Rutledge could not uphold the tax.

Summarily stated, Justice Rutledge's position with respect to commerce clause restrictions on state regulating and taxing authority was one of great tolerance toward state action. He wrote thirteen opinions dealing with some aspect of state regulation or taxation affecting interstate commerce. In ten of these, the state policy was upheld. In all, he cast votes in twenty-eight such cases and voted to uphold the state action in twenty of them. It should not be assumed from his, how-

244 327 U.S. 416 (1946).
ever, that he favored a restrictive interpretation of Congressional power under the commerce clause. Indeed, he believed that the clause constituted a broad instrument of power through which Congress might legislate to rectify some of the pressing problems of the day. 245 A consideration of Rutledge's philosophy of the positive content of the commerce clause follows.

In Prudential Insurance Co. v. Benjamin, Rutledge wrote:

The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce. On the contrary, it is, as Marshall declared in Gibbons v. Ogden, a grant to Congress of plenary and supreme authority over those subjects.

Solutions to problems involving the positive content of the commerce clause, "as compared with the negative implications operative upon the states, have been relatively easy. There has been concern with what is commerce, not so much with what is regulation . . . ." 246 Largely, Rutledge concluded, the Court's task has been one of defining the reach of the federal legislative arm. The construction he gave to Congressional statutes passed under the exercise of the commerce power harmonized with his generally liberal philosophy.

As Albert Abel has shown, Justice Rutledge's lengthy opinion in Mandeville Island Farms, Inc. v. American Crystal Sugar Co. 247 provides us with important clues as to his view here. In Mandeville, he reviewed the history of judicial doctrine as to Congressional power over

245 Canon, 170-171.

246 Declaration of Legal Faith, p. 39.

interstate commerce, and asserted that that doctrine was defaced by the opinion in E. C. Knight with its "artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effect of the former two upon the latter, and the varying methods by which the several processes are organized, related, and carried on." He went on to characterize the decision in the The Shreveport Case as substituting "judgement as to practical impending effects upon . . . commerce for rubrics concerning its boundaries as the basic criterion of effective Congressional action."

He noted the ensuing competition for judicial acceptance between Knight's disjunctive principle and Shreveport's conjunctive principle, and concluded that Knight's position of "several links" (as opposed to Shreveport's "whole chain") was "no longer effective to restrict Congress' power." In order to determine whether Congressional legislation is valid, the Court must consider "the effect upon commerce, not the moment when its cause arises . . . . The inquiry whether the restraint occurs in one phase or another, interstate or intrastate, is now merely a preliminary step. . . ." For Rutledge, the determinant of Congressional power was "the total pattern and not the isolated circumstance." 

Consequently, Justice Rutledge, on one occasion, categorically supported the judicial approach of construing statutes so as to give

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250 See Abel, 504-505.
the most extended possible operation to what Congress was attempting to do. And, on a case-by-case basis, he adhered to this approach in numerous instances. He sought "a rounded program, a statutory policy and purpose. This being discovered, the question became one of whether the case at hand fell within the ambit of that program." Inevitably, this approach occasionally led to an "over-refined, perhaps even tortured" analysis of data; more often, however, it afforded all-embracing, "Brandeis-like" explorations of complex facts. Developing the various aspects of the case, for example, Rutledge brought the idiosyncracies of newspaper distribution, the marketing practices in the beet sugar industry, and the production of processed agricultural commodities within the prescribed statutory policy. Justice Rutledge's strong support for federal regulation under the commerce clause is evidenced by Alfred Canon's statistical analysis:


253 Abel, 502.
254 NLRB v. Hearst Publications, Inc.
255 Mandeville Island Farms.
257 Abel, 502.
In cases dealing with some aspect of labor relations, he was 93 per cent "pro-labor," or more accurately, "pro-employee," voting with the majority of the Court in 81 per cent of these cases. He was 96 per cent "anti-monopoly," casting his vote in 80 per cent of the cases with the majority. His highest rate of agreement with the Court's majority came in the ICC cases, where he was 88 per cent in agreement, establishing a record as approximately 68 per cent "pro ICC."

In other phases of federal regulation, he agreed with the majority 80 per cent of the time and cast 74 per cent of his votes "pro-federal regulation." 258

How, then, in summary, may we characterize Justice Rutledge's treatment of commerce clause problems—both in technique and in substance? Clearly, his technique was a functional one. He refused to fall back upon equivocal doctrines or sophistical labels. Neither did he develop a formula of his own. Rather, he proceeded on a case-to-case basis, methodically analyzing the facts, determining the "practical effects," and squaring the "facts" and the "effects" with what he defined to be the purpose of the commerce clause.

He did not believe, however, that the practical solution to a problem could or should be divorced from policy considerations. The solution must depend, ultimately, upon the position which the doctrine of federalism occupied in the judge's hierarchy of values. In Rutledge's scheme of values, the commerce clause was that "instrument of federalism" which had "kept the country democratic." Its original purpose (as a limitation on state action) having been attained, it must now be used to give both national and state governments maximum authority to deal with the difficult problems of the day. This correlation of power he saw as absolutely necessary in order to avoid a hiatus in the ultimate

258 Canon, 172-173.
reaches of federal and state authority. Hence, Rutledge viewed the commerce clause in its positive aspects as a broad grant of regulatory authority to the federal government, and in its negative aspects as a means of restricting state action only so as to make it consistent with the broad pattern of federal regulation. He frankly argued that in this process of correlation the Supreme Court was possessed with the positive task of implementing the scheme. He took a most definite stand behind the belief that the federal judicial power should be used in a positive fashion, i.e., as an instrument of government to insure national supremacy in the federal system, while also protecting the permissive features of the commerce clause, as they related to state action.

259 Mosher, 227. We saw this particular position develop in Chapter II. Rutledge sharply criticized the Court's decision in Hammer v. Dagenhart and Bailey v. Drexel Furniture feeling that these decisions had resulted in a governmental vacuum with respect to interstate commerce in the products of child labor.

260 For example, in a number of cases involving the question of governmental tax immunity, Rutledge consistently supported the principle of McCulloch v. Maryland, 4 Wheat. 316 (1819)—states are without power, unless consented to by Congress, to tax the United States, its property, or its functions. In Wilson v. Cook, 327 U.S. 474, 489 (1946) (dissenting), he argued that the McCulloch rule was "the essence of federal supremacy" and was not to be "chipped away by ambiguous decisions of state courts." Similarly, he held in Massachusetts v. United States, 333 U.S. 611 (1948), that federal claims to funds of individuals took precedence over claims by a state. As Alfred Canon (177) has noted, however, Rutledge also saw fit to uphold the right of a state to tax private "persons" engaged in an ordinary business that was related to governmental activity (Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949)) and although he joined in Frankfurter's majority opinion in New York v. United States, 326 U.S. 572 (1946), he wrote a concurring opinion insisting that when Congress seeks to tax a state's business operations, it must do so in an explicit fashion.
Justice Rutledge's over-all contribution to commerce clause doctrine, then, was to stimulate the creation of more extensive federal regulation in some areas (notably, the rights of labor), while protecting the right of the states to maximize their own taxing and regulatory power in harmony with the general purpose of the federal scheme. In all of this, however, his concern for the rights of the individual remained paramount. While he staunchly defended the rights of labor unions, for example, he was even more concerned that individual workers have the right to reject union control at their own choosing. Thus, his treatment of most commerce clause problems was consistent with his liberal philosophy toward civil liberties and other problems of law and government. The power of government (be it national, state, or local) must be adequate to the task of protecting the rights of the individual (be he worker, employer, or small businessman).


262 Elgin, Joliet, & Eastern Ry. v. Burley, 325 U.S. 711 (1945); May Department Stores Co. v. NLRB, 326 U.S. 376, 393 (1945) (concurring); Medo Photo Supply Corporation v. NLRB, 321 U.S. 678, 688 (1944) (dissenting).
CHAPTER V

JUSTICE RUTLEDGE AND PREFERRED FREEDOMS

The First Amendment Freedoms

We have seen that Justice Rutledge recognized the commercial origin and economic framework of the Constitution. He acknowledged that neither by design nor by desire was the Constitution framed to secure the basic liberties enumerated in the Bill of Rights. He understood these liberties to have been added only later, by popular demand, but he refused to attribute them to the historical situation alone. For Wiley Rutledge, the doctrine of civil liberty was rooted, essentially, in faith. As to the relative worth of these civil liberties, he made but one distinction: "If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment."\(^{263}\)

In a number of respects, Justice Rutledge's major contribution to the theory of substantive freedoms guaranteed under the First Amendment is his notable opinion in the Union Organization case of 1945, Thomas v. Collins.\(^{264}\) It is "the most clearly, expressly, and extremely stated" argument for the "preferred freedoms" doctrine, forthrightly elaborating on and surpassing Justice Stone's first statement of that position.

\(^{263}\) Declaration of Legal Faith, p. 25.

\(^{264}\) 323 U.S. 516 (1945).
in his now-famous footnote in United States v. Carolene Products Co. 265

It is also the "high watermark in the use of the clear-and-present danger test" which had gradually become the touchstone of constitutionality in all cases involving freedom of expression. 266 It further serves to illustrate that when it came to basic freedoms, Justice Rutledge's opinions often, as here, used "strong language reflecting natural law thinking which verged on religious dogma." 267 For these reasons, we will begin with Thomas v. Collins. 268

The case involved the validity of a particular application of a Texas statute requiring all persons soliciting members for labor unions to register with the Secretary of State in order to receive an organizer's card. 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. 269 The state courts were given power to issue restraining orders or injunctions to enforce the provisions of the act. 270 Additional enforcement proceedings included

266 Mason and Beaney, p. 500.
268 For discussion of this case see Marvin Summers, Free Speech and Political Protest (Boston: D. C. Heath and Co., 1967), pp. 46-49.
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. R. J. Thomas, President of the United Auto Workers, deliberately challenged the law by soliciting members for a union without observing the registration provisions. In an address before an assembly of Houston oil refinery employees, Thomas invited non-union men to join the Oil Workers Industrial Union. This was in violation of a restraining order issued ex parte only a few hours before the address enjoining him from solicitation unless he registered. The state court, defining the whole speech and assembly as "solicitation", held Thomas in contempt. He appealed to the United States Supreme Court which, by a 5-4 vote, held the law unconstitutional. Rutledge wrote for the majority. His position was that the legislation in question unduly restrained orderly discussion and assembly without the presence of any public danger which would make such restraint necessary. He began by labeling as established doctrine the newly developed tenet that First Amendment freedoms enjoy a "preferred position" in our constitutional scheme, and then went on to make the linkage between this doctrine and the "clear and present danger" test:

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

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271 Ibid.

272 The concept of preferred freedoms was first stated in United States v. Carolene Products Co., 304 U.S. 114, 152 n.4 (1938), and was subsequently developed in Schneider v. Irvington, 308 U.S. 88 (1940). The actual phrase, "preferred position," was first used in 1942 by C. J. Stone in Jones v. Opelika, 316 U.S. 584.
the usual presumption supporting legislation is balanced
by the preferred place given in our scheme to the great,
the indispensable freedoms secured by the First Amendment.
That priority gives these liberties a sanctity and a san­
tion not permitting dubious intrusions. And it is the
character of the right, not of the limitation, which deter­
mines what standard governs the choice.

For these reasons any attempt to restrict those
liberties must be justified by clear public interest,
threatened not doubtfully or remotely, but by clear and
present danger . . . . Only the gravest abuses, endangering
paramount interests, give occasion for permissible limitation
Where the line shall be placed in a particular application,
rests . . . on the concrete clash of particular interests
and the community's relative evaluation both of them and of
how the one will be affected by the specific restriction,
the other by its absence. That judgement in the first
instance is for the legislative body. But in our system
where the line can constitutionally be placed presents a
question this Court cannot escape answering independently,
whatever the legislative judgement, in the light of our
constitutional tradition. And the answer, under the tradi­
tion, can be affirmative, to support an intrusion upon this
domain, only if grave and impending public danger requires
this.273

The minority argued that there was no more involved here than a
paid organizer and a business transaction which involved labor unions
as business associations. They rejected the "preferred position" doc­
trine and would have upheld the law on the so-called "rational basis"
test, i.e., when the Court is confronted with a law alleged to infringe
basis freedoms, it is limited to judging whether a "reasonable man"
could have reached the legislature's conclusion as to the existence of

273 Underlining added.
a danger demanding that protective action be taken. Rutledge, however, rejected the argument that First Amendment freedoms do not apply to business and economic activity. The First Amendment, he argued, guards "great secular causes, and small ones." It is "a charter for government not for an institution of learning. . . . 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." Thus, although a state's power to regulate may include, in most cases, the power to impose restrictions which the legislature has a "rational basis" for adopting, the great First Amendment freedoms "may not be infringed on such slender grounds."275

Rutledge's votes and opinions for the Court consistently supported the premises of his Thomas v. Collins opinion until his death in 1949. In the Hatch Act case276 of 1947, the 4-3 majority returned to the "rational basis" test and upheld the law's curbs on political activity by federal employees. Rutledge joined in Black's dissenting view that "no statute of Congress has ever before attempted to stifle the spoken and written utterances and lawful political activities of federal and state employees as a class." He concluded that the law "reduced the constitutionally protected liberty of several million people to less than a shadow of its substance." A year later, in United States v. CIO,277

274 The "rational basis" test, as opposed to the "clear and present danger" test does not require as strong a justification for the curtailment of civil liberties. It was embraced by the majority in Gitlow v. New York, 268 U.S. 652 (1925) and Whitney v. California 274 U.S. 357 (1927)

275 Rutledge was joined in this opinion by Black, Douglas, Murphy, and Jackson. However, Jackson concurred on other grounds.


277 335 U.S. 106 (1948).
Rutledge again dissented. He argued that the provision of the Taft-Hartley Act in question, forbidding expenditures by labor unions "in connection with" any national election was fatally ambiguous. He would have had the Court vigorously exercise its power of judicial review to invalidate the law. He said, in part:

When regulation of prohibition touches (basic liberties) this Court is duty bound to examine the restrictions and to decide in its own independent judgement whether they are abridged within the First Amendment's meaning. That office cannot be surrendered to legislative judgment, however, weighty, although such judgement is always entitled to respect. As the Court has declared repeatedly, that judgement does not bear the same weight and is not entitled to the same presumption of validity, when the legislation . . . restrict the rights of conscience, expression, and assembly protected by the First Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusions into those domains.

Finally, in 1949, the arguments, pro and con, over the "preferred freedoms doctrine" were succinctly stated in Kovacs v. Cooper\(^{278}\) by Justices Rutledge (dissenting) and Frankfurter (concurring) who stood in basic opposition on this point.\(^{279}\) The case involved a Trenton, New Jersey ordinance which forbade the use of sound truck amplifiers emitting "loud and raucous noises." Justice Reed, in writing the majority opinion upholding the ordinance, applied the "preferred freedoms" concept: "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience." Frankfurter, concurring in the

\(^{278}\) 336 U.S. 77 (1949).

