

FACULTY NOTES

W.B.R.: SOME REFLECTIONS†

I

IN June of 1950 the Supreme Court was winding to the end of another judicial year. In terms of judicial product, the October Term, 1949, had not been very prepossessing. In part this may have been the luck of the docket. In part it may have reflected the fact that the Court was not wholly comfortable with itself. Two of the justices were newcomers—replacements for two colleagues, Wiley B. Rutledge and Frank Murphy, who had died almost simultaneously, and with jarring suddenness, the summer before. The newcomers were working hard to master their new responsibilities and become useful members of an intricate and unique enterprise. But it would take them time—as it had taken all their predecessors, back to 1790, time—to learn the meanings and the methods of the enterprise, and to define their individual roles in forwarding the collective tasks. So the Court that June faced the new decade with some uncertainty.

June 5th, 1950, was the last Opinion Monday of the 1949 Term. The Court entered a number of *per curiam* orders, announced decisions in thirteen argued cases, and recessed for the summer. One of the thirteen decided cases was *United States v. Kansas City Life Ins. Co.*,¹ which, notwithstanding the narrowness of the issue involved, had been pending for two years. The Court had failed to dispose of the case at its 1948 Term and had therefore put it over for reargument in the 1949 Term.

The single question in the case was whether, when the United States constructed a lock and dam which deepened the channel of the upper Mississippi by permanently elevating the water level to ordinary high water mark, the resultant interference with the drainage of farm land riparian to a non-navigable tributary was a “taking” for which the Fifth Amendment required compensation. The Court of Claims had found for the plaintiff. Justice Burton, speaking for the Court, affirmed.² But four members of the Court, speaking through Justice Douglas, dissented. And at the end of his opinion, Justice Douglas added a grace note:

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1. 339 U.S. 799 (1950).

2. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950). The Court had recently made it clear that no compensation would have been owing for damage to land bordering on the navigable Mississippi. *United States v. Willow River Co.*, 324 U.S. 499, 509 (1945); *United States v. Chicago, M., St. P & P.R. Co.*, 312 U.S. 592, 596-97 (1941). But plaintiff, relying on earlier doctrine (*United States v. Cress*, 243 U.S. 316 (1917)), successfully insisted that land bordering on a non-navigable tributary occupied higher constitutional ground.

I am indebted to the late Mr. Justice Rutledge for much of the phraseology and content of this dissent.³

Justice Douglas' comment did not show that the case, had it been disposed of the term before, would have been decided differently: Justice Minton, who had succeeded Justice Rutledge, was one of those who joined Justice Douglas in dissent. Rather, Justice Douglas seemed to be paying honor to a dead colleague and friend by building upon his draft opinion, and publicly acknowledging the law's indebtedness to that unfinished work. And in the same breath Justice Douglas was drawing strength to his dissenting view—just as Story had on occasion invoked the name of Marshall in dissenting in cases which reached the Court in the Chief Justice's lifetime but were not disposed of until after his death.⁴

Perhaps, without fully realizing it, Justice Douglas was also doing something else. Perhaps he was voicing the law's lament at the loss of a judge whose devotion to personal liberty, whose sensitive awareness of the nature of American federalism, and whose Lincolnian courage and commonsense were precious judicial attributes likely to be in short supply in the hazardous decade which faced the Court.

II

The judge to whom Justice Douglas acknowledged his indebtedness served on the Supreme Court for a scant six years. Early death robbed Wiley Rutledge of the chance to exercise his full powers. Not that mere length of tenure can assure greatness. But it seems to be true—at least in the annals of the Supreme Court—that no judge who has not served for a long time can hope to make the enduring contributions on a wide front of judicial responsibility which, in the aggregate, spell preeminence. Marshall, Johnson, Taney, Miller, Field, Holmes, Brandeis, Black, and Frankfurter: each was a working member of the Court for more than twenty years.

