Justice Robert H. Jackson - Impact on Civil Rights and Liberties
The David C. Baum Memorial Lecture

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JUSTICE ROBERT H. JACKSON—IMPACT ON CIVIL RIGHTS AND CIVIL LIBERTIES

Philip B. Kurland*

I. INTRODUCTION

The Baum Memorial Lectures, although of comparatively recent origin, have already gained great significance for their celebration of the protection of civil rights and civil liberties as a primary endeavor of those dedicated to the rule of law. The lectureship has, therefore, come to honor the lecturer no less than the subject. And I am, of course, pleased to assume the mantle of those who have preceded me.

I must, nevertheless, confess to being somewhat uncomfortable in the role. For surely there is something gauche about preaching heterodoxy from a pulpit which, like all pulpits, is by definition dedicated to orthodoxy. Let me state my problem.

Civil liberties in the context of the law, and particularly Supreme Court law, reveals to me two distinct modes of thought which, for convenience rather than description, I would label the "libertarian tradition" and the "liberal tradition." (I speak not at all here of the "conservative tradition.") There is, I think, not much difference between the goals of the legal libertarian and the legal liberal. For both, the objective is a free people in a democratic society. But freedom and democracy are not words without multiple meanings. Indeed, there are societies that call themselves democratic and their people free which nevertheless epitomize the very opposite of what most of us would mean when we use those words. And there is, as well, a substantial difference between the libertarian and the liberal as to the appropriate means to their jointly defined goal.

As I see it, the legal libertarian tends to think in terms of the absolute and unconditioned protection of asserted civil liberties, almost without acknowledgement of the possibility of any legiti-
mate competing values. For many of them, the mere assertion of a claim labeled civil liberties is sufficient to justify its encompassment within the protection of our Constitution. I would say here that the tradition is represented by such great jurists as Hugo Black and William Douglas, as Wiley Rutledge and Frank Murphy, as Earl Warren and William Brennan, as Henry Edgerton and Skelly Wright. You may derive from this roster that the libertarian tradition, for the most part, includes also a commitment to judicial activism, particularly in support of civil liberties. But you will recognize, too, that while all libertarians may be judicial activists, not all judicial activists are libertarians. In gross, then, the libertarian as I perceive him is dedicated to a creed that societal salvation lies in the maintained primacy of all claimed civil rights and that the saviour is the judicial branch of government.

My discomfort lies in the fact that I believe the Baum Lectures to have been founded to further this libertarian creed. Yet neither my subject, Mr. Justice Jackson, nor I, properly can be called an adherent of the faith. We belong rather to the liberal tradition, a tradition that earned the first Lord Halifax the opprobrious sobriquet, "The Trimmer." For the liberal tradition is, indeed, a tradition born in doubt rather than faith, and maintained by skepticism rather than by belief.

Perhaps the American tradition does not derive, as Professor Bickel would have it, from Edmund Burke. But surely Bickel, the foremost academic apologist for the liberal tradition, accurately described it in his posthumously published book, The Morality of Consent, when he wrote:

The Age of Reason continues, if not quite as pretentiously and self-confidently as it began. Precisely for that reason, however, the problem of which Burke spoke is even more acute for us. A valueless politics and valueless institutions are shameful and shameless and, what is more, man's nature is such that he finds them, and life with and under them, insupportable. Doctrinaire theories of the rights of man, on the other hand, serve us no better than Burke thought they would. The computing principle is still all we can resort to, and we always return to it following some luxuriant outburst of theory in the Supreme Court, whether the theory is of an absolute right to contract, or to speak, or to stand mute, or to be private. We find our visions of

1. "A Constitution cannot make itself; some body made it; not at once but at several times. It is alterable; and by that draweth nearer Perfection; and without suiting itself to differing Times and Circumstances, it could not live. Its Life is prolonged by changing seasonably the several Parts of it at several times." THE COMPLETE WORKS OF GEORGE SAVILE, FIRST MARQUESS OF HALIFAX 211 (Raleigh Ed. 1912).
good and evil and the denominations we compute where Burke told us to look, in the experience of the past, in our tradition, in the secular religion of the American republic. The only abiding thing, as Brandeis used to repeat . . . is change, but the past should control it, or at least its pace. We hold to the values of the past provisionally only in the knowledge that they will change, but we hold to them as guides.