\(^{279}\) After 1949, and particularly after the outbreak of war in Korea, Frankfurter's position commanded majority support. Black and Douglas continued to support the "preferred position" doctrine which again won majority status during the era of the Warren Court.
result, opposed Reed's use of the "preferred position" doctrine. "This is a phrase," he argued, "that has crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may safely imply, that any law touching communication is infected with presumptive invalidity." Frankfurter went on to argue that since Jackson had not really subscribed to the doctrine in its most extreme application, Thomas v. Collins, it had never actually commended itself to a majority of the Court. Still, he admitted, the doctrine had been employed in numerous cases and this only made it all the more "mischievous because it radiates a constitutional doctrine without avowing it" by a convinced majority. Rutledge, in his dry dissent, said simply that his brother Frankfurter had "demonstrated the conclusion opposite to that which he draws, namely, that the First Amendment guarantees occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court." Rutledge would have invalidated the ordinance as an ambiguously drawn law that would violate the Fourteenth Amendment even if no question of free speech were involved.

Justice Rutledge exhibited largely the same natural law approach to problems of religious liberty, and, immediately upon taking his seat on the Court, he had an opportunity to make his presence felt. This opportunity came in the form of the so-called "Jehovah's Witnesses Cases."

280 See Rockwell, 46.

281 Rockwell, 47.

Rutledge's position in these cases was clearly predictable. A year earlier, while still on the Court of Appeals, he had voted, in dissent, to invalidate a license tax as applied to Jehovah's Witnesses who were selling religious tracts in the streets. At precisely the same time, the Supreme Court was upholding a similar tax when it first considered Jones v. Opelika. Justice Frankfurter, Reed, Roberts, Jackson and Byrnes formed the majority. They argued that "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." (Such was also the view of the majority of the D. C. Court in Busey case.) Chief Justice Stone, joined by Justices Black, Douglas, and Murphy, wrote a dissenting opinion which was substantially in accord with the dissent Rutledge was then writing for the D. C. Court in Busey. Stone regarded the license fees as a tax on disseminating ideas, and he saw such regulations as a "ready instrument for destruction of the rights underlying the First Amendment." On the day Rutledge took his seat on the Supreme Court replacing the recently resigned Justice Byrnes, the Court voted to rehear the Jones case.

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284 316 U.S. 584 (1942).

285 318 U.S. 796 (1943).
and, in the end, reversed itself with Rutledge casting the fifth and deciding vote in each instance.

The Struthers case differed slightly in factual content from the Jones and Murdock cases, and thus provides us with a further dimension of Justice Rutledge's views. Involved here was a municipal ordinance prohibiting any person to knock on doors or otherwise summon to the door the occupants for the purpose of distributing handbills. The same majority (Black, Douglas, Murphy, Rutledge and Stone) voted to invalidate the law. Black, characteristically eschewing natural law concepts, utilized an historical approach in his majority opinion. He based his argument upon what he saw as a "custom" and "common practice" of centuries "in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants." Justice Rutledge, however chose to join in his brother Murphy's concurring opinion which was premised rather on natural law philosophy. For Murphy and Rutledge, "the immutable principle of religious freedom transcended legislative enactments and had a higher dignity under the Constitution than municipal or personal convenience. . . ." In the Murphy-Rutledge view, the right to practice and proclaim one's religious convictions enjoyed a "higher estate" than, and a "preferred position" over, the right of the

286 319 U.S. 103 (1943).

287 Justices Frankfurter, Reed, Roberts, and Jackson again constituted the minority.

288 See comments on his opinion in Adamson v. California, infra.

289 Mosher, 671-672.
individual householder to determine whether he was willing to receive
the message in question. 290

Similarly, in West Virginia State Board of Education v. Barn-
ette, 291 decided by the Court that same year, Rutledge voted with the
majority to overturn Minersville School District v. Gobitis, 292 a pre-
cedent of only three years standing. 293 The Court held that a state
could not make the flag salute ceremonies in public schools compulsory
when it interfered with the religious beliefs of Jehovah's Witnesses.
Here, again, Rutledge subscribed to Jackson's opinion that:

the right of a state to regulate . . . may well include
. . . power to impose all of the restrictions which a
legislature may have a "rational basis" for adopting.
But freedoms of speech and of press, of assembly, and
of worship, may not be infringed on such slender grounds.

This view prevailed, then, in the Jehovah's Witnesses cases, notwithstanding
the strong dissent of Justice Frankfurter in Barnette which stands
in complete contradistinction to the preferred freedoms doctrine:

(The Supreme Court's) power does not vary according to
the particular provision of the Bill of Rights which is
invoked. The right not to have property taken without just
compensation, has, so far as the scope of judicial power
is concerned, the same constitutional dignity as the right
to be protected against unreasonable searches and seizures,
and the latter has no less claim than freedom of the press
or freedom of speech or religious freedom.

290 ibid.
291 319 U.S. 624 (1943).
292 310 U.S. 586 (1940).
293 The swift realignment of the Court from 8-1 in Gobitis to 3-6
in Barnette was partly the result of personnel change (the addition of
Jackson and Rutledge) and partly the result of the change of viewpoint
of Black, Douglas, and Murphy. See Mason and Beaney, p. 567.
Rutledge's role in the Jehovah's Witnesses cases continued with his majority opinion in Prince v. Massachusetts. 294 This is a most interesting case for a number of reasons. First, it is one of only five instances in which Rutledge voted against a right claimed under the First Amendment. 295 Second, it provides us with some insights into Rutledge's scheme of values, illustrating that in some instances, the civil liberty issue was subordinate to some competing value, even for him. Third, it marks one of the rare instances in which Justices Rutledge and Murphy disagreed. This disagreement teaches us something both about the generally warm relationship between the two even when in opposition, and, at the same time, about the basic differences in their judicial styles. Let us examine.

At issue in the case was whether a state, by its child labor laws, could prohibit children (a nine year old girl in this instance), in the custody of their parents, from practicing their faith by selling or otherwise distributing religious literature in the streets and public places. This was a particularly difficult problem in light of the precedents. The rights of children to freedom of expression of religious beliefs had been established in Barnette; and the rights of parents to give their children religious training in schools had been recognized in Pierce v. Society of Sisters 296 where the Court held that a state could not require all children to attend secular public school. Never-

295 See civil liberty chart at the end of this chapter.
296 268 U.S. 510 (1925).
the Court voted in *Prince*, 8-1, to uphold the child labor law at the expense of religious freedom. The eight were not agreed, however, as to the grounds for the decision. Justice Jackson, joined by Justices Frankfurter and Roberts, wrote a concurring opinion in which he stated his belief that, although the religious practices of Jehovah's Witnesses occupied the "same high estate under the First Amendment as . . . worship in the churches," he did not believe that "going upon the streets to accost the public was the same thing for application of public law as withdrawing to a private structure for religious Worship." He concluded that the activities of Jehovah's Witnesses in the streets were analogous to lotteries, Bingo games, and other fund-raising activities which are only collateral to religion, basically secular in nature, and thus subject to state regulation.  

Wiley Rutledge, however, saw the matter quite differently. For him, the case involved competition between two great values: the constitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of children. The Court's function in such cases was to accommodate the colliding interests. He reached that accommodation in his majority opinion by attributing to the states a greater power to regulate the religious activities of children than to regulate the similar activities of adults. He wrote:

*Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.*

297 *Mosher, "Civil Rights,"* 669.
Rutledge refused to distinguish between forms of religion or places of worship as did the concurring opinion. He also refused to tamper with the natural vitality of the Murdock doctrine attributing an equality of dignity to Jehovah's Witnesses as a religious sect. Instead, he based his decision on the general interest of the community in protecting its youth, drawing an analogy to compulsory school attendance and vaccination which had been repeatedly upheld by the Court regardless of religious objections. The essence of his opinion is caught by the following excerpt:

The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies . . . . It is too late now to doubt that legislation appropriately designed to reach such evils (as child employment and activities subject to all the diverse influences of the street) is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

Justice Rutledge thus saw fit to sustain the law as a proper exercise of the state's police power. This apparently represented reliance upon the "rationality" rather than the "clear and present danger" test, unless the necessity of safeguarding the community welfare from apparent harms is interpreted to be so patently paramount to the public interest as to tacitly imply a "clear and present danger" if not heeded. In any case, Rutledge did not explicitly refer to either the "rationality" or the "clear and present danger" test. Only Justice Murphy, alone in dissent, relied expressly upon the "clear and present danger" test and the "preferred freedoms" doctrine.
Murphy found it impossible to see the Court's job here as simply accommodating colliding interests. Even though the conference discussions indicated that nearly every other Justice considered the regulation reasonable on the merits, Murphy saw it as religious oppression. After reading Rutledge's draft, Murphy wrote to his clerk:

...It is not difficult to come out on the same side of the question that Rutledge does although all my instincts are against it and I want very much to be on the other side in dissent if I can stand on firm ground....

Rutledge had made something of an impressive case. I want you to see his side of it and clearly what we have to meet. He stand on the grounds of enlightened conception of control and responsibility for child welfare.... But I do not want to conform. I want to save all that can be saved for the individual in freedom of conscience and I want to save all that can be saved for the parent as against the state in the right to teach the religion to the child.298

Murphy, in the end, did not conform. He wrote, instead, what his biographer has called his "most ill-advised opinion."299

If the right of a child to practice its religion 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.... The human freedoms enumerated in the First Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid.... We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too

298 Murphy Papers, Michigan Historical Collections of the University of Michigan; Frank Murphy to clerk, January 22, 1944, No. 98, Box 133.

sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.

Before submitting this dissent, however, Murphy took care to explain his position to his brother Rutledge:

Wiley, I am never happy disagreeing with you. And there is so little I can contribute here but I am a profound if not an adequate Jeffersonian on freedom of conscience. So I will write a note—inoffensive I'm sure—in the Prince case when it comes down.300

Almost certainly, Rutledge understood. He knew his friend and colleague Murphy well, and although the two sometimes disagreed, they never quarreled. When in substantive agreement on the issues of a case, they often cooperated in performing their judicial work. When in disagreement, they took great pains to avoid misunderstanding.301 The Prince case is one example of their rare disagreements. Another arose three years later in Everson v. Board of Education,302 involving the "establishment" clause. The controversy arose from an appropriation of school funds by a New Jersey township board of education for the purpose of reimbursing parents for transporting children to parochial schools.

In a 5-4 decision, the Court sustained the payment of the transportation expenses.

300 Murphy papers, unsigned memo, January, 24, 1944, No. 98, Box 133.

301 For a detailed discussion of the close relationship between Murphy and Rutledge see the section on "Interpersonal Relations," next chapter.

Justice Black, with whom Justices Murphy, Douglas, Vinson, and Reed joined, argued that, although "the wall between church and state... must be kept high and impregnable," New Jersey had not breached it in this case. The ordinance did "no more than... help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." The First Amendment was not designed to prevent this. It was meant only to require neutrality between the state and groups of religious believers. It was not meant "to require the state to be their adversary." Rutledge, joined by Frankfurter, Jackson, and Reed, dissented.

The "establishment of religion" clause means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid 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.

Justice Rutledge rejected the majority's "child benefit" theory. He challenged the assumption that the case involved no more than a question of welfare legislation. For him the cost of transportation was "a part of" not "secondary to... aid" to religious schools. And then, returning as he often did to practical effects, he warned:

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... The end of such strife cannot be other than to destroy the cherished liberty. The dominant group will achieve the dominant benefit; or all will embroil the state in their dissensions.
Perhaps the most significant portion of the opinion, however, was Rutledge's use of history to interpret the establishment clause. His principal source was James Madison's *Memorial and Remonstance Against Religious Assessments*, written in 1785 condemning a bill pending in the Virginia Assembly which would have levied a tax to support "teachers of the Christian religion." He appended the entire Remonstance to his dissent and relied heavily on Madison's assertion 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." Rutledge interpreted this to mean that government is absolutely prohibited from contributing in any way to any or even all religions. Edward S. Corwin has challenged this interpretation as excessive. Corwin reads Madison's conception of "establishment of religion" to mean only the prevention of one religion from enjoying a preferred status which would carry with it the right to compel others to conform. In any event, Rutledge's dissent in *Everson* carried the day in the next "establishment" case, *McCollum v. Board of Education*, which came up in the 1947 October Term. Here the Court condemned the version of "released time" program of religious instruction in the public schools adopted by the Board of Education of Champaign, Illinois. Justice Black wrote the majority opinion, and Justice Frankfurter wrote a concurring opinion adding greatly to the

303 Mann, 542.


305 Mann, 543 n 70.

historical sources used by Rutledge in Everson. Rutledge's dissent in Everson had apparently influenced all but Justice Reed who alone dissented in McCollum.

It is interesting to note that Rutledge later observed to Irving Brant that the heaviest mail he received during his six years on the Court resulted from Everson and McCollum. The public reaction to the first case was a spontaneous endorsement of his dissent by opponents of state aid to church schools, and a spontaneous attack upon it by advocates of state aid. In the period between the two cases there ensued a "systematic adoption and resolutions of protest against his stand by church bodies seeking public tax support." He was under continuing pressure from interest groups to reverse his attitude, while the issue was still before the court. Brant concludes: Rutledge saw the significance of briefs filed by counsel for church groups as amici curiae and proceeded to develop the issue in terms of fundamental American policy. This brief account appears to fit the model of judicial decision-making produced by Jack Peltason. Federal judges are "participants in the political process," writes Peltason. Their "activity is interest activity." Their decisions "decide controversies between litigants and, at the same time, (represent) one phase in the accommodation of the

307 Brant, 440-441.
308 Ibid.
309 Ibid.
interests which the litigants represent." Their opinions are "to interest promotion what a movie star's endorsement is to a cigarette's sales." The above account of political reaction to Rutledge's Everson dissent appears to support this Bentlayan orientation of the process model.

In summary, Justice Rutledge was a staunch defender of First Amendment freedoms who believed that those freedoms enjoy a "preferred position" in the American constitutional scheme. He participated in deciding 24 non-unanimous cases involving rights claimed under the First Amendment between 1943 and 1949, and voted to protect the right claimed in 19 (or 79%) of them. In the five cases in which he voted against the right, he saw the civil liberty issue as secondary. In the Prince case, the more important value was the general interest which the state had in protecting its youth. In United States v. Ballard, he recognized the power of government to punish disseminators of religious doctrine for intentionally using the mails to defraud. He was also willing to allow economic regulation of the press, upholding the application of the Sherman Act and the Fair Labor Standards Act to the publishing business in Associated Press v. United States and Oklahoma Press Publishing Co. v. Walling, respectively. And in Rescue Army v. Municipal Court, he remanded the case because the denial of religious liberty

311 Ibid., pp. 1, 3, 7-8.

claimed was not presented with enough "clarity and precision." (Murphy and Douglas thought the religious freedom issue was "abundantly clear.").\textsuperscript{313}

With these five exceptions, Rutledge exhibited a zealous sensitivity to all restrictions of First Amendment freedoms, and in voting to uphold rights claimed under the Amendment was second only to Murphy who voted to protect the right claimed in 96% of the 24 cases between 1943 and 1949.\textsuperscript{314}

**Procedural Rights and the "Incorporation" Issue**

By the time Wiley Rutledge was appointed to the Supreme Court in 1943, the First Amendment freedoms had already been "incorporated" into the Fourteenth Amendment and thus made applicable against infringements by the states as well as by the national government.\textsuperscript{315} The real fight over incorporating the rest of the Bill of Rights, however, was just beginning. Two cases involving procedural safeguards which speak to this problem of "incorporation" are *Adamson v. California*,\textsuperscript{316} and *Wolf v. Colorado*.\textsuperscript{317} These two cases are as critical in providing a clue as to Rutledge's view of "incorporation" as *Thomas v. Collins* is in

\textsuperscript{313} Rockwell, 49.
\textsuperscript{314} Ibid., 47.
\textsuperscript{316} 332 U.S. 46 (1947).
\textsuperscript{317} 338 U.S. 25 (1949)
understanding his philosophy of "preferred position." Thus, we will begin this section with an analysis of them.