In Rutledge's short span on the Court he did not reshape the institution. But neither did Benjamin R. Curtis in the same time span. Neither, indeed, did Cardozo who came to the Court a more celebrated judge (save, perhaps, Brandeis) than any of his brethren. Yet this is not failure. Rather it is a measure of the subtlety and vastness of the Court's work; and it is a measure of the slow tempo of that work, attuned to history. But what can be done in half-a-dozen years Curtis and Cardozo accomplished: they learned the rudiments of their new trade, and then began to launch ideas upon which the Court would build in due season.⁵

3. 339 U.S. at 814.

4. See, e.g., "Such is a brief view of the grounds upon which my judgment is, that the act of New York is unconstitutional and void. In this opinion I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief Justice Marshall." Story, J., dissenting in *New York v. Miln*, 36 U.S. (11 Pet.) 102, 161 (1837). And cf. *Briscoe v. Commonwealth*, 36 U.S. (11 Pet.) 256, 350 (1837).

5. Curtis' great achievement was, of course, the opinion in *Cooley v. Board of Wardens*,

So it was with Rutledge. In his short career as a justice, he worked with skill and devotion, to the great profit of the Court.⁶ Rutledge's brethren, and the lawyers who practiced before him, were right in reckoning his death a grave loss.⁷ The Court entered a critical decade sapped of important strength.

III

The beginning of the 'fifties was an era of judicial retreat, as it was an era of national retreat. But since 1954, when it handed down the opinions in the *School Segregation* cases,⁸ the Court has been steadily rediscovering its proper role: to give voice and sinew to the fundamental postulates of the democratic experiment. Case by case, the Court has for the past eight years shown increasing understanding of Rutledge's formidable admonition: "It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions. . . . It can become too late."⁹

Rutledge's impact on the present Court reaches deep into the fundamental attitudes of many of the justices. But, beyond this, his patient thinking through of major questions of public law is now reaping its harvest in particular cases. Within the past twelve months the Court has handed down three major decisions in important and profoundly conversial areas of constitutional adjudication. One facet or another of each of the three decisions bears Rutledge's stamp.

A year ago, on the last day of the 1960 Term, the Court decided *Mapp v. Ohio*.¹⁰ The question in that case was whether to disapprove the 1949 holding of *Wolf v. Colorado*,¹¹ that evidence gained by an unconstitutional search

53 U.S. (12 How.) 298 (1851), which, building on *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), established the doctrinal framework for the Supreme Court's arbitrament of cases in which state economic regulations are challenged on grounds of conflict with Congress' authority to regulate commerce among the states. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-69 (1945).

Cardozo, while on the Court, wrote influentially on several fronts. See, e.g., his dissent in *Carter v. Carter Coal Co.*, 298 U.S. 238, 324 (1936); his opinions for the Court in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); and his opinion for the Court in *Palko v. Connecticut*, 302 U.S. 319 (1937). ("Rumor has it that the *Tompkins* case [*Erie v. Tompkins*, 304 U.S. 64 (1938)] was originally intended for Cardozo and would have gone to him except for his illness." Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 267, 295 (1946).)

6. For a preliminary survey of Rutledge's work, see *Symposium*, 25 IND. L.J. 421 (1950). The first study based upon the Justice's papers is now in process of preparation by my colleague, Fowler V. Harper, who brings to the task not only his own broad scholarship, but also his years of intimate friendship with Rutledge.

7. See the Supreme Court proceedings conducted in memory of the Justice. 341 U.S. v. (1951).

8. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

9. *In re Yamashita*, 327 U.S. 1, 41-42 (1946) (dissenting opinion).

10. 367 U.S. 643 (1961).