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Our problem . . . is that we cannot govern, and should not, in submission to the dictates of abstract theories, and that we cannot live, much less govern, without some "uniform rule and scheme of life," without principles, however provisionally and skeptically held.

Since few principles are inscribed sharply in the Constitution itself, the Supreme Court speaking in the name of the Constitution fills, in part, the need for middle-distance principles. . . . It proffers, with some important exceptions, a series of admonitions, an eighteenth-century checklist of subjects; it does this cautiously and with some skepticism. It recognizes that principles are necessary, have evolved, and should continue to evolve in the light of history and changing circumstance. That . . . is the Constitution as the Framers wrote it. And that is what it must be in a secular democratic society, where the chief reliance for policy-making is placed in the political process.

. . . Few definite, comprehensive answers on matters of social and economic policy can be deduced from it. The judges, themselves abstracted from, removed from political institutions by several orders of magnitude, ought never to impose an answer on the society merely because it seems prudent and wise to them personally, or because they believe that an answer—always provisional—arrived at by the political institutions is foolish. . . .

Yet in the end, and even if infrequently, we do expect the Court to give us principle, the limits of which can be sensed but not defined and are communicated more as cautions than as rules. Conflined to a profession, the explication of principle is disciplined, imposing standards of analytical candor, rigor, and clarity. The Court is to reason, not feel, to explain and justify principles it pronounces to the last possible rational decimal point. It may not itself generate values, out of the stomach, but must seek to relate them—at least analogically—to judgments of history and moral philosophy. . . .

For the liberal tradition, the representative jurists are not less than those of the libertarian camp. They include Holmes, Brandeis, and Cardozo, Frankfurter and Stone, Learned Hand and Henry

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Friendly, and certainly Robert Jackson, the subject of this essay.

Those of you who know the extrajudicial writings of Judge Learned Hand— and I commend them to everyone who cherishes the high style of a great essayist—will find their echoes in my quotation from Bickel. You will also find those echoes in Paul Freund’s conclusion of an essay devoted to the same subject that I address here, an essay that makes all I am about to say redundant. Probably because it would be difficult to speak of Jackson as a civil libertarian, Freund ended his paper with praise of Jackson’s investment in the uniqueness of each case that came before him, and next with compliments for the style and wit with which his opinions were written. Freund’s third conclusory point demonstrated the contemporary relevance of Jackson’s work: “The Justice contrived to focus on the twin evils that are most corrupting in a legal order: secrecy where there should be disclosure; publicity where there should be privacy.”

Finally, Professor Freund concluded:

More generally, he left a legacy of concern for the inner self, the free mind and spirit on which a free society ultimately depends. In an era of growing exploration and manipulation of the deepest recesses of the mind, as well as the far reaches of outer space, a time of increasing anonymity and submersion in the mass, a period of a morality of statistics, a poignant reminder from Justice Jackson of who each of us is—the vagrant, mysterious, unservile, yet responsible self—is a heritage to be husbanded and treasured.

It is significant that Freund titled his piece “Mr. Justice Jackson and Individual Rights.” For in the concern for the individual rather than the class or group, the concern for “the vagrant, mysterious, unservile, yet responsible self,” is to be found one of the essential separations of the liberal from the libertarian tradition. It is the singularity of the individual, what I have elsewhere called “The Private I,” that makes the tradition for which Hand and Jackson were the most elegant judicial spokesmen in an era in which the individual has become more and more subordinated to the collective, whether it be the state or some other form of Leviathan.