Adamson v. California brought in question the validity of a California Code provision permitting the prosecution in criminal cases to comment on the failure of a defendant to take the witness stand in his own defense. Adamson, a previously convicted felon, chose not to take the stand, prompting adverse comments by the District Attorney. Such comments on a defendant's failure to testify were not then permitted by federal courts and by the majority of state courts. Nevertheless, the Court upheld the California Code notwithstanding its contrariety to federal standards and the claim that it violated the Fifth Amendment's guarantee against self-incrimination.

The majority opinion, written by Justice Reed, followed the Twining rule that the guarantee against self-incrimination was not made effective by the Fourteenth Amendment as a protection against state action. More specifically, as illustrated by Justice Frankfurter's concurring opinion, the majority relied upon the so-called "fundamental rights" test developed by Benjamin Cardozo in Palko v. Connecticut. Palko raised the question whether the Fifth Amendment's guarantee against double jeopardy was applicable to the states. In holding that it was not, Cardozo, framed the test which is at the core of one possible approach to "incorporation," the so-called "selective incorporation" position: Only

318 Mason and Beaney, p. 477.
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" are protected against state action by the Fourteenth Amendment. This "selective incorporation" position developed by Cardozo was followed by Frankfurter in Adamson (and is championed on the current Court most notably by Justice Harlan.)

According to Justice Frankfurter, the lesson of history showed that the Fourteenth Amendment was never intended to be a "shorthand summary" of the Bill of Rights. And for him the "fundamental rights" test was an objective standard by which to decide, by an independent examination of the record in each case, whether the right claimed was to be properly "incorporated." Justice Black disagreed vehemently on both counts. For him, the "fundamental rights" test was mired inescapably in subjectivity. And in his thirty-page dissent in Adamson he attacked the Court's "boundless power under national law" concepts, recalling Justice Iredell's misgivings in Calder v. Bull. 321

Black wrote

The "natural law" formula should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power... I fear to see the consequences of the Court's practice of substituting its own concept of decency and fundamental justice for the language of Bill of Rights as its point of departure in interpreting and enforcing the Bill of Rights.

321 Dall. 386 (1798).
Black further indicated that his "study of the Historical events that culminated in the Fourteenth Amendment" persuaded him "that one of the chief objects" which the Amendment was intended to accomplish "was to make the Bill of Rights applicable to the states." He would thus have invalidated the challenged provision of the California Code on the basis of his "strict incorporation" position, i.e., the Fourteenth Amendment incorporates and protects those rights, and only those rights, listed in Amendments One thru Eight.

Rutledge, along with Murphy and Douglas, also dissented in Adam--son. All believed that the entire Bill of Rights should be absorbed by the Fourteenth Amendment. But Rutledge joined in Murphy's separate dissent which went further. According to the Rutledge-Murphy position, "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." Thus Rutledge read the Fourteenth Amendment as absorbing the entire Bill of Rights plus unspecified "fundamental rights" which would supplement the Bill of Rights "in order to fill in the chinks." This approach has been labeled the "incorporation plus" position and its distinction from Black's "strict incorporation" was evident in Rutledge's dissent in Wolf v. Colorado.

In this case, the Court ruled that the Fourth Amendment's protection against unreasonable searches and seizures was applicable to the states. Black agreed with the majority, however, that this prohi-
bition did not carry with it the federal exclusionary rule (which pro-
hibites the use of evidence secured through the illegal search and
seizure) since that rule was not an explicit requirement of the Fourth
Amendment but simply a federal remedy, "a judicially created rule of
evidence which Congress might negate." Rutledge vehemently dissented.
He argued that Congress could not validly enact legislation permitting
the introduction in federal courts of evidence seized in violation of
the Fourth Amendment. Further, he asserted that the federal exclusion-
ary rule was a "fundamental standard of procedure" which must be made
applicable to the states because the "Fourth Amendment without the
sanction" would be "a dead letter." "Compliance with the Bill of Rights,"
he concluded, "be tokens more than lip service."

Interestingly, Black and Rutledge apparently adopted their respec-
tive positions toward "incorporation" in Adamson and Wolf for the same
reasons. Both were ardent defenders of civil liberties who felt that
under Cardozo's "fundamental rights" test the Court was not sufficiently
extending constitutional protections to criminal defendants. Black
believed that his "strict incorporation" of the entire Bill of Rights
would result in a broader protection of procedural rights. He was also
interested, however, in producing a more objective standard for the
judicial review of procedural rights cases than he believed Cardozo's
formula allowed. Thus he was willing to settle for incorporating only
the Bill of Rights and no more even though there might be some loopholes
in it. Rutledge also wanted a more rigid protection of procedural rights

323 Ibid., Rockwell's discussion of this matter is excellent.
than the "fundamental rights" test permitted. He also may have agreed that a more objective standard was desirable in principle. But he did not want more objectivity at the cost of allowing loopholes. Thus he would have kept the "fundamental rights" test to fill in the "gaps" in the Bill of Rights.

Finally, there should be a word about the implication of Rutledge's "incorporation plus" position for his judicial style. Whereas Black's position required at least an aspect of judicial self-restraint (in the sense that the protection of procedural rights in any jurisdiction would be restricted to the Bill of Rights), Rutledge's position led him to assume a more active role. It necessarily required the kinds of latitude in the exercise of discretion and the kinds of value judgements which Black had decried in Adamson. Rutledge was guided in almost all of the procedural rights cases by an a priori standard which required the Court to carefully supervise state procedures in order to guarantee rights "reasonably" and "morally", if not specifically, derived from the Bill of Rights. Lastly, unlike Black's more mechanistic approach which would have saved the Court from having to examine the entire record in each case, Rutledge's formula led to the determination of each case on the basis of an independent and subjective examination of the facts. We will now consider Rutledge's role in this process.

Between 1943 and 1949, Justice Rutledge participated in the disposition of ten non-unanimous decisions involving self-incrimina-
tion. He voted to uphold the right allegedly violated in all ten cases. No other member of the Court was this consistent. Both the Adamson majority and the Adamson dissenter agreed that coerced confessions represented one form of self-incrimination which the "fundamental rights" tests prohibited. But the Justices could not agree on what constituted a coerced confession. In Lyons v. Oklahoma, the Court held that a voluntary confession following a coerced one by twelve hours was nevertheless valid. Rutledge, Murphy, and Black dissented. They believed that the first confession, which all agreed was inadmissible, infected the second with self-incrimination. United States v. Bayer involved the same problem except that the time interval between the coerced and voluntary confessions was six months, not twelve hours. Again, the Court held the second confession valid. This time, however, only Rutledge dissented. Murphy and Black voted with the majority because they found the time interval long enough to remove the coerced confession--self-incrimination nexus. Rutledge did not. Of all ten cases, this is the only one in which Rutledge and Murphy disagreed.

Feldman v. United States involved a slightly different factual stimulus. This was a criminal prosecution in a federal court. Admitted in evidence against the accused was testimony he had been forced to give previously in a state court under a statutory provision for

Immunity. The majority, Frankfurter writing, upheld the conviction analogizing to the admissibility in federal courts of evidence secured through unreasonable search and seizure by state officials. Since the previous testimony was not "wrongfully" acquired by federal officers, it was admissible and did not violate the self-incrimination clause of the Fifth Amendment. Rutledge and Douglas joined Black's strong dissent in which he argued that the Court's ruling cut "into the very substance of the Fifth Amendment."

And it (the majority) 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.

(The court's decision here is) shocking to the Universal sense of justice and offensive to the common and fundamental ideas of fairness and right.326

The majority, however, was not listening. On year later, in Malinski v. New York, the Court found that the first of a series of confessions made by one of two co-defendants, Malinski, had been coerced. The Court reached this conclusion after an "independent determination on the disputed facts," and reversed the conviction. However, the Court upheld the conviction of the second co-defendant, Rudish, even though that conviction had been based in part on evidence from the coerced confession of Malinski.

325 Murphy did not participate in Feldman.

326 As Mosher has noted, although Black repudiates natural law concepts, he often uses natural law language.
Justice Rutledge wrote a dissenting opinion in which he addressed himself to the Court's handling of both defendants. Although he agreed with the majority that Malinski's conviction should be reversed, he favored reversal based on a broad theory of what constitutes a coerced confession rather than the majority's "independent determination" approach. He argued that whenever one confession is coerced, no later confession could possibly be entirely voluntary. Referring to the psychological aspects involved, Rutledge wrote:

A man once broken in will does not readily, if ever recover from the breaking ... No change in circumstances can wholly wipe out its effects upon himself or upon others. Thereafter he acts with knowledge that the damage has been done. ... It would seem consistent therefore with our constitutional tradition that once a coerced confession has been obtained all later ones should be excluded from evidence. ... In no other way can the effects of the coercion be wholly excluded from the trial. In no other way can one who has been subjected to use of force or coercive "psychology" be put upon an equal plane for the determination of his guilt or innocence with others who have escaped such unlawful action or be put back in the position he is entitled by law to occupy until his trial and a verdict of guilty ...

With respect to Rudish, Rutledge (joined only by Murphy) dissented strongly. He argued that the proceeding was one continuous case and that due process did not permit a man to be convicted upon the coerced confession of another.

Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal ... The effect is not different because the two, confessor and the person implicated, are tried together or because the torture is applied to other witnesses but not to the accused.
In cases involving the problem of right to counsel, Rutledge compiled a similarly consistent and liberal record. In fourteen non-unanimous decisions on this issue between 1943 and 1949, he voted to protect the right claimed in every case. When Rutledge came to the Court in 1943 the issue of right to counsel in state prosecutions was largely unsettled. The Court had extended the right to cover capital offenses in Powell v. Alabama in 1932 and to all indigent defendants in any criminal prosecution in Smith v. O'Grady in 1941. But it had then backed down from this position in Betts v. Brady in 1942 holding that the right to counsel was not a "fundamental right" essential to state criminal trials. The question remained unsettled until long after Justice Rutledge's departure, not being firmly decided until 1963 in Gideon v. Wainwright. Nevertheless, a few of the fourteen cases decided between 1943 and 1949 provide us with a clear insight into Rutledge's view here as well as with some observations on the nature of libertarian dissent. Let us examine three of Rutledge's dissents in


328 287 U.S. 45 (1932).

329 312 U.S. 329 (1941).

330 316 U.S. 455 (1942).

331 373 U.S. 335 (1963).
Gayes v. New York involved the indictment and conviction for burglary of an indigent, sixteen year old boy. Although he was represented by counsel in the instant case, he had been indicted on similar charges three years earlier when, without the presence or help of a friend or lawyer, he had waived his right to counsel. In the present case he was sentenced as a second offender, which sentence he now challenged on the ground that his first conviction was a denial of due process by reason that he had not been represented by counsel. The Court rejected the claim. Justice Frankfurter, for the majority, argued that "upon (the defendant's) subsequent sentence as a second offender ... he had full opportunity ... to contest whatever infirmity he may have claimed in the earlier sentence when the fact of that sentence was included in the sentence which he is now serving." But Rutledge, in dissent, erupted against Frankfurter's contention that since Gaye's did not attack the first sentence in 1941 he was "forever foreclosed." "Such a doctrine of forfeitures concerning constitutional rights" was totally unacceptable to Justice Rutledge.

Perhaps the case prompting Rutledge to his most emotional dissent, however, was Foster v. Illinois. Here, the defendants had pleaded guilty to burglary charges without having been advised of their right to counsel. The Court held 5-4 that a state trial court need not necessarily offer the accused the assistance of counsel in every case, and that the right to counsel guaranteed in federal trials by the Sixth Amendment does not always apply to prosecutions in state courts. Justice Frankfurter, who wrote for the majority, was generally inclined, as Justice Holmes had been, to think in terms of generality and system
rather than in terms of the immediate result, and thus believed that
the Court ought to confine itself to matters of general import. 332

In keeping with this style, he wrote in Foster v. Illinois:

It is not for us to suggest that it might be desirable to
offer to every accused who desires to plead guilty the
opportunities for counsel and to enter with formality upon
the record the deliberate disclaimer of his need for coun-

sel.... After all, due process, "itself a historical
product,"... is not to be turned into a destructive dogma
in the administration of systems of criminal justice under
which the states have lived not only before the Fourteenth
Amendment but for eighty years since its adoption.

Here, Frankfurter and Rutledge stood diametrically opposed. Rutledge's
concern was almost always with the impact of the immediate result on
the individual. His dissent in Foster v. Illinois has been chosen by
C. Herman Pritchett to illustrate what this scholar has observed to be
"the emotional overtones present in numerous libertarian dissents" and
the "hint... of personal involvement in the controversy experienced
by" libertarian dissenters. 333 Rutledge wrote:

When men appear in court for trial or plea, obviously with-
out counsel or, so far as appears, the means of securing such
aid, under serious charges such as were made here involving
penalties of the character imposed, it is altogether incon-
sistent with their federal constitutional right for the
court to shut its eyes to their apparently helpless condi-
tion without so much as an inquiry concerning its cause.
A system so callous of the rights of men, not only in their
personal freedom but in their rights to trial comporting with
any conception of fairness, as to tolerate such action, is in

332 Mosher, 691 n 83. As a further example, note Frankfurter's
comment in attempting to dissuade the Court from intervening in state
proceedings in Uveges v. Pennsylvania: "After all," he wrote, "this is
the nation's ultimate judicial tribunal, not a super-legal-aid bureau."

333 C. Herman Pritchett, Civil Liberties and the Vinson Court
my opinion wholly contrary to the scheme of things the nations charter establishes. Courts and judges under that plan, owe something more than the negative duty to sit silent and blind while men go on their way to prison, for all that appears, for want of any hint of their rights. Adding to this blindness a "presumption of regularity" to sustain what has thus been done makes a mockery of judicial proceedings in any sense of the administration of justice and a snare and a delusion of constitutional rights for all unable to pay the cost of securing their observance.