11. 338 U.S. 25 (1949).

and seizure was nonetheless admissible in a state criminal prosecution—a holding from which Justices Douglas, Murphy and Rutledge had dissented. Four justices, led by Justice Clark, voted to jettison *Wolf*; except for Justice Douglas, none of the four had been on the Court when *Wolf* was decided. Three justices—including Justice Frankfurter, who had written for the Court in *Wolf*—voted to reaffirm the 1949 holding. Justice Stewart voted to set aside Miss Mapp's conviction, but on grounds unrelated to the unconstitutional search and seizure. Justice Stewart's vote meant victory for Miss Mapp; but the overriding doctrinal question of *Wolf*'s survival depended on the casting vote of the senior justice, Justice Black, who had been a member of the six-man *Wolf* majority in 1949. Justice Black filed a separate concurrence in which he reappraised the

close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem. . . . It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the *Wolf* case. And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases.¹²

In the term just ended, the decision of monumental constitutional implication was, of course, the *Reapportionment* case.¹³ There again the Court's basic obstacle was an earlier decision by Justice Frankfurter—*Colegrove v. Green*,¹⁴ in which the Court, by a vote of four to three, had affirmed dismissal of a complaint filed before the 1946 elections seeking a federal district court order directing realignment of Illinois' hopelessly unequal congressional districts. Justice Frankfurter's opinion in *Colegrove* had been widely understood as meaning that a federal court could not constitutionally adjudicate so "political" a controversy. But the casting vote in *Colegrove* had been that of Justice Rutledge: he had joined the judgment of affirmance because he believed the particular complaint to be wanting in equity; but he had stated his agreement with the dissenters—Justices Black, Douglas, and Murphy—that prior decisions of the Court established that the judicial power extended to such a case.¹⁵ And so, in the *Reapportionment* case, Rutledge's *Colegrove* concurrence and Black's

12. 367 U.S. at 662. In his celebrated dissent in *Adamson v. California*, 332 U.S. 46, 68, 89 (1947), Justice Black also rejected a constitutional position [that announced by Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1937)] to which he had once subscribed. Off-hand, there comes to mind no other constitutional *volte face* of comparable dimension in Justice Black's extraordinary quarter-century on the Court.

The impact of the *Mapp* decision on state prosecutions is already substantial. See *e.g.*, the news account captioned *Policy Prosecutions Here Cut by High Court Ruling*, N.Y. Times, July 16, 1962, p. 1, col. 2.

13. *Baker v. Carr*, 369 U.S. 186 (1962).

14. 328 U.S. 549 (1946).

15. *Id.* at 564-66. In Justice Rutledge's view, the Court necessarily so held in *Smiley v. Holm*, 285 U.S. 355 (1932). Since the *Colegrove* complaint could be dismissed for want of equity, he felt that reexamination of *Smiley v. Holm* was inappropriate. *Cf.* Rutledge's concurrence in *MacDougall v. Green*, 335 U.S. 281, 284 (1948).

Colegrove dissent became affirmative authority for the Court's conclusion that the complaint filed in the Tennessee federal court, seeking realignment of the Tennessee state legislature, was proof against a motion to dismiss.

On the last day of this term the Court decided the *School-Prayer* case.¹⁶ Justice Black's limited holding was that the constitutional bar on government establishment of religion precluded state officials—the regents and teachers of the New York public school system—from formulating and conducting a *religious* (albeit voluntary) ritual: namely, a daily prayer in which public school children acknowledged their “dependence” on “Almighty God.” (Not too surprisingly, Justice Black's holding was promptly misrepresented by those too hostile to read his opinion fairly or too lazy to read it at all.¹⁷) In terms

16. *Engel v. Vitale*, 30 U.S.L. WEEK 4550 (June 25, 1962).

17. In Congress, according to the N.Y. Times, June 27, 1962, p. 1, col. 1, and p. 21, col. 4:

Democrats and Republicans took the floor to denounce the court. In strident language, several questioned the Justices' honesty and patriotism.

Representative Frank J. Becker, Republican of Nassau County, called the decision “the most tragic in the history of the United States.”

Representative John Bell Williams, Mississippi Democrat, said it was part of “a deliberate and carefully planned conspiracy to substitute materialism for spiritual values.”

Senator Prescott Bush, Connecticut Republican, termed the decision “most unfortunate,” “divisive” and “quite unnecessary.”

Senator Herman E. Talmadge, Democrat of Georgia, said it was “an outrageous edict which has numbed the conscience and shocked the highest sensibilities of the nation.”

Southern members were among the most prominent critics. Some punctuated their denunciations with references to the issue of racial segregation of schools.