Obviously I cannot, in the space of a single lecture, hope to

5. Id. at 56.
6. Id.
replicate the contents of Jackson's judicial efforts on the Supreme Court, even limited to the single field of civil liberties and civil rights. Mr. Justice Jackson's opinions epitomized the individuality that he so clearly cherished. They defy both summary and easy classification. His was probably the best writing that a Justice of the Supreme Court has ever produced. It is not readily captured in the prosaic and deadening words of a mere critic. I shall endeavor, therefore, to deal with but a few examples of his opinions and to allow his voice to come through directly by means of extensive quotation. If I succeed in my purpose, you may then seek out the corpus of his work for yourself to gain understanding, where I can offer only direction.

II. OF FLAG SALUTES AND SIMILAR MATTERS

A clear distinction between libertarian and liberal is to be found in the latter's notion that the Constitution afforded protection to individuals and, therefore, to all, rather than to classes and, therefore, only to some. For Jackson, it would seem, constitutional liberties could not derive from or be confined to membership in a group or a class. Such liberties as the Constitution afforded to members of a group or class must be liberties claimable by everyone. Moreover, it would seem possible for a class or group jointly not to have the constitutional rights that each individual in that class or group may have by himself.

The judicial origins of such propositions as these, so far as Mr. Justice Jackson's tenure on the Court is concerned, came during his second term, when the Jehovah's Witnesses were being given so much attention by the Court. Indeed, Mr. Justice Jackson's most famous civil liberties decision was rendered in 1943 in his opinion in the second flag salute case, West Virginia State Board of Education v. Barnette.8 Three years earlier the Court, through Mr. Justice Frankfurter, who was joined by Justices Black, Douglas, and Murphy, among others, and over the lone dissent of then Mr. Justice Stone, held that the Jehovah’s Witnesses were not entitled to exemption from compulsory flag salute laws because the compulsory flag salute was not an invasion of their freedom of religious exercise.9

The case came back to the Court after, in the interim, Justices Black, Douglas, and Murphy had changed their minds.10 They had changed their minds about the answer to the question that had been

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raised in *Gobitis*, the first flag salute case: "We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments."11 But, according to Jackson, the spokesman for the Court, the question in *Gobitis* was not the proper question to be addressed in *Barnette*:

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.12

Although the majority opinion frequently is misread even today as a religious freedom ruling, perhaps because of the concurring opinions of Black, Douglas, and Murphy, Jackson's different position could not have come as a surprise to his brethren. It was clear to them that Jackson would espouse no such cause as special privilege for Jehovah's Witnesses. Earlier in the term, the Court had dealt with a series of Jehovah's Witnesses cases involving municipal restrictions on their right to proselytize by ringing doorbells, soliciting funds, and seeking allegiance to church doctrine that those of more conventional religious faiths found totally abhorrent. It was in these cases that Mr. Justice Jackson dissented from finding special constitutional protections in the religious freedom clause.

In a composite minority opinion, filed in *Douglas v. City of Jeannette*,13 Jackson wrote: "I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups."14 He went farther, thus putting himself beyond the pale of some modern academic and judicial dogmas that minorities are entitled to preferences that may be denied to majorities—however one defines those terms—as he wrote in *Jeanette*:

The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority

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11. 319 U.S. at 643.
12. Id. at 634-35.
14. Id. at 179.
to fix its limits. Civil government cannot let any group ride roughshod over others simply because their "consciences" tell them to do so.\textsuperscript{15}

For Jackson, if not his libertarian brethren, there was a weighing of interests to be conducted. The claims of the Jehovah's Witnesses in the solicitation cases impinged on the claims of those on whom they imposed their message. Jackson would find the balance in favor of the latter, the imposed on rather than the imposers. If the Court's valid precedents precluded such activities as those of the Jehovah's Witnesses when indulged by others, as they did, even those who could aspire to Mr. Justice Douglas's colorful appellation of "colporteur," were not specially privileged.

These Witnesses, in common with all others, have extensive rights to proselyte and propagandize. These of course include the right to oppose and criticize the Roman Catholic Church or any other denomination. These rights are, and should be held to be, as extensive as any orderly society can tolerate in religious disputation. The real question is where their rights end and the rights of others begin.\textsuperscript{6}

For Jackson, therefore, the flag-salute case was easier. At least it was easier in one respect:

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and the rights of the individual.\textsuperscript{7}

Stating the question that way, Jackson answered it. In a conflict between rights of the individual and the claims of Leviathan, the Constitution insists that the individual prevail.