Rutledge, Murphy, Black, and Douglas thought pretty much alike in cases involving the right to counsel. In fact, these four Justices, who constituted the so-called "libertarian bloc" between 1943 and 1949, voted the same way in thirteen of the fourteen cases. Only in Canizio v. New York did they split. Here, a poorly educated, indigent, and orphaned boy of nineteen had been arrested on a burglary charge. He had not been informed of his right to counsel by the county court when he was arraigned and pleaded guilty. He was represented by counsel, however, for sentencing. Black and Douglas joined the majority which held that Canizio had received adequate assistance when counsel was assigned partway through the proceedings. Counsel for the defense, could have asserted all defenses originally available at the time of sentencing. Rutledge and Murphy dissented on the argument that the right to counsel was essential in each step of the proceeding. This was particularly true in this case, they believed, because of a New York law which made a withdrawn plea of guilty admissible in evidence against a defendant at his later trial. Thus, Rutledge concluded, "the damage done by the original invalid plea was not removed by the attorney's eleventh hour entry nor could it have been at that time, fully and effectively, in view of the existing state of the law and the facts."
In cases involving search and seizure, Justice Rutledge was only slightly less consistent. In the ten non-unanimous decisions rendered by the Court on this subject between 1943 and 1949, he thought the right had been violated in nine, and found the search and seizure permissible in one. Except for his dissent in Wolf v. Colorado, discussed above, Rutledge wrote only one opinion in this group of cases. Interestingly, this was his majority opinion in the one case where he found the seizure "reasonable." It was otherwise, however, a relatively obscure case. He reached his result by relying on the "probable cause" doctrine. He found the facts of the case analogous to those in the more famous case of Carroll v. United States where the Court had held in 1925 that it is permissible to search an automobile without a warrant where there is probable cause to believe that it contains contraband or that it is being used to violate a law.

Except for this majority opinion in Brinegar and the dissent in Wolf, we have only Justice Rutledge's votes as indicators of his position in search and seizure cases. In Harris v. United States, federal agents unexpectedly had found Selective Service registration certificates and classification cards and had seized them while making an


arrest for an unrelated crime. The Court ruled that the seizure was permissible since it was made incident to a legal arrest during the course of a reasonable search even though the items seized had no relationship to the object of the search. Rutledge dissented. On year later, however, the Court appeared moving in a different direction. Rutledge joined with the majority in two 5-4 decisions. In the first, the Court ruled that odors alone (e.g., burning opium) did not authorize search without a warrant and that, therefore, the arrest in question was unlawful. In the second, the Court held also invalid the seizure without a warrant of an illegal still. Odors (e.g., fermenting mash) and sounds (e.g., a gasoline motor) alone did not justify the seizure, especially since it had been "reasonably practicable" for the federal agents to have obtained a warrant.

In cases involving the guarantees of the Sixth and Seventh Amendments concerning jury trials, Justice Rutledge was considerably less sympathetic to claims of violation. Between 1943 and 1949, the Court made eight non-unanimous decisions in this field. Although his brother Murphy voted to uphold the right claimed in all eight cases, Rutledge did so in only five. He voted to reject the claim in the other three.

Justice Rutledge joined with the majority in holding that federal jury rolls must represent a fair cross-section of the community. This was decided in 1946 in Ballard v. United States, involving the exclusion of women, and in Thiel v. Southern Pacific Co., involving the exclusion of laborers. The Court then refused, however, to extend this rule to state procedure. Rutledge dissented from the Court's decisions in Fay v. New York and Moore v. New York involving that state's use of "blue ribbon" juries. The Justices were agreed on the essential facts: (1) that the jury selection method in question resulted in panels unrepresentative of the community; and (2) that there was, however, no evidence of intent to discriminate. The majority, relying on the "fundamental rights" tests, approved the "blue ribbon" panels. It supported its position by noting that there was no intent to discriminate and by extending Brandeis' plea for tolerance of state experimentation in the field of social legislation to the field of civil liberties.\(^\text{341}\) Rutledge, Black, Murphy and Douglas disagreed. It was their view that any method of jury selection which effectively excluded any part of the community was invalid, even in the absence of evidence of intent to discriminate. Indeed, as Black put it in his dissenting opinion, the absence of an intent to exclude simply made it harder to establish what was clearly a "very subtle and sophisticated form of discrimination."

Rutledge's most noteworthy stand in this group of cases came in the "Michigan one-man jury case", In re Oliver. In this case, a witness was summarily convicted for contempt by a judge acting as a one-

\(^{341}\) See Rockwell, 39.
man grand jury because of the seeming inconsistency of his testimony with that of another witness. The entire proceeding was held in secret and there was no separate hearing on the contempt charge. Justice Black, writing for the majority, held that the secrecy of the proceedings and the lack of opportunity to be heard on the contempt charge amounted to a denial of due process. Rutledge concurred in the result, but wrote a separate opinion arguing that the entire one-man grand jury system was unconstitutional.

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 process 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 ... 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 notions. 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 constitutionally provided method. This is no time to experiment with established liberties.

342 Hosher, 678 n 41.
Two of the three cases in which Justice Rutledge voted against alleged violations of jury trial rights, also involved the problem of composition. In *Akins v. Texas*, he agreed with the majority that the equal protection clause does not require the proportional representation of community groups such as, in this case, Negros. And in *Frazier v. United States*, he wrote for the majority which upheld the conviction of the defendant for violating the Federal Narcotics Act by a jury made up exclusively of federal employees. Rutledge's decision here was based on the fact that although the jury panel originally contained both governmentally and nongovernmentally employed individuals, the defendant's lawyer had, himself, used his preemptory challenges so as to eliminate all but federal employees. Thus, said Rutledge, it was the defendant not the procedure which was responsible for the jury's final composition. Rutledge also wrote for the majority in *Galloway v. United States*, the third instance in which he rejected a claimed jury trial right. Here the claim did not relate to the composition of juries but to the Seventh Amendment's guarantee that "the right of trial by jury shall be preserved . . ." Black, Douglas and Murphy, in dissent, argued that a directed verdict served to erode this right "since the trial of fact by juries rather than judges is an essential bulwark of civil liberties." But Rutledge argued that a directed verdict per se did not violate the Seventh Amendment because the amendment was "designed to preserve the basic institutions of jury trial in only its most fundamental elements,

343 Rockwell, 40 n 58.
not the great mass of procedural forms and details varying . . . so widely among common law jurisdictions."

In addition to cases involving self-incrimination, right to counsel, search and seizure, and jury trial rights, Justice Rutledge participated in the disposition of three other cases involving procedural rights. The most famous was the military trial of General Yamashita. There was also, however, the John L. Lewis contempt case, and the OPA jurisdiction case, Yakus v. United States. Let us consider each in the above order.

An intense consideration of the strategy of decision in Yamashita must await our analysis of "interpersonal relations" in Chapter VI. This case is highly instructive as to the closeness of the Rutledge-Murphy alliance. Let us consider here then not the strategy but simply the elements of decision. General Yomoyuki Yamashita had been the commanding general of the Japanese Fourteenth Army group in the Philippine Islands. He had surrendered to American forces on September 2, 1945 following Japan's "unconditional surrender" of August 14. A month later, he was served with a charge of violating the laws of war, and on December 5, 1945 he was found guilty by a military commission and sentenced to die by hanging on December 7. General Yamashita's lawyers appealed to the Supreme Court to review the military trial, claiming

344 ibid., 39-40.
345 In re Yamashita, 327 U.S. 1 (1946).
both the innocence of their client and serious procedural errors in
the trial, including the reception in evidence of depositions and
hearsay and opinion evidence. The issue came down to whether an
American military commission in the trial of an accused enemy belli-
gerent could disregard fundamental procedural rights, especially the
Fifth Amendment's guarantee that "no person shall . . . be deprived of
life, liberty, or property, without due process of law." The Court
found that: (1) there was proper authority to create the military
commission; (2) the charge was adequate to make out war crimes; and (3)
the details of the trial were "not reviewable by the courts, but only
by the reviewing authorities." "From this viewpoint" the majority con-
cluded, it was "unnecessary to consider what, in other situations, the
Fifth Amendment might require . . . ."

Rutledge and Murphy dissented. Rutledge could find no legal
authority, indeed, no precedent in American history, for the trial.
More importantly he challenged the entire proceeding from the stand-
point of procedural due process. His position was, essentially, that,
"the Constitution follows the flag" on all occasions except on the field
of combat. "There, the maxim about the law becoming silent in the noise
of arms applies."348 As Rutledge put it in Yamashita:

The difference between the Court's view of this proceeding
and my own comes down in the end to the view, on the one
hand, that their is no law restrictive upon these proceed-
ings other than whatever rules and regulations may be pre-
scribed for their government by the executive authority or
the military and, on the other hand, that the provisions

348 Corwin, Total War and the Constitution, pp.121-122.
of the . . . Fifth Amendment apply.349

Justice Rutledge's procedural purism was perhaps most accentuated in his dissent in the John L. Lewis contempt case. Here, civil and criminal contempt charges had been mingled in the same proceeding, or "hodgepodge" as Rutledge labeled it. He noted that the American Constitution totally rejected the continental system of combining criminal and civil adjudication. "Our tradition," he argued, "is exactly the contrary and few would maintain that this had had no part in bringing about the difference existing today for individual freedom here and in Europe."

The Yakus case, as well as the Yamashita case, is better discussed in detail later. We will examine it closely in our consideration of "policy-making in Chapter VI. Still, it should be noted here that Rutledge again exhibited his zeal for due process in criminal proceedings by condemning, in dissent, a statutory procedure which prohibited the enforcing court from considering all questions of validity. In his judgement, the Emergency Price Control Act afforded too little recourse to the courts for individuals allegedly violating its regulations. And again he condemned the mingling of civil and criminal proceedings. He noted that the means of enforcing the act included both criminal proceedings and suits for the recovery of civil penalties. Thus what was in essence a single trial was divided into "separate segments, with some

of the issues essential to guilt triable in another court in a highly summary civil proceeding held elsewhere."

Justice Rutledge excoriated the entire procedure as "piece-meal," "chopped up," and "disruptive of constitutional guarantees in relation to trials for crime."

Other Problems of Civil Liberty

Civil liberties in wartime, deportation and denaturalization, and competing civil liberties formed a triplicity of special problems which the Court was called upon to deal with between 1943 and 1949. Here, Justice Rutledge did not stray from his role as a "civil libertarian," although in the wartime cases he was willing to give greater latitude to governmental action, approved in light of the war emergency, than in any other set of cases.

In the wartime litigation, he participated in the disposition of three cases concerning curfew, evacuation and relocation programs, and in three treason/sedition cases. He voted to sustain the civil liberty claimed in three of the six cases. Hirabayashi v. United States involved a curfew regulation applicable to all aliens and all persons of Japanese ancestry in West Coast areas. The Court upheld the curfew.

350 Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); and Ex parte Endo, 323 U.S. 283 (1944).

Although Rutledge voted with the majority, he wrote a concurring opinion (the only time he expressed himself in writing in these six cases) in which he voiced his opposition to the majority's 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." Rutledge was apparently anxious to make certain that "the door would remain open for future judicial review" of the Army's curfew program.\(^{352}\) In *Korematsu v. United States*, however, he again supported the government by voting with the majority to uphold a much more drastic interference with liberty, i.e., the evacuation of Japanese and Japanese-Americans from the West Coast. This decision was apparently based upon the belief that the war power gave wider discretion to the military and that "the loss of individual rights ... (is) one of the inevitable hardships of war."\(^{353}\) It is perhaps, somewhat surprising that Rutledge agreed with the majority argument that the military authorities were justified in concluding that the Japanese residents of the West Coast area constituted a potentially grave danger so pressing that there was no time to set up procedures for determining the loyalty or disloyalty of the individual.\(^{354}\) However, in *Ex parte Endo*, decided the same day as *Korematsu*, Rutledge voted with the majority, ruling that once the loyalty of a relocation center internee had been determined, he could no longer be legally detained against his will.

\(^{352}\) At least this is Rockwell's interpretation, 53.

\(^{353}\) Mason and Beaney, p. 505.

\(^{354}\) Mosher, 678 n 39.
In Hartzel v. United States, Rutledge voted with the majority to reverse the conviction of a Nazi leader under the Espionage Act on the ground that the "willful intent" required by the Act had not been demonstrated beyond a reasonable doubt. And in Cramer v. United States, he voted against a treason conviction on the ground that the overt acts necessary to prove treason were absent. But in Haupt v. United States, two years later, he voted to sustain a similar conviction. Although Rutledge voted to support the civil libertarian interest in only three of the six above, wartime cases, he still scored a considerably more "liberal" record than Black who supported the civil liberty only once (in Cramer) and Douglas who did so not at all. Only Murphy, who supported the government just once (in Hirabayshi) was more "liberal."

During his six years on the Court, Justice Rutledge participated in deciding two deportation cases, and four denaturalization cases. He failed to support the government in any of them. In Bridges v. Wixon, the government's protracted attempt to deport Henry Bridges came to an end when the Court ruled that the deportation statute relied upon did not apply to him. Rutledge agreed. In Ludecke v. Watkins, however, the Court approved the deportation of a German enemy alien. The majority view was that the termination of the war was a matter to be decided not by the courts but by the political branches, and that the Court, un-


under the circumstances, could not review the findings of the Attorney General. Justice Rutledge disagreed. He voted to support the minority contention: (1) that for the purposes of judicial review, there was no difference between the deportation of enemy aliens and other deportation proceedings, and that the Attorney General's findings were thus subject to review; and (2) that, by any standard, the war should be considered terminated by 1948 anyway.

The general rule evolved from the four denaturalization cases in which Rutledge participated was that citizenship may be revoked for fraud if it can be shown that the defendant, at the time he obtained his naturalization certificate, took his oath of "attachment to the Constitution" with mental reservations. As demonstrated by Murphy's majority opinion and Rutledge's concurring opinion in Schneiderman and their separate dissents in Knauer, these two Justices would have appended two further requirements: (1) that since no naturalized citizen could be secure in his rights if citizenship could be cancelled on the same as its power to denaturalize"; (2) that since denaturalization was the worst kind of punishment, all the safeguards of criminal procedure guaranteed by the Bill of Rights must attend denaturalization proceedings. There must be proof beyond a reasonable doubt, i.e., "clear, unequivocal and convincing" proof as Murphy put it in Schneiderman, that the citizenship in question was fraudulently obtained.

Rutledge's opinion in Klapprott v. United States pretty much summed up his position.

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.

For Rutledge there was no distinction between the naturalized and the native-born citizen. There could be no "second-class citizens."

Thus in the Knauer case, Rutledge dissented from the majority holding Knauer, proven to be a dominant figure in the German-American Bund, had fraudulently obtained citizenship which should be revoked. Rutledge wrote:

Not merely Knauer's rights, but those of millions of naturalized citizens in their status and all that it implies of security and freedom, are affected by what is done in this case . . . . No native born American's birthright could be stripped from him for such a cause or by such a procedure as has been followed here. Nor can he be punished with banishment. To suffer that great loss he must forfeit citizenship by some act of treason or felony and be adjudged guilty by process of law with all the great protections thrown about such trials.

Finally, at least brief mention should be made of one case in which Justice Rutledge was apparently forced to choose between competing claims to civil liberty. This was the case of Screws v. United States which involved the fatal beating of an "uppity" Negro prisoner by a Georgia sheriff. The sheriff had not been brought to trial in state courts because as the prosecutor explained, he (the sheriff) had not filed a complaint. But he was then indicted by federal

357 325 U.S. 91 (1945).
358 Howard, p. 355.
authorities under the Civil Rights Act of 1866 which prohibited the deprivation of rights, privileges, and immunities secured by the Constitution, by state officers acting "under color of any law." Screw's conviction by the trial court was affirmed by the Court of Appeals, and he sought reversal by the Supreme Court on the ground that the law invoked against him was unconstitutionally vague and indefinite.