Representative L. Mendel Rivers, Democrat of South Carolina, said the court had “now officially stated its disbelief in God Almighty.” He accused the court of “legislating—they never adjudicate—with one eye on the Kremlin and the other on the National Association for the Advancement of Colored People.”

Two other House Democratic critics were representatives Francis E. Walter of Pennsylvania and Thomas G. Abernethy of Mississippi. Mr. Abernethy said the decision would please no one but a “few atheists” and world communism.

Meanwhile at p. 1, col. 7:

former President Herbert Hoover, in a rare comment on a ruling by the court, called for Congressional action.

“The Congress should at once submit an amendment to the Constitution which establishes the right to religious devotion in all governmental agencies—national, state or local,” he said.

Mr. Hoover added that the court's decision represented “a disintegration of a sacred American heritage.”

On the other hand:

Former President Harry S. Truman declared that “the Supreme Court, of course, is the interpreter of the Constitution.”

And President Kennedy observed that the decision

“would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and

of long-range constitutional implication, Justice Douglas' concurrence may prove even more important than the opinion for the Court. For Justice Douglas was unpersuaded "that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. A religion is not established in the usual sense by letting those who chose to do so say the prayer that the public school teacher leads."¹⁸ What he thought more compelling was the fact that "once government finances a religious exercise it inserts a divisive influence into our communities."¹⁹ Having reached this juncture, Justice Douglas found himself face-to-face with a decision which he himself had joined:

My problem today would be uncomplicated but for *Everson v. Board of Education*, 330 U.S. 1, 17, which allowed taxpayers' money to be used to pay "the bus fares of parochial school pupils as a part of a general program under which" the fares of pupils attending public and other schools were also paid. The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples. Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy:

The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon the secular foundation it vanishes with the resting. *Id.*, Par. 7, 8. Public money devoted to payment of religious costs, education or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here

we can make the true meaning of prayer much more important in the lives of all of our children."

N.Y. Times, June 28, 1962, p. 1, col. 4.

The clerical reaction was largely, but by no means entirely, critical of the decision. N.Y. Times, June 26, p. 1, col. 7, and p. 17, col. 1. Some Protestant ministers approved, though most apparently did not. Most rabbis seemed to favor the decision. Catholic opinion, led by Cardinal Spellman, was overwhelmingly disapproving, but *cf.* the view thereafter announced by the diocesan newspaper in Portland, Maine, as reported in N.Y. Times, July 11, 1962, p. 24, col. 3:

The Church World, the official organ of the Roman Catholic Diocese of Portland, this week endorsed the recent Supreme Court ruling on prayers in public schools.

The Rev. Vincent A. Tatrzcuk, vice chancellor of the diocese, said in an editorial that "the prayer [of the New York State Board of Regents] contains nothing offensive to our own faith. . . . Yet one can easily imagine the confusion, the violence of conscience which would result from the attempt of governmental agencies to compose official prayers."

18. 30 U.S.L. WEEK at 4556 (June 25, 1962).

19. *Ibid.*

one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11.²⁰

Justice Douglas' repudiation of *Everson* has significance far beyond the school-prayer issue. The *Everson* opinion was written by Justice Black. But Justice Frankfurter, long steadfast on issues of separation of church and state,²¹ was one of the dissenters. Justice Douglas' conclusion that *Everson* was "out of line with the First Amendment" means that, of the three sitting justices who were members of the *Everson* Court, only Justice Black remains committed to its teaching. Moreover, *Everson* was a five-to-four decision (the dissenters were Justices Frankfurter, Jackson, Rutledge and Burton) so that Justice Douglas' defection robs *Everson* of virtually all its precedential impact. And this is of real consequence, because *Everson* is the chief doctrinal reliance of those who argue that governmental appropriations in aid of church-related schools are constitutional.²² In short, the contrary view—the view espoused by, among others, President Kennedy—is immensely strength-