In \textit{Gobitis}, Frankfurter had stated the same issue but had come down with a different conclusion.\textsuperscript{8} For Frankfurter, the conflict between the interests of the nation and the interests of the individual were for resolution by the legislature not the judiciary. But neither Frankfurter, nor Stone, nor Black, nor Douglas, nor Murphy had asked the right question. And there is no way to get the right

\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id. at 178.}
\textsuperscript{17} 319 U.S. at 630.
\textsuperscript{18} \textit{Id. at 636-37.}
answer except by asking the right question. "The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."¹⁹

The question was not whether an individual was entitled to exemption from a valid legislative order, the question was whether the legislative order was valid. And surely, the Jacksonian question was a properly Jeffersonian question to be addressed to a national government under a Constitution of delegated powers. It did not quite fit with the notion of state authority whose powers were not delegated to it by the national Constitution. So Jackson had to resort quickly, as he did, to the limitations on state authority to be found in the First Amendment. But it was not a religious freedom proposition, nor even an orthodox free speech construction. He had both to deny the liberal notion of judicial self-abnegation and to create a First Amendment principle to support a right of disobedience to an invalid law.

First, the Bill of Rights was promulgated to remove certain subjects from the legislative realm. Or, in Jackson's words:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.²⁰

Second, it is clear that mere rationality of legislative purpose cannot justify legislative action that was beyond the legislative ken. It did not matter, therefore, that judges were not specially competent to judge the wisdom of the legislation:

True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social

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¹⁹. *Id.* at 635-36.
²⁰. *Id.* at 638.
advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions.\(^2\)

It was not a proper objective of the state to achieve uniformity. "Compulsory unification of opinion achieves only the unanimity of the graveyard."\(^2\)\(^2\) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."\(^2\)\(^3\) One must wonder what Mr. Justice Jackson would think about the uniformities imposed today in the name of egalitarianism.

Here is the liberal judicial creed with all its internal conflicts showing. They are the conflicts of our democratic society. The individual is free and supreme, subject to majority rule in those areas where the majority is authorized to rule, and the realm of majority rule has been greatly extended, but not with regard to matters of faith, or speech or ideas unless that speech or ideas or faith does specific harm to others. Above all, for the liberal jurisprude, responsibility was an attribute of liberty. There was a duty to the society, but that did not include an obligation to submit to compulsion of thought. No little red book, not even a red-white-and-blue one, can be tolerated.

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. ... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.\(^4\)

### III. THE ALIENS IN OUR MIDST

The Jacksonian concern for the individual is shown in still another context. Since I am limited here to a sampling of the Justice's opinions, I have selected some from his individual expressions about the treatment of aliens. The alien is probably the least privileged of persons to seek succor from the courts of the United States, at

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21. Id. at 639-40.
22. Id. at 641.
23. Id. at 642.
24. Id. at 641-42.
least if he is an alien not yet legally admitted to our borders. I have
selected these not only because they are idiosyncratic factual situ-
tions, but because Jackson used these opinions to state some of his
more basic notions about the fundamentals of our jurisprudence.

It would appear—both from the document itself and the rele-
vant decisions—that the Constitution affords the unadmitted alien
no comfort whatsoever. And so, for the most part, Jackson speaking
frequently on behalf of these woebegone creatures was speaking in
dissent. When he did speak, he did not attempt to force the Consti-
tution to cover what it clearly did not cover. He did, however, put
congressional legislation into the press of common sense in order to
squeeze from it humane conclusions.

Two opinions are of primary interest here. Both are concerned
with the admission to the country of aliens. The first is the "German
war bride case," United States ex rel. Knauff v. Shaughnessy,25 in
which Jackson's appeal to his brethren failed, but ultimately suc-
cceeded in securing relief by executive and legislative
clemency.26 The second was Shaughnessy v. Mezei,27 the man-without-a-country
story, whose ultimate outcome I do not know.