The case could thus be interpreted as presenting the question of how much solicitude is to be shown for the constitutional rights of defendants charged with violating the constitutional rights of another. Examining the case in this new sense, however, we find that the Court did not reach a firm result. Four separate opinions were written, in none of which did five or more Justices concur. A majority did uphold the statute against the charge of vagueness but, at the same time, it ordered a new trial on the ground that the statutory requirement for a "willful" violation had not been properly submitted to the jury. Rutledge believed both that the statute in question was valid and that the evidence of "willful" intent was clear. He did not believe therefore that a new trial was necessary. Nevertheless, in order to avoid a stalemate and to achieve a majority disposition of the case, he reluctantly voted for a new trial. Still, he managed to make his view clear in his concurring opinion.

Federal power lacks no strength to reach the malfeasance (of state officials) when they infringe constitutional rights. Generally state officials know something of the individual's basic legal rights. If they do not they should, for they assume that duty when they assume their office. . . . When they enter such a domain in dealing

359 Rockwell, 48.
with the citizens rights they should do so at their peril.

We are probably safe in assuming that Justice Rutledge read this case as involving not the competition between two claims to individual rights but the competition between the general theory of individual rights and the theory of states' rights. Certainly his opinion reflected his greater concern for personal rights than for the notion of state sovereignty. That Rutledge would place individual liberties above states' rights was implicit in his philosophy of the juridical idea of sovereignty which one scholar has characterized as "generally associated with Leon Duguit, i.e., that the state as a reified entity is nothing but a collection of human beings performing a social function or service, and that an individual citizen who is the victim of abuse of official authority should have some redress against the individual officers." 360

At the very least, Justice Rutledge's intense concern for individual freedoms has been documented in this chapter and is statistically capsulized on the following page.

360 Mosher, 694.
<table>
<thead>
<tr>
<th>Type of Civil Liberty Claimed</th>
<th>No. of non-unanimous decisions participated in by Rutledge, 1943-1949</th>
<th>No. of cases in which Rutledge voted to sustain the liberty claimed.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FUNDAMENTAL SUBSTANTIVE RIGHTS</strong></td>
<td></td>
<td></td>
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<td>First Amendment Freedoms</td>
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<td>19</td>
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<td><strong>FUNDAMENTAL PROCEDURAL RIGHTS</strong></td>
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<td></td>
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<td>Self-Incrimination</td>
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<td>10</td>
</tr>
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<td>Right to Counsel</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Search and Seizure</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Jury Trial Rights</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Other</td>
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<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
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<td>41</td>
</tr>
<tr>
<td><strong>CIVIL LIBERTIES IN WARTIME</strong></td>
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<td></td>
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<tr>
<td></td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td><strong>DEPORTATION AND DENATURALIZATION</strong></td>
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<td></td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td><strong>TOTAL CIVIL LIBERTIES RECORD</strong></td>
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<tr>
<td></td>
<td>81</td>
<td>69</td>
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CHAPTER VI
INTERPERSONAL RELATIONS, JUDICIAL STYLE,
AND POLICY-MAKING

Individual andBloc Relations

A bloc on the Court, according to Glendon Schubert, "consists of three or more Justices who manifest a relatively high degree of interagreement in their voting, whether in the majority or in dissent, over a period of at least a term. A bloc differs, therefore, from a group which consists of a temporary alignment of Justices who vote together in a particular case or set of cases; a group lacks both the persistency and the consistency of a bloc."361 Using Schubert's terms, we can observe that Justice Rutledge was a member of two blocs which were active from 1943 to 1949: (1) the "certiorari bloc," as Schubert has labeled it;362 and (2) the "libertarian activist bloc," as Pritchett has called it.363

Examining the decisions of the Court between 1943 and 1949, in Federal Employer's Liability Act evidentiary cases, Schubert postulated that Justices Rutledge, Murphy, Black, and Douglas combined into

363 Pritchett, Civil Liberties and the Vinson Court, pp. 190-192, and The Roosevelt Court, pp. 41-43, 240-253.
a bloc with the deliberate objective of forcing upon the rest of the Court the consideration of an issue which the bloc wanted decided in a particular way. Assuming that:

"the objective of the bloc was to maximize the number of decisions favorable to workmen's claims, game theory can prescribe how the bloc should behave rationally in order to accomplish this objective. Four justices are adequate to grant certiori, but not (normally) to decide cases on the merits. It is assumed that, during this period, the remaining five justices had no fixed predisposition either toward or against the claimants. The only question in these cases is whether the trial court correctly evaluated evidence; the cases turn, in other words, on questions of fact rather than law. Typically, they fall into two categories: (a) the trial court directs a judgement for the defendant railroad, on the ground that the evidence is insufficient for the case to go to a jury, or else the court directs a judgement for the defendant notwithstanding a jury verdict for the plaintiff; or (b) the trial judge enters a judgement for the plaintiff on the basis of a jury verdict. In either event, the decision of the trial court has been affirmed or reversed by a court of appeals, and either the plaintiff workman or the defendant railroad has petitioned the Supreme Court for certiorari."364

Now, the bloc of Rutledge, Murphy, Black and Douglas needed only to pick up one additional favorable vote on the merits, and, assuming that there is an equal chance that any of the five uncommitted Justices will vote either for or against a claimant if the court of appeals has disagreed with the trial court, the chances of the bloc picking up that vote should be 31/32, because the only permutation of the five uncommitted members on which the bloc could lose would be for all five to vote against the claimant. Thus, according to game theory, the bloc's pure strategy would be never to vote in favor of petitions filed by railroads, and always to vote to grant certiorari in cases in which review

is sought by workmen and in which an appellate court has reversed a
judgment in favor of the plaintiff, and always to vote for the peti-
tioner on the merits.

If the bloc plays the game rationally, always following its pure
strategy, the Court should decide 97 percent of the cases in favor of
the claimants. If it plays irrationally, departing from pure strategy,
it could expect to win a smaller proportion of victories on the merits.
Schubert found that, as a matter of fact, the payoff to the "certiorari
bloc" of Rutledge, Murphy, Black and Douglas during this period was 92
percent (12 pro decisions and 1 con) in cases in which the bloc adhered
to its pure strategy.365

The "libertarian activist bloc" of the 1940's is much better
known than the "certiorari bloc" of the same period, and is perhaps the
best known bloc within recent years. It consisted of the same four Jus-
tices (Rutledge, Murphy, Black, and Douglas) identified by Pritchett
through an examination of the voting record of Justices in selected non-
unanimous civil liberties cases. Pritchett found that while the average
rate of support of the Court for these issues was 35 percent, only five
of the eleven Justices on the Court during this period had averages above
this mean. Specifically, Pritchett found that the individual rates of
support were as follows: Murphy (100 percent), Rutledge (96 percent),
Douglas (89 percent), Black (87 percent), Frankfurter (61 percent),
Jackson (31 percent), Clark (24 percent), and Reed (13 percent).366

365 Ibid.
366 Pritchett, Vinson Court, p. 190.
Pritchett's hypothesis was that decisions involving civil liberties questions are primarily influenced by the interaction of two factors: (1) "the direction and intensity of a Justice's libertarian sympathies, which will vary according to his weighing of the relative claims of liberty and order"; and (2) "the conception which the Justice holds of his judicial role and the obligations imposed on him by his judicial function." Thus, Pritchett concluded, Murphy, Rutledge, Black, and Douglas were both "libertarian" and "activist," while Frankfurter was "libertarian" in personal sympathies but a self-restraintist in judicial role. The other six Justices, Pritchett labeled simply "less libertarian."

While Justices Rutledge, Murphy, Black and Douglas exhibited considerable interagreement, then, as members of the "certiorari" and "libertarian activist" blocs of the 1940's, the split within the bloc of four is also striking. Of the four, Murphy was the Court's outstanding protagonist of civil rights, followed by Rutledge, Black, and Douglas in that order. Rutledge was less intense in his convictions than Murphy and consequently more "reasonable." It will be recalled that in the Screws case, for example, Rutledge compromised his views to avoid a hopeless division on the Court, and voted in opposition to Murphy even though in agreement with Murphy's position. Rutledge also differed from Black and Douglas, in terms of the cases in which all three participated notably in their views on wartime problems. Rutledge was opposed by both Black and Douglas in the Cramer and Knauer cases, while Douglas opposed

367 Ibid., p. 191.
Rutledge and Black in the Hartzel case. Indeed, Douglas differed sharply from his libertarian activist colleagues in most of the wartime cases, and was, in fact, the only Justice on the Court who supported the government in every one of the non-unanimous wartime freedom decisions. 368

Thus, while Justice Rutledge's relations with his colleagues can be interestingly described in terms of his bloc activities, a fuller appreciation of his interpersonal relations requires a broader perspective. One approach is to examine the average rate of agreement between Rutledge and the other Justices on the Court in the non-unanimous decisions rendered between 1943 and 1949. Utilizing data provided by canon 369 and Pritchett, 370 we can observe that Rutledge agreed most often with Murphy (74.7 percent), and then, in order, with Black (70.6 percent), Douglas (65.0 percent), Stone (53.3 percent), Reed (51.6 percent), Frankfurter (43.6 percent), Jackson (43.3 percent), Burton (38.5 percent), Vinson (38.3 percent) and Roberts (31.0 percent). Table 3 adapted from Canon's study, 371 illustrates Rutledge's rates of agreement with his colleagues for each of his seven terms on the Court. In six of those seven terms, his highest rate of agreement was with Murphy. Also in six of those seven terms, his second highest rate of agreement was with Black. It is further quite evident that the "expected degree of unity"

369 Canon, 186-191.
370 Pritchett, Roosevelt Court, pp. 240-252.
371 Canon, 191.
between Rutledge and Frankfurter, as had been predicted by Brant, never
developed.

We now might go beyond the implications of such statistical
analyses as appear above to examine in some depth the relationship
between Rutledge and the man with whom he was expected to get along
but did not, Frankfurter, and the man with whom he was most clearly the
closest, Murphy. The relationship between Rutledge and Frankfurter was
sometimes warm, sometimes cold, and almost always bittersweet. Occasion­
ionally they agreed with each other. Rarely did they team up in dissent.
One example of their rare teamwork, however, is their joint dissent in
Board of Governors v. Agnew. Frankfurter's fight for the limitation
of judicial review had been a losing one. But in this 1947 case where
the action of the Board of Governors of the Federal Reserve System in
removing certain directions of a national bank was attacked, the Federal
Reserve Board argued that its removal orders were not subject to judicial
review unless a charge of fraud was involved. The Court, however,
held that the courts are under the duty of keeping the Board within
"the limits of its statutory grant of authority." Only Rutledge and
Frankfurter spoke up for restricting judicial review. Rutledge wrote
that because the Federal Reserve System

is a highly specialized and technical one, requiring expert
and coordinated management in all its phases, I think their
judgement should be conclusive upon any matter which, like
this one, is open to reasonable difference of opinion. Their
specialized experience gives them an advantage judges cannot

372 See Pritchett, Roosevelt Court, p. 185.
Chart 3
JUSTICE RUTLEDGE'S RATE OF AGREEMENT
WITH COLLEAGUES, 1943-1949

(Percent)

<table>
<thead>
<tr>
<th></th>
<th>1942-43</th>
<th>1943-44</th>
<th>1944-45</th>
<th>1945-46</th>
</tr>
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<tbody>
<tr>
<td>Douglas</td>
<td>87</td>
<td>81</td>
<td>79</td>
<td>73</td>
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<tr>
<td>Black</td>
<td>84</td>
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<tr>
<td>Murphy</td>
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<td>78</td>
<td>73</td>
</tr>
<tr>
<td>Jackson</td>
<td>63</td>
<td>63</td>
<td>63</td>
<td>56</td>
</tr>
<tr>
<td>Stone</td>
<td>55</td>
<td>62</td>
<td>62</td>
<td>56</td>
</tr>
<tr>
<td>Reed</td>
<td>55</td>
<td>59</td>
<td>63</td>
<td>54</td>
</tr>
<tr>
<td>Frankfurter</td>
<td>55</td>
<td>52</td>
<td>47</td>
<td>45</td>
</tr>
<tr>
<td>Roberts</td>
<td>33</td>
<td>40</td>
<td>20</td>
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</table>

<table>
<thead>
<tr>
<th></th>
<th>1946-47</th>
<th>1947-48</th>
<th>1948-49</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murphy</td>
<td>77</td>
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<td>Black</td>
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<td>Douglas</td>
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<td>Reed</td>
<td>48</td>
<td>46</td>
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<tr>
<td>Burton</td>
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<td>44</td>
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<tr>
<td>Vinson</td>
<td>42</td>
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<td>Jackson</td>
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</tr>
<tr>
<td>Frankfurter</td>
<td>34</td>
<td>25</td>
<td>11</td>
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</tbody>
</table>

(Adapted from Canon's study, 191.)
possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it.

Such instances of cooperation in attempting to restrain the Court were rare however. The differences between Rutledge and Frankfurter over the questions of "preferred position" and "incorporation" as treated in Kovacs v. Cooper and Adamson v. California, respectively, have already been illustrated. But an exchange of letters between Rutledge and Frankfurter over the Bob-Lo case serves to suggest a further distinction in their judicial styles and choice of tactics. It was Frankfurter's position that in dealing with cases involving alleged racism, the Court should refrain from reciting ugly facts which only served to stir up Negro resentments without turning whites away from the practice of prejudice. Accordingly, he wrote to Rutledge as follows:

Before coming down here, when I was counsel for the Association for the Advancement of Colored People, considerable practical experience with problems of race relations led me to the conclusion that the ugly practices of racial discrimination should be dealt with by the eloquence of action, but with austerity of speech. Time has only deepened that conviction and it has compelling force, I believe, in regard to opinions by this Court within this field. By all means let us decide with fearless decency, but express our decisions with reserve and austerity. It does not help harmonious race relations to stir up our colored fellow citizens to resentment by even

374 Supra., Chapter V.
375 Supra., Chapter IV.
pertinent rhetoric or needless recital of details of mistreatment which are irrelevant to a legal issue before us. Nor do we thereby wean whites, both North and South, from what so often is merely the momentum of the past in them. Forgive this little sermon.\textsuperscript{376}

Rutledge answered by writing that he did not object to a "little bit of preaching" now and then, and that he doubted if Frankfurter did either, and he reminded Frankfurter that they had both recited racial facts in the recent case of \textit{Fisher v. United States}.\textsuperscript{377} Frankfurter retorted:

\begin{quote}
I am glad to have you clinging to a little bit of the golden fleece of Baptism—but must you do it in opinions? Quite seriously, this Court should avoid exacerbating the very feelings which we seek to allay. And if I myself at times betray this wisdom, so much the worse for me.\textsuperscript{378}
\end{quote}

Rutledge's relationship with Murphy was, to the contrary, an almost always pleasant one, even when they stood in disagreement over a particular case. Indeed, Murphy's biographer, J. Woodford Howard, has argued that as early as 1943 in the \textit{Schneiderman} case, Rutledge and Murphy showed signs of forming a "duo within the libertarian bloc."\textsuperscript{379} Murphy saw the \textit{Schneiderman} case as a crucial test of political toleration and was tempted to widen the gap between his colleagues by using the broadest of constitutional concepts and language. But Rutledge,

\begin{footnotes}
\textsuperscript{376} Felix Frankfurter Papers, Manuscript Division, Library of Congress, Box 34, Jan. 2, 1948.
\textsuperscript{377} 328 U.S. 463 (1946).
\textsuperscript{378} Frankfurter Papers, Box 34, Jan. 2, 1948. Also see Howard, 354 n 61/h.
\textsuperscript{379} Howard, 322.
\end{footnotes}
In his comment on the first circulation, urged him to say nothing that might preclude a future challenge to the Schwimmer rule regarding pacifists. Murphy heeded Rutledge's advice and wrote an opinion based on a narrower argument than he first intended. A pleased Rutledge wrote to him: "This is a magnificent opinion. You will be proud of this opinion all your life."