20. *Ibid.*

21. Justice Frankfurter was in the majority in *McCullum v. Board of Educ.*, 333 U.S. 203 (1948), and dissented (as did Justices Black and Jackson) from Justice Douglas' opinion for the Court in *Zorach v. Clauson*, 343 U.S. 306 (1952). Cf. Justice Frankfurter's dissent in *Board of Educ. v. Barnette*, 319 U.S. 624, 646 (1943). Because he was still convalescing from a mild stroke, Justice Frankfurter did not participate in the *School-Prayer* case. Had he participated (and, like the rest of the Court, reached the merits) it seems a fair surmise that he would have joined the judgment, if perhaps not the opinion, of the Court. But it must be acknowledged that Mr. George Sokolsky, one of the leading critics of the *School-Prayer* decision, does not share this surmise:

Mr. Justice Black and his five supporters in the Supreme Court have apparently no sense of tradition and history. It only confirms what has long been believed, namely, that the present Court is without intellectual leadership in the absence of Justice Felix Frankfurter. Had Frankfurter been around to argue down the Godless arguments, surely some of the five concurring judges would not have turned their backs upon him. Frankfurter would not have gone along with the nonsense of depriving children of an undenominational prayer to God. But Mr. Justice Frankfurter is sick and did not partake of this decision. Too bad.

New Haven Register, July 7, 1962, p. 14, col. 5.

22. Thus, the memorandum prepared by the Legal Department of the National Catholic Welfare Conference on *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 GEORGETOWN L.J. 399, 419, 421-22 (1961), analyses *Everson* in the following terms:

Everson thus teaches that aid rendered to a citizen in order to obtain state-prescribed education in a church-related school is not, in the constitutional sense, "aid to religion," or a "financing of religious groups," or "support of the religious function" (to borrow terms used by various objectants to aid to education in church-

ened by Justice Douglas' acquiescence, in the *School-Prayer* case, in the view of the First Amendment articulated by Justice Rutledge fifteen years ago.²³

IV

There have been thirty-four Presidents. There have been eighty-seven Congresses. But there has, from the beginning, been but "one Supreme Court." When the Court says "we held," the collective reference back may be half a year or half a century. Many justices long dead survive in the Court's rhetoric. A smaller number live in the ongoing life of the Court and the nation.

related schools). It is recognition of the principle that government may assist all public service aspects of an educational enterprise. . . .

It cannot readily be denied that the New Jersey program aided "the religious function," that is, helped the teaching of religion in Catholic schools to continue. Justice Rutledge, dissenting in *Everson*, was not able to distinguish between so-called "direct" and "indirect" benefits. He thought that what the majority had sanctioned was "aid" to religious institutions—modified by whatever adjective. This, in his view, (which is the view which *lost* in *Everson*) was unconstitutional. As Professor Paul G. Kauper has noted:

But to distinguish on principle from this type of benefit ["fringe" or "auxiliary"] and the more substantial benefits that would accrue from subsidies to pay teachers' salaries or to provide educational facilities presents difficulties, particularly when it is noted that in the *Everson* case the Court emphasized that the state imposed a duty on all parents to send their children to some school and that the parochial school in question met the secular educational standards fixed by the state. By hypothesis the school building and the instruction in secular courses also meet the state's requirements. When we add to this that education is appropriately a function of both government and religion, the question may well be raised whether the same considerations that govern the problems of bus transportation costs and text books, as well as the question of public grants to hospitals under religious auspices, do not point to the conclusion, whatever different conclusions may be reached under state constitutions, that the First Amendment, in conjunction with the Fourteenth, does not stand in the way of governmental assistance for parochial schools. . . .

The rule of *Everson v. Board of Educ.* is plainly this: (1) Government may support the education of citizens in various ways. (2) "Education of citizens" may take place in church-related schools. (3) Government may not support a religion or church, as such, but so long as its program confers directly and substantially a benefit to citizen education, that program is constitutionally unobjectionable, although benefit is at the same time incidentally conferred upon a religion or a church.

23. At his press conference on June 27, 1962, President Kennedy repeated a distinction he has previously drawn between aid to church-related schools and aid to church-related colleges and universities. *N.Y. Times*, June 28, 1962, p. 17, col. 4.