To be sure, there were differences between the two Justices. Rutledge was prone to restrain his libertarian zeal and to adopt a procedural and circumspect approach if such appeared required to achieve a firm result. Murphy, on the other hand, was always a politician and an evangelist. He tended toward broadly cast opinions infused with crusading polemics designed to appeal to the mass conscience. Rutledge was prone to restrain himself from upsetting legislative compromises when engaging in statutory construction. After exercising that restraint in Commissioner of Internal Revenue v. Gooch Milling and Elevator Co., he wrote to Murphy: "I am constrained to concur, though I wish . . . there was some tenable way to reach the opposite result." But to accept harsh results was not possible for a man of Murphy's zeal.

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380 Murphy Papers, June 3, 1943, Nov. 2, Box 131.
381 ibid., comments on circulated majority opinion, No. 2, Box 131.
382 Howard, p. 329.
383 320 U.S. 418 (1943).
384 Murphy Papers, Dec. 1, 1943, No. 53, Box 132.
Still, the two were very close. Both, always felt slighted under Chief
Justice Stone's thin assignments, and beginning at least as early as
Yamashita they established a collaboration and division of labor pro-
bably never surpassed in the Court's history.

Angered by the shortness of time in considering Yamashita and by
pressures for a speedy decision, Rutledge wrote to Murphy: "How about
this: You take the charge, I'll take the balance. And then, perhaps,
we can join each other." This they did. Murphy concentrated on the
legality of the charges against Yamashita, submitting them to searching
scrutiny according to the Geneva Convention and the Articles of War.
Rutledge, meanwhile, took on what he saw as the procedural infirmities
involved. The two Justices concurred in each other's separate dissenter-
ing opinions. This liaison became even closer after Murphy's illness
in 1948 which forced him to miss the fall opening of the Court. The
politically tight power balance on the Court made retirement unpalatable
to Murphy and spurred his determination to return. But Rutledge wrote to
him: "It is much more important for your long-run service here, invalu-
able to the causes we seek to serve, that you safeguard your health even
at the expense of taking further time." Rutledge then, in collabora-
tion with Murphy's two new clerks, devised a system of communication and

385 Howard, p. 267.
386 Murphy Papers, No. 61, Box 136.
388 Murphy Papers, Sept. 27, 1948, Box 125.
opinion production which allowed Murphy to keep up with written briefs and to give Rutledge his vote in November conferences.\footnote{389 See Howard, pp. 458-459.}

Rutledge also took great pains to cool Murphy's hot temper and to curb his tendency toward overstatement. When, in \textit{Follett v. Town of McCormick},\footnote{390 321 U.S. 573 (1944).} Murphy wrote the Court's opinion which Roberts opposed as providing a subsidy to religion, Roberts denounced him by name from the bench. Attempting to tranquilize the situation, Rutledge wrote to Murphy: "The brother has lost all sense of restraint or consideration. I'd give it no more thought than a child's petulant outburst."\footnote{391 Murphy Papers, March 27, 1944, No. 486, Box 133.}

And in \textit{Brotherhood of Railroad Trainmen v. B. and O. R. R. Co.}\footnote{392 331 U.S. 519 (1947).} Rutledge sought to modify Murphy's hyperbolized rhetoric concerning a railroad regulation when he advised:

\begin{quote}
tone down the certitude of your wording . . . in view of all the trouble you've taken to make plain what after all isn't so terribly plain. And with these remarks my Brother (the word is used in non-religious sense) Murphy, I bid you again--get on one side of the line and stay there even tho its a thin one.\footnote{393 Murphy Papers, June 2, 1947, No. 970, Box 137.}
\end{quote}

As the pressure mounted toward the end of their lives (and thereby their terms on the Court), and as they found themselves even more frequently in agreement, Rutledge and Murphy expressed their mutual respect and friendship openly. Murphy wrote: "I do not know how I would
have gotten on this year unless you were in the corner next to me.
Your kindness and congeniality made the burdens of the Court bearable." Rutledge answered: "I hardly need to reiterate the sentiment. Without you here, I do not know how I could stand the grind."

**Judicial Style**

Justice Rutledge's judicial style is, at once, difficult to describe yet easy to label. It is difficult to describe because it necessarily involves the complex interweaving of at least three subjectively-interpreted variables: (1) his policy preferences (i.e., predilections which may or may not explain his votes; (2) his intellectual method (i.e., his method of reasoning which appears to have varied with the value-content of the case before him); and (3) his conception of the proper judicial function (i.e., activism v. restraint). It is easy to label (at least if we allow ourselves some indulgence in oversimplification and the use of a much overworked term) because he was, in both intellectual method and judicial function, an eclectic.

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394 *Ibid.*, June 29, 1947, Box 122
396 At least Walter Murphy has argued in his *Elements of Judicial Strategy* that a judge may vote opposite to his primary predilection, waiting for a better or more opportune time to press his views, or as a bargaining technique on issues of less than primary concern to him, or as part of an image-building tactic to make more effective his future move in another direction.
For Rutledge, the premises of democracy logically entailed the expansion of the welfare state. At the same time, he insisted that for democracy to survive, the fundamental, moral standards of human rights and freedoms, as he understood them, had to be maintained. As he saw it, there was nothing in the Constitution which precluded the use of far-reaching public power, but that same Constitution, he believed, absolutely prohibited governmental intrusions into the private provinces of personal rights. The apparently competing values of security and freedom were not, however, incompatible in his mind. To support his views on socio-economic issues his intellectual method was pragmatic and based on a fundamental realism. On issues of personal freedom, however, his method of reasoning was largely a priori and reflected an ethic and a humanism characteristic of natural law jurisprudence.

In his Declaration of Legal Faith, Rutledge came close to professing his preference for a natural law jurisprudence as opposed to a positivist philosophy. There he stated his belief in "abstract justice" which he envisaged as "the source, the reservoir of basic ideas in society of what is right and just, from which the community adopts its norms of just behavior." In turn, these norms "form the raw material of law." They then have "concrete content." He concluded: "From abstract justice, to justice according to law is the continuing cycle by which the legal institution evolves and must maintain itself if just social accommodation is to be found in an orderly way." 397

397 Declaration of Legal Faith, p. 15.
These views apparently led him to a procedural purism based on natural law—due process when dealing with cases involving the rights of criminal defendants. And in all civil liberties cases he insisted that the individual enjoy not just physical security but mental security as well. In the Knauer denaturalization case he argued that no citizen should be "timorous or insecure because blanketed with the threat that some act or conduct, not amounting to forfeiture for others, will be taken retroactively to show that some prescribed condition had not been fulfilled . . . ." As Mosher has pointed out, the concept of freedom implied to Rutledge even a "psychic security" reminiscent of Montesquieu's dictum that "political liberty of the subject is a tranquility of mind, arising from the opinion each person has of his safety."

Nevertheless, Justice Rutledge's natural law concepts were not fixed and immutable. Indeed his natural law thinking was frequently modified by a fundamental realism even when responding to alleged intrusions upon personal liberties. In Oklahoma Press Publishing Co. v. Walling, 399 for example, he wrote the Court's majority opinion upholding the subpoena power of an administrative agency. Empirically, he was aware of the needs of administrative agencies in terms of their responsibility and effective operation. Murphy, to the contrary, dissented strictly on natural law principles and argued that the constitutionality of permitting administrative agencies to issue subpoenas was itself in doubt and that only the courts should have this power of compulsion.

399 327 U.S. 186 (1946).
But Rutledge's decision was based essentially on the pragmatic recognition of the growing importance and necessity, as he saw it, of administrative bodies in the practical functioning of the modern administrative state.

Rutledge's underlying pragmatism is perhaps best reflected in his often quoted question: "What good is law unless it serves human needs?" He firmly believed that law was designed not to protect the status quo but to provide for systematic change and growth. Like Holmes, he believed that the postulates of law had to be established from within and grounded upon social desires. But unlike Holmes he was not a skeptical realist. Rather, for him, moral standards always came first. He recognized that judges must always consider the possible consequences of legal concepts in their practical application, but ultimately, he felt, the judge's choice "must be intuitive, must be felt, or it cannot be complete." Perhaps the most accurate, if apparently paradoxical, characterization of his intellectual method is to call him a "natural law realist" who "employed the tenets of pragmatism as a juristic tool or technique in applying natural law concepts."

Just as Rutledge's intellectual method varied according to the value-content of the case before him so did his perception of the proper judicial function. While he believed that the Court should exercise

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See Mosher, 697-698.


Declaration of Legal Faith, p. 5.

Mosher, 698.
self-restraint in dealing with the socio-economic policies of both state and national governments, he uncompromisingly opposed any experimentation in the domain of civil liberties and believed that the Court had an obligation to actively protect those liberties. The motivational characteristics of the libertarian activist, to which Rutledge largely conformed, are catalogued by Pritchett as follows: (1) "a judgement as to the relative worth of the different values which the Court may be called upon to protect;" (2) belief in "an open society and the essentiality of the basic human liberties to the democratic way of life;" (3) "a high degree of sympathetic identification with litigants whose civil liberties have allegedly been violated;" and (4) "personal involvement in the controversy" leading to "emotional overtones" in their opinions. The fact that Pritchett singled out Rutledge's dissent in Foster v. Illinois as an example of such overt emotionalism is discussed above. That Rutledge approved of such emotional eruptions is evidenced by a complaint he once registered with Murphy about another colleague:

He may feel strongly but I've never seen emotional evidence of it. That lack of intense feeling is why he can't see some of these biggest things right. There are times when emotional force must be added to intellectual. So I'm all for your occasional volcanic eruptions. They do you, me and all others good.

404 Pritchett, Vinson Court, pp. 192-194.
405 See excerpts from that dissent in Chapter V, Supra.
The observer, however, must be careful not to attribute too much to the emotional and apparently ideologically motivated opinion. As Howard has suggested, an opinion which appears on its face to be based on a devotion to absolutes is often, in fact, the results of a lengthy process of reasoning and internal argument. The fact that the often complex calculus used in reaching decisions is sometimes overshadowed by a simplistic mode of explaining them may account for the actuality that some opinions read as if doubts never existed in the minds of the Justices when in fact they clearly did. As Murphy has also noted, ideological commitments are lower and fluidity of choice greater than opinions often imply. The opposing opinions of Justice Rutledge and Murphy in the Prince case are excellent examples. Although both appear straightforward and written with strong conviction, the fact is that both were developed only after original doubts, the weighing of opposing arguments, the solicitation of private criticism from polar opposites on the bench, and a general uncertainty as to the proper disposition of the case. Although Justice Rutledge's discretion, like that of his colleagues, was certainly subject to the limitations suggested above, his commitment to the protection of civil liberties was still powerful enough to guarantee, in most instances, a libertarian activist position.

407 Howard, pp. 346, 483-484.
Although, like most other Justices, Rutledge paid lip service to the so-called Brandeis rules of "cautionary consideration," he did not always abide by them, and on one occasion, openly challenged an application of the seventh rule which reads as follows:

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.409

As Murphy and Pritchett have pointed out, however, judges may be in disagreement as to how far they may go in interpreting a statute so as to make it constitutional. "The principle of judicial self-restraint may give conflicting advice. The rule that a judge should not declare a statute invalid if he can avoid it may be challenged by the rule that a judge should give to the word of a statute their normal and intended meaning."410 It can be argued, in other words, that to rewrite a statute in order to make it constitutional is a more unwarranted exercise of judicial power than to take the legislation at its face value and judge it accordingly. This, in essence, was Rutledge's position in his dissenting opinion in United States v. C.I.O.411 which dealt with the prosecution of a labor organization under the Taft-Hartley Act for publishing a newspaper in which support was expressed for a particular candidate for Congress. The Court held that if the act

411 335 U.S. 106 (1948).
applied to such publications, "the gravest doubt would arise in our minds as to its constitutionality," and thus interpreted the act as not having intended to prohibit union expenditures for such publications. Rutledge dissented:

By reading such expenditures out of the section, in order not to pass upon its validity, the Court in effect abdicates its function in the guise of applying the policy against deciding questions of constitutionality unnecessarily. I adhere to that policy. But I do not think it justified invasion of the legislative function by rewriting or emasculating the statute. This is my judgement is what has been done in this instance. Accordingly, I dissent from the construction given to the statute and from the misapplication of the policy. I also think the statute patently invalid.

We should not take the foregoing discussion to mean that Justice Rutledge was always an unrestrained activist. Indeed, he exhibited remarkable restraint when he felt restraint necessary in order to achieve a firm result, to preserve the image of symmetry, continuity, and certainty in the law, or to protect the Court's standing with the public. The example of the Screws case has already been cited. Two additional examples can be found in cases involving rights allegedly denied by the functioning of state electoral processes. In the Colegrove v. Green apportionment case, involving a suit to restrain Illinois from electing Congressmen from grossly unequal district, the Court's majority followed Justice Frankfurter's argument that the issue in question was one "of a peculiarly political nature and therefore not meant for judicial determination." In the majority's view, legislative apportion-

412 328 U.S. 549 (1946).
ment was a "political question" and the Court should not enter the "political thicket." Black, Douglas, and Murphy dissented on the ground that in an electoral system where one district has eight times the population of another, the resulting discrimination necessarily deprives citizens of the equal protection of the laws. Rutledge, although he agreed with Black, Douglas, and Murphy, joined with Frankfurter, Reed, and Burton to form a 4-3 decision. This he did for two reasons. First, he opposed the Court's intervention because of difficulties he perceived in equitable remedies. Second, and more importantly, he did not want to see a seven-man Court make such an important decision (Jackson was in Nuremberg and Stone was recently deceased). He feared that a nine-man Court, once restored, might well order a reargument and reverse the decision. Such a "shock," he felt, would damage the Court.

In MacDougall v. Green, the Court was asked to enjoin the exclusion of the Progressive Party from the 1948 Illinois ballot. The Court upheld the exclusion by a per curiam opinion, from which Black, Douglas, and Murphy again dissented. Again seeing problems in equitable remedies, Rutledge joined the majority and wrote a concurring opinion explaining that it was physically impossible to provide relief by an order issued only twelve days before the election, after ballots were on the press. Colegrove and MacDonald nevertheless remain rare in-

41335 U.S. 281 (1948).
414 Ibid., 284; See Brant, 442.
stances of Rutledge's adherence to the "political questions" doctrine. As Canon has noted, Justice Rutledge was not prone to retreat behind the label of "political question" when he felt that only the active support of the federal judiciary could adequately guarantee the rights of the citizen under the Constitution. And in at least one case, like Colegrove and MacDonald, involving a state's electoral system, he demanded that the Court assume jurisdiction and hold hearings on the merits of the complaint.

Unable to view the following text due to technical restrictions.
Justice Rutledge's law clerks have recalled that characteristic of the thoroughness with which he devoted himself to his work were the sessions on Friday nights before the regular Saturday conferences. "It was his custom to sit with his law clerk, into the following morning if necessary, and go over in detail the cases to be decided and the petitions for certiorari."

Every memorandum on an in forma pauperis petition, of which there were an increasing number during his tenure, was carefully read, underlined, and discussed, and if there were any doubts, the original often ill-written papers were sent for and examined. Similarly, he took considerable time to examine, as he received them, the draft opinions of his brethren. While he did not read them in a hypercritical spirit, he was generally reluctant to concur in what was said without careful analysis of all the implications. Even when his might not be the deciding vote—though frequently it was—he felt it part of his obligation as a Justice to give acquiescence only to views which he had himself thought through . . . . He (would not cast his vote) until he satisfied himself that he had found the core of the problem presented, and had seen the full import of the resolution suggested. Such consideration generally required time; and there was not always time to be had. Hence his occasional reservations in concurring opinions or the statements dubitante, or the reservations of his vote at conference.

Justice Rutledge had a "consciousness that law exists for the sake of the interests that may be vindicated and protected by means of it."


Thus, although he sought precedents diligently and used them with skill, he was greatly concerned with promoting both justice and the general welfare as he understood these values and believed them to be commonly understood. He respected precedent but "was not constrained by it." Still, he was honestly reluctant to translate his own social preferences into answers to legal questions. Rejecting this easy route to decision, he often found himself confronted with a dilemma which could only be resolved on a case-to-case basis, and which often caused him to "fret over details almost to a fault."

The essence of Justice Rutledge's case approach is perhaps best captured in John P. Frank's assessment in his review of the Court's 1948-49 term:

Justice Rutledge enjoys his work most thoroughly when he can examine a large mass of precedents from which he can skillfully choose a line to follow... That he is not doctrinaire was illustrated by his two opinions rejecting claimed abuses of civil rights despite his obvious predilections in behalf of such claims. (Frazier v. United States and Brinegar v. United States.) The process of case by case determination sometimes makes it difficult for him to make up his mind at all, and he is the only member of the Court who occasionally concurs "dubitante." In the Hirota case, which the Court disposed of very quickly, he reserved "decision and announcement" of his vote "until a later time," and at the close of the term had not yet announced it. Yet the existence of honest doubts, hesitantly resolved, should not

420 Edgerton, 294.
421 Rockwell, 27.
422 Howard, p. 369.
give the impression of aimlessness . . . On fundamentals, once his mind is made up, Justice Rutledge shows no hesitancy at all.\textsuperscript{423}

**Discretion and Policy Making**

According to Walter Murphy, a "policy oriented" Justice, in analyzing the problem of minimizing the effect of political checks on his policy-making power, would have to make plans for two different kinds of general situations: (1) a situation in which his policy goals have been impaired by Congressional or Presidential action; and (2) a situation in which he would need positive Congressional or Presidential action to achieve his policy objectives. In other words, he must be prepared both to prevent the effects of hostile political action and to secure positive political action.\textsuperscript{424}

The obvious strategy open to him in accomplishing the former is the simple and direct one of attempting to sweep the policy into constitutional oblivion by declaring it invalid. There are obvious reasons, of course, why he might not find this strategy prudent: (1) he might not be able to convince himself that the policy which competes with his preferences is unconstitutional as well as unwise; (2) he might, recognizing that the effect of a declaration of unconstitutionality is in large part psychological, decide to use the strategy sparingly, saving it for a more vital threat to his policy objectives; and (3) he might believe that a declaration of invalidity would generate a


\textsuperscript{424} Murphy, Elements of Judicial Strategy, Chapter V and VI; esp. pp. 123, 156.
counterattack either against the particular policy or against the Court itself, and, since his strategy is to achieve broad policy goals, not simply to win a battle with Congress, he might believe a long-range peaceful path to attainment to be more rational. If any of these considerations should lead him to decide against a direct declaration of invalidity, he might still strike indirectly at the policy's content by strictly applying procedural techniques or by delaying, hoping to avoid for the time being any decision on the merits.\footnote{Ibid., pp. 156-158.}

Justice Rutledge's role in attempting to prevent hostile action is clearly evidenced by his trenchant arguments, particularly in civil liberty cases, and by his capacity to be shrewdly circumspect to achieve his goals generally, as described in Chapter IV and V. But more to the point was his success in securing positive action. Here, as Murphy suggests, persuasion on the merits is usually the only strategic alternative really open to the Justice.\footnote{Ibid., p. 124} In fact, Murphy points out, "the best example of Congress being moved to action was provided by Justice Rutledge's minority opinion in \textit{Yakus v. United States}."\footnote{Ibid., p. 125}

As Cardozo has noted, a dissenting opinion can be not only an appeal to history or to future judges but also an appeal to contemporaries--to members of Congress, to the President, to lower court judges, to interest groups and to the mass public--to change the decision of the major-

\footnote{Ibid., pp. 156-158.}
\footnote{Ibid., p. 124}
\footnote{Ibid., p. 125.}
Rutledge's dissent in Yakus exemplifies such an appeal which succeeded in securing positive action at least partially meeting his policy objectives.

On January 30, 1942, Congress passed the Emergency Price Control Act, which was designed essentially to prevent the rise in prices which had cost the people and the government dearly during World War I and to prevent the destruction of morals by wartime profiteering. The act established an Emergency Court of Appeals and conferred upon it "exclusive jurisdiction to determine the validity of any regulation or order of the Price Administrator," and further declared that "no Court, Federal, State or Territorial, shall have jurisdiction or power to restrain, enjoin or set aside any provision of this Act."

In Yakus, certain merchants were indicated and convicted for selling beef at prices above the maximum prices fixed by the Administrator. In accordance with the exclusive jurisdiction mandate of the statute, Yakus was refused the opportunity in the criminal court of contending that the regulation was invalid. Yakus appealed to the Supreme Court, arguing that the statute, as interpreted and applied in

428 Benjamin N. Cardozo, "Law and Literature," Yale Review, 14 (1925), 699, 715-716. The same point is made by Charles Evans Hughes, The Supreme Court of the United States (New York: Columbia University Press, 1928), p. 68. See also Murphy, p. 60 n 60.

429 U. S. Code, tit. 50—War, Appendix—924 (d).

the orders of the Price Administrator, deprived him of his property without due process of law. The Court's majority disagreed. It held that the terms of the statute were "broad enough to deprive the district court of power to consider the validity of the administrative regulation or order as a defense to a criminal prosecution for its violation"; and that this did not deny the defendant his constitutional rights, since prior to conviction he might, following a protest to the Administrator, have brought a suit for injunction in the Emergency Court of Appeals.

The Court's decision, however, left many perplexing problems unanswered. First, there was the question whether a decision that a regulation was invalid would constitute a defense to enforcement proceedings arising out of violations occurring before the final decision of invalidity. The Solicitor General in oral argument had contended that the statute imposed an unqualified obligation to obey until the regulation was finally held invalid, and consequently that a conviction for such violation would stand, regardless of invalidity. The majority avoided this question. Second, there was a question regarding the nature of the "judicial power" and of the power of Congress to "control" it. As Corwin has noted, the Emergency Price Control Act, as construed in the Yakus case, "broke over what has always been thought


to be the fundamental distinction between the 'judicial power' which
the Constitution itself confers on the national courts and their 'juris-
diction' which for the most part it leaves with Congress to assign."

Justice Rutledge's dissent hit squarely at both questions. He began by
admitting that:

War such as we now fight calls into play the full power of
government in extreme emergency. It compels invention of
legal, and of martial tools adequate for the times' necess-
ity. Inevitably, some will be strange, if also lifesaving,
instruments for a people accustomed to peace and the normal
working of constitutional limitations. Citizens must surren-
der or forego exercising rights which in other times could
not be impaired.

But in the crux of his opinion he asserted:

It is one thing for Congress to withhold jurisdiction. It
is entirely another to confer it and direct that it be
exercised in a manner inconsistent with constitutional re-
quirements or, what in some instances may be the same thing,
without regard to them. Once that it is held that Congress
can require the courts criminally to enforce unconstitutional
laws or statutes, including regulations, or to do so without
regard for their validity, the way will have been found to
circumvent the supreme law and, what is more, to make the
courts parties to doing so. This Congress cannot do. There
are limits to the judicial power. Congress may impose others.
And in some matters Congress or the President has final say
under the Constitution. But whenever the judicial power is
called into play, it is responsible directly to the funda-
mental law and no other authority can intervene to force
or authorize the judicial body to disregard it. The pro-
blem therefore is not solely one of individual right or
due process of law. It is equally one of the separation
and independence of the powers of government and of the
constitutional integrity of the judicial process, more
especially in criminal trials. ......................

The procedural pattern is one which may be adapted to the
trial of almost any crime. Once approved, it is bound to
spawn progeny. If in one case Congress thus can withdraw
from the criminal court the power to consider the validity
of the regulations on which the charge is based, it can do so
for other cases, unless limitations are pointed out clearly
and specifically. And it can do so for statutes as well.
In short the way will have been found to avoid, if not alto-
gether the power of the courts to review legislation for consistency with the Constitution, then in part at least their obligation to observe its commands and more especially the guaranteed protections of persons charged with crime in the trial of their causes. This is not merely control of definition of jurisdiction. It is rather unwarranted abridgment of the judicial power in the criminal process.

Just at the time the Yakus case was decided, the Banking and Currency Committees of both houses were considering the renewal of price control legislation. As Murphy suggests, Senators and Representatives are, as a group, intelligent, well-educated men open to persuasion by intellectually responsible arguments. Carefully reasoned and written opinions, and not necessarily only majority opinions, can thus be an important means of influencing official behavior. Justice Rutledge's dissent was such an opinion. It focused Congressional attention on the procedural provisions of the statute and moved a number of Congressmen to press for serious procedural revisions.

As finally rewritten and enacted the statute: (1) permitted a defendant in either criminal or civil proceedings, upon good cause being shown, to file a complaint in the Emergency Court of Appeals challenging the validity of the regulation he was charged with violating; (2) authorized the enforcement court, upon such a filing, to stay the execution of judgement in its proceedings until the validity question was settled; (3) flatly provided that a determination of invalidity would be a defense to charges of prior violations; (4) broadened the old route to the Emergency Court by eliminating a 60-day time limit on the filing of protests (which had the effect of increasing the volume of protests); and (5) provided for formal boards of review to hear and consider pro-
tests and advise the Administrator as to their disposition. And, in fact, these boards, on occasion, came to recommend relief which the price branch had refused. Thus, while the extension act preserved the essential features of exclusive jurisdiction, it also met some of Justice Rutledge's objections to the 1942 act and thus represented at least a partial achievement of his policy goal.

433 Mansfield, pp. 277-278.

434 Ibid.
Recapitulation

The chief purpose of this study has been to examine judicial policy-making at the Supreme Court level by an investigation in depth of the judicial career of Mr. Justice Wiley Blount Rutledge, to identify the policy considerations in his work as a judge and to measure his capacity to secure policy goals. Mr. Justice Rutledge was selected as the focus of the investigation principally because preliminary evidence appeared to show him to be a "natural" as a policy-oriented Justice (i.e., a Justice who: (1) is aware of the impact of judicial decisions on the formulation of public policy; (2) recognizes the room for discretion inherent in the exercise of the judicial function; and (3) is willing to utilize that discretionary power to pursue particular policy goals.) Indeed, the expectation that he would be a dedicated adherent to the policy values of the appointing authority (i.e., President Roosevelt and the New Deal Administration) was the key variable explaining his appointment to the Supreme Court.

Rutledge was appointed to the Court on January 11, 1943, after a distinguished but not brilliant career as a law school teacher and administrator, and after four years of service on the United States Court of Appeals for the District of Columbia. In frequent addresses before bar associations, commencement day audiences, and other assorted
groups, he had been a vocal critic of such controversial Supreme Court
decisions as those in *Hammer v. Dagenhart*[^435] and *United States v.
Butler*.[^436] He had also been an ardent proponent of the socio-economic
policies of the New Deal and a willing, if not eager, supporter of the
Roosevelt Court enlargement bill. Not only had he demonstrated his
belief in a liberal interpretation of the general welfare clause, but
his vigorous involvement in the activities of the St. Louis Commission
for Social Justice during the 1930's demonstrated also his support
for the other side of the liberal coin, a concern for the maintenance
of civil liberties. Although a nonpolitical appointee in the sense
that he had not actively sought the position and could claim no party
support for it, Rutledge was expected, by friend and foe alike, to be
a "liberal" Justice.[^437]

After taking his seat on February 15, 1943, Justice Rutledge pro­
ceeded for the next six years to fulfil this expectation. Viewing the
commerce clause as a "two-edged instrument," he saw in its positive as­
pects a broad grant of regulatory authority to the federal government,
and in its negative aspects a means of restricting state action only so
as to make it consistent with the broad pattern of federal regulation.
Thus he cast his judicial votes to permit more extensive federal regu­
lation in many policy areas (notably in protecting the rights of labor),

[^435]: 247 U.S. 251 (1918).
[^436]: 297 U.S. 1 (1936).
[^437]: Newsweek, v. XXI, No. 3, p. 32. (January 18, 1943); Time Maga­
while at the same time to protect the right of the states to maximize their own taxing and regulatory power. In twenty-eight non-unanimous decisions involving state regulation or taxation of interstate commerce, Justice Rutledge voted to uphold the state action in twenty (or 71%) of the cases. He consistently voted to support the federal administrative agencies (though exhibiting a considerably less favorable attitude toward the Interstate Commerce Commission, as compared to the other agencies). In eight-one non-unanimous decisions involving the major administrative agencies, Justice Rutledge voted to sustain the agency in fifty-six (or 69%) of the cases. In the area of civil liberties, he was the Roosevelt Court's most frequent spokesman for the "preferred position" and "incorporation plus" dictrines. In eighty-one non-unanimous decisions involving some aspect of civil liberty, Justice Rutledge voted to sustain the right claimed in sixty-nine (or 85%) of the cases.

Although Justice Rutledge's judicial style was one which involved, regardless of the nature of the case, a detailed and scholarly analysis of the facts and issues, his intellectual method varied with the value-content of the case before him. To support his socio-economic policy preferences, his intellectual method was pragmatic. On matters of civil liberty, it was largely a priori. The result has been to guarantee him a place in history as a "liberal" jurist, in policy terms. He has been

438 Though not the most emotional. That place belonged to Justice Murphy.
labeled, by those who have written about him, "a liberal," \textsuperscript{439} "a forthright liberal," \textsuperscript{440} and "a liberal in the tradition of the Midwest."\textsuperscript{441}

But for those who have attempted to appraise not just his impact in policy terms but his over-all performance as a judge, there has arisen the problem of characterizing any jurist who has sought to fulfill policy objectives while still adhering to the norms of judicial self-restraint. Thus, Justice Rutledge has been variously characterized as "a libertarian dissenter," \textsuperscript{442} "a constitutional judge," \textsuperscript{443} and "a twentieth century Jeffersonian."\textsuperscript{444} The problem, and the inevitable inaccuracies, in attempting to characterize the political behavior of an actor in the legal process (with that certain effective uniqueness which the legal process possesses)\textsuperscript{445} results from our lingering inability to either describe or explain the mysteries of the judicial decision.

\textsuperscript{439} Wirtz, 549; and Forrester, 517.
\textsuperscript{440} \textit{New York Herald Tribune}, September 12, 1949.
\textsuperscript{441} \textit{New York Times}, October 9, 1949.
\textsuperscript{442} Swisher, Growth of Constitutional Power, p. 230.
\textsuperscript{443} Leviathan, 551.
\textsuperscript{444} Rockwell, 28.
\textsuperscript{445} At least the argument has been made (most notably by Theodore Becker in his Political Behavioralism and Modern Jurisprudence) that the difficulty arises from attempting to transfer theories and methodologies developed for the study of an essentially "political" environment (e.g., Congress) to a very different environment; and that is especially true when the subject to be studied is the legal process with its "effective uniqueness," i.e., the impact of a body of legal precedent in interaction with the role demand of \textit{stare de cisis} in a litigation appeal context on the outcome of the process—the judicial decision.
We once thought of the judicial function as being essentially mechanical. According to this mechanical model, the judge worked with the materials of the law by means of a system of rules and of a system of legal logic that were apparently complete and self-contained. He perceived the law as given matter created by the state. Thinking about the law was excluded from his province. The legal process was apparently watertight against all ideological intrusions, and all legal problems were couched in terms of legal logic. \(^{446}\) In this conception, the limitations on the exercise of discretionary judicial power were embodied in the legal technicalities themselves. The erosion of this conception (through the real avoidance of technical checks on judicial power) was documented by the functionalists. As Roscoe Pound wrote in 1919:

> The most significant advance in the modern science of law is the change from the analytical to the functional attitude. For the jurist today, the world over, seeks to discover and to ponder the actual social effects of legal institutions and legal doctrines.\(^{447}\)

And Benjamin Cardozo added:

> In every department of law . . . the social value of a rule has become a test of growing power and importance . . . . When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of other and larger ends.\(^{448}\)


\(^{448}\) *The Nature of the Judicial Process*, pp. 73, 65.
We then began to think of a legal process model in which the emphasis had changed from the content of the legal precept and the existence of the legal remedy to the effect of the precept in action and the efficiency of the remedy in attaining the desired ends. Technical checks on the exercise of judicial discretion, the realists soon showed us, could be avoided. The doctrine of precedent had a "Janus-face": there was one set of rules for utilizing precedents that appeared helpful, and another set for avoiding those precedents which appeared troublesome. It was "a sign of an incompetent ... judge that he was over-impressed by citation of particular authority. Authority is but a guide to judicial understanding--a servant, not a dictator." Some cases, to be sure, would be governed by a set of unanimous precedents which the judge would accept as either sound or harmless. But more often, judges of equal technical competence would reach opposite results because they would perceive no measure of the pertenence or worth of the precedents involved. What was then decisive was the "inarticulate major premise," the judge's view as to the reasons and policy which lie behind the law.

450 Llewellyn, The Bramble Bush, p. 149. See also Murphy, Elements of Judicial Strategy, p. 30.
452 Edgerton, 293.
Believing that we had then stripped the judicial process of all illusion, we began to perceive the determinant of judicial behavior to be not the legal precept but the "social picture" of the judge. No longer bound by technical checks on his power, the judge could pursue his policy objectives (what one writer has called engaging in "gastronomic jurisprudence") limited only by the political checks. Soon it was perceived that these too could be avoided, or at least their effects minimized.

Confronted with the "reality" that judges "make law," not merely "find it," we stepped back to consider the propriety of such discretionary power. Some scholars as we have seen, called for a return to "neutral principles," and a restrained approach to judicial policy-making. Others made a defense of and a plea for the "unprincipled decision." To some, neutral principles were "little more than the lawyer's nostalgia for the legal view of the Court and the legal modes of discourse that prevailed before the advent of the political view of the Court and political modes of discourse." The test of principle

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453 Forrester, 529.
454 Murphy, Elements of Judicial Strategy.
456 Clark, "A Plea for the Unprincipled Decision."
was just one of three components in the criteria established for evaluating judicial decision-making by Robert G. McCloskey. The Court must be judged, in addition, on its values (i.e., how well it functions as "a national conscience" and "a channel for moral imperative"), and on the wisdom with which it uses its powers (i.e., the degree to which it takes care not to overtax its power capabilities).

But despite all these years of frank, even brutal, analysis of the judicial process by the "legal realists" and the "judicial behavioralists," the mysteries of the judicial decision remain almost entirely sacred. What we have done in this study is to raise some new questions, not about the limits of judicial objectivity, these already have been rigorously explored, but about the limits of judicial discretion--political, intellectual, and psychological. We have seen that Wiley Rutledge was a policy-oriented Justice who advocated a form of government designed to promote the general welfare while protecting the personal rights of individuals, and who believed that, when necessary, the Supreme Court was properly possessed of the positive task of implementing that scheme. But these policy preferences and ideological commitments were not translated ipso facto into his judicial decisions, but were subject to a variety of limitations. The thesis presented here may be stated as follows: there is inherent in the exercise of the judicial function a significant element of discretion which can be utilized

successfully by a policy-oriented Justice to secure particular policy objectives, but which is not an unlimited discretion, indeed, is considerably more restricted than often supposed. The specific findings of our investigation are listed below.

Findings

(1) The expectation that Justice Rutledge would work for the policy goals of those who appointed him (such expectations being relevant only if judges do in fact have the discretionary power to make policy) was fully realized.

(2) The expectation that he would develop a reasonable degree of unity with Mr. Justice Felix Frankfurter was not realized. This finding is explained largely in terms of role perception.

(3) Although there exists considerable leeway for discretion in the performance of the judicial task, a number of important limitations were also found to exist: (a) the necessity to experiment sometimes causes personal predilections to give way to the demands of original situations; (b) legal training, common to all judges, (i.e., the judicial tendency never to ignore the value of legal reasoning) often produces a psychological desire for certainty which can be easily found in the form of "binding authority" or logical argument from legal principles; (c) the occasional need to escape the agony of decision by relying on established rules; and (d) competing perceptions and strategies between Justices and between the Court and its constituents.
(4) Decisions reached and opinions written often produce the mistaken impression that they were arrived at on the basis of personal predilection rather than precedent and legal reasoning, when, in fact, they were not. Two of the reasons for this appear to be: (a) the necessity of advocacy, i.e., the demands of persuading colleagues often turn the simplicity of opinion writing into special pleading, a tendency stimulated by the inevitability of personal antagonisms on the Court leading to simplistic and overstated conclusions; and (b) the heavy workload and frequent demands for speedy decisions which sometimes lead to the use of standard arguments to support conclusions reached not on the basis of predilection as they therefor appear, but on the basis of a complex calculus of legal reasoning.

(5) There is apparent utility in the production of "one-man studies" of judicial policy-making, particularly the use there of private papers,459 to answer the two questions which Walter F. Murphy argues that we must answer, but as yet have not answered, if we are to formulate theories of judicial behavior: (a) what range of choice is actually open to the policy-oriented Justice? and (b) how may possible choices be expressed?460

459 It should be noted that in J. Woodford Howard's similar study of Mr. Justice Murphy some of the same limitations on the exercise of judicial discretion as those suggested above were found. See Howard, pp. 346, 481-488.

460 Elements of Judicial Strategy, p. 3.
The precise nature of legal precedents, personal predilections, and psychological desires, and their proportionate distribution in the admixture of determinants of judicial behavior, remain a mystery. Perhaps what we have produced here is only an equivocal guide to an elusive conclusion. Certainly, further enlightenment awaits further investigation—investigation of not only legal doctrine, judicial votes, opinion verbiage, and personal attributes, but also, where possible, of the private papers of Justices. The subtle nuances of judicial decisions can be better discovered, perhaps, in the subjective context of their production out of the interpersonal relations of Justices.
Appendix A

Opinions Delivered as Associate Justice
of the Appellate Court for the District
of Columbia: May 2, 1939 to
February 15, 1943

Acker v. H. Herfurth, Jr., Inc. 110 F 2d 241 (1939).
American Gas and Electric Co. v. SEC 134 F 2d 633 (1943)
American National Bank and Trust Co. v. United States 134 F 2d
674 (1943).
American Security and Trust Co. v. Frost 117 F 2d 283 (1940)
(dissenting).
Balinovik v. Evening Star Newspaper Co. 113 F (2d) 505 (1940)
(dissenting).
Beard v. Bennett 114 F 2d 578 (1940).
Boykin v. Huff 121 F 2d 865 (1941).
Boykin v. United States 130 F 2d 416 (1942).
Burke v. Canfield 121 F 2d 877 (1941).
Georgetown College v. Hughes 130 F 2d 810 (1942).
Christie v. Callahan 124 F 2d 825 (1941).
Clawans v. White 112 F 2d 189 (1940).
Cotonficio-Bustese v. Morgenthau 121 F 2d 884 (1941).
Coupe v. United States 113 F 2d 145 (1940).
Dow v. Ickes 123 F 2d 909 (1941).
Earll v. Picken 113 F 2d 15 (1940).
Evans v. F C C 113 F 2d 166 (1940).
Ewing v. United States 135 F 2d 663 (1942).
Fairclaw v. Forrest 130 F 2d 829 (1942).
Farley v. Abbetmeir 114 F 2d 569 (1940).
Fennell v. Bache 123 F 2d 905 (1941).
Fidelity Bankers Trust Co. v. Helvering 113 F 2d 14 (1940).
Fletcher v. Evening Star Newspaper Co. 114 F 2d 582 (1940).
Fogel v. General Credit Inc. 122 F 2d 45 (1941).
Fowler v. Pilsen 123 F 2d 910 (1941).
Fox v. Johnson and Weinsatt 127 F 2d 727 (1942).
Frene v. Louisville Cement Co. 134 F 2d 511 (1943).
Frick-Gallagher Mfg Co. v. Ro Tray Corp. 122 F 2d 81 (1941).
Gilbert v. Ickes 123 F 2d 917 (1941).
Hartford Accident and Indemnity Co. v. Cardillo 112 F 2d 11 (1940).
Hemphill Co. v. Coe 121 F 2d 897 (1941).
Hoffman v. Sheahin 121 F 2d 861 (1941).
Hohenthal v. Smith 114 F 2d 494 (1940).
Howard v. Overholser 130 F 2d 429 (1942).
Hundley v. Gorewitz 132 F 2d 23 (1942) (concurring).
Identification Devices, Inc. v. United States 121 F 2d 895 (1941).
International Association of Machinists v. N.L.R.B. 110 F 2d 29 (1939).
Joerns v. Irvin 114 F 2d 458 (1940).
Jordon v. Group Health Association 107 F 2d 239 (1939).
Lawyers Title Insurance Co. v. Lawyers Title Insurance Corp. 109 F 2d 35 (1939).
Lebanon Steel Foundry v. N.L.R.B. 130 F 2d 404 (1942).
Levine v. Coe 119 F 2d 185 (1941).
Mancari v. Frank P. Smith, Inc. 114 F 2d 834 (1940) (dissenting).
Mason v. Automobile Finance Co. 121 F 2d 32 (1941).
McKenna v. Austin 134 F 2d 659 (1943).
Melvin v. Pence 130 F 2d 423 (1942).
Mille v. Miller 114 F 2d 596 (1940).
Morrison v. Coe 127 F 2d 737 (1942).
National Broadcasting Co. v. F C C  132 F 2d 545 (1942).
Nelson v. Ickes 113 F 2d 515 (1940).
Nolde and Horst Co. v. Helvering 122 F 2d 41 (1941).
Orne v. Lendahand Co.  128 F 2d 756 (1942).
Panity v. District of Columbia 172 F 2d 61 (1941).
Press Co. v. N.L.R.B.  118 F 2d 937 (1940) (dissenting).
Prudential Insurance Co. of America v. Saxe  134 F 2d 16 (1943).
In re Rosier 133 F 2d (1943) (dissenting).
Rowley v. Welch 114 F 2d 499 (1940).
Saul v. Saul 122 F 2d 64 (1941).
Scharfeld v. Richardson 133 F 2d 340 (1942).
Schlaefer v. Schlaefer 112 F 2d 177 (1940).
Sherwood Bros., Inc. v. District of Columbia 113 F 2d 162 (1940).
Sloane v. Coe 122 F 2d 37 (1941).
Sweeney v. District of Columbia 113 F 2d 35 (1940).


Thomas v. Peyser 118 F 2d 369 (1941).


Warehouseman's Union v. N.L.R.B. 121 F 2d 84 (1941).


Webster v. Clodfelter 130 F 2d 434 (1942).

Weiss v. District Title Co. 121 F 2d 900 (1941).


Wyant v. Crittenden 113 F 2d 170 (1940).

Young Men's Shop v. Odend'hal 121 F 2d 857 (1941).
Appendix B

Opinions Delivered as Associate Justice of the Supreme Court of the United States: February 15, 1943 to September 10, 1949

American Power and Light Co. v. SEC 329 U.S. 90, 121 (1946) (concurring).
Board of County Commissioners v. Seber 318 U.S. 705, 719 (1943) (concurring).
Catlin v. United States 324 U.S. 229 (1945).
Ex Parte Collett 327 U.S. 55, 72 (1949) (concurring).
Davis v. United States 328 U.S. 582, 623 (1946) (dissenting).
Direct Sales Co. v. United States 319 U.S. 703 (1943).
Everson v. Board of Education 330 U.S. 1, 28 (1946) (dissenting).
Gemisco, Inc. v. Walling 324 U.S. 244 (1945).
Hirabayashi v. United States 320 U.S. 81, 114 (1943) (concurring).
Knauer v. United States 328 U.S. 654, 674 (1946) (dissenting).
Kraus and Bros. v. United States 327 U.S. 614, 628 (1946) (concurring).
Marconi Wireless Co. v. United States 320 U.S. 1, 64 (1943) (dissenting).


Mayflower Transit Co. v. Board of Railroad Commissioners of Montana 332 U.S. 495 (1947).


Musser v. Utah 333 U.S. 95, 98 (1948) (dissenting).


In re Oliver 333 U.S. 257, 278 (1948) (concurring).


United States v. Standard Oil Co. of California 332 U.S. 301 (1947).
Webre Steib Co. v. Commissioner 324 U.S. 164, 175 (1943) (dissenting).
In re Yamashita 327 U.S. 1, 41 (1946) (dissenting).
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