The Ellen Knauff case involved a congressional act of compas-
sion which provided that war brides of American servicemen could
be admitted to this country without meeting the qualifications im-
posed on other aliens. As a safeguard, however, Congress provided
that the Attorney General could deny admission in any particular
case to protect the security of the United States. Ellen Knauff was
a German war bride who was denied admission by the Attorney
General, without hearing and without stated reason for the exclu-
sion. Jackson spoke in dissent on behalf of himself and Justices
Black and Frankfurter.

No constitutional argument was raised by the dissenters, per-
haps because 1960 preceded in time the notion of constitutional
penumbras and haloes. And Jackson's opinion opened with a dis-
claimer:28

I do not question the constitutional power of Congress to author-
ize immigration authorities to turn back from our gates any alien or
class of aliens. But I do not find that Congress has authorized an
abrupt and brutal exclusion of the wife of an American citizen with-
out a hearing.

27. 345 U.S. 206 (1953).
Due process of law is a rule of construction as well as a constitutional doctrine. Given the opportunity to read the statute as affording elementary procedural due process or denying it, Jackson set out reasons for rejecting procedures that suggested origins in Franz Kafka's novels:

[T]he government tells the Court that not even a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and, even if we cannot get any reason for it, we must say it is legal; security requires it.

Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. 21

This was a lesson which, had it been learned, would have stood us in good stead from then to now, from the pre-McCarthy period to the post-Watergate period. But Jackson did not prevail. Another alien case, argued the same day as Knauff, but decided a month later, saw Mr. Justice Jackson writing for the majority. The case was Wong Yang Sung v. McGrath30 and the question was whether the procedural hearing requirements of the Administrative Procedure Act were applicable to deportation proceedings against an alien who was alleged to have entered the country illegally. Once again the issue was made one of statutory construction, but that construction was forced in part because its opposite would raise constitutional difficulties:

But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. . . .

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. . . When the Constitution requires a hearing, it requires a fair one,

29. Id. at 551.
one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.31

It was, however, the Knauff attitude and not the Wong Sung position that prevailed when the Mezei case came before the Court a few years later. Again Justices Black and Frankfurter were in dissent with Jackson, but only Frankfurter joined the Jackson opinion. The facts are even now hard to believe. In Jackson's words:

What is our case? In contemplation of law, I agree, it is that of an alien who asks admission to the country. Concretely, however, it is that of a lawful and law-abiding inhabitant of our country for a quarter of a century, long ago admitted for permanent residence, who seeks to return home. After a foreign visit to his aged and ailing mother that was prolonged by disturbed conditions in Eastern Europe, he obtained a visa for admission issued by our consul and returned to New York. There the Attorney General refused to honor his documents and turned him back as a menace to this Nation's security. This man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him. He was shipped and reshipped to France, which twice refused him landing. Great Britain declined, and no other European country has been found willing to open its doors to him. Twelve countries of the American Hemisphere refused his applications. Since we proclaimed him a Samson who might pull down the pillars of our temple, we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands. . . . For nearly two years he was held in custody of the immigration authorities of the United States at Ellis Island, and if the Government has its way he seems likely to be detained indefinitely, perhaps for life, for a cause known only to the Attorney General.32

The question was whether the unwanted man could secure release from custody by habeas corpus. The Government argued that he was not detained by them. He was free to leave Ellis Island at any time, except to enter the United States. Jackson had little

31. Id. at 49-51.
32. 345 U.S. at 219-20 (footnotes omitted).
doubt that he was effectively in custody and that the Great Writ was appropriate to the circumstances:

Fortunately it is still startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint. Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates. Lord Mansfield, in the celebrated case holding that slavery was unknown to the common law of England, ran his writ of habeas corpus in favor of an alien, an African Negro slave, and against the master of a ship at anchor in the Thames.33

What then was the constitutional question posed by the detention of this alien? The standard is that of the Due Process Clause of the Fifth Amendment, which Jackson saw as having two attributes, substantive and procedural. There was no substantive due process right to be relieved of custody. If the Government had cause for his detention, it could not be denied that power.

Substantively, due process of law renders what is due to a strong state as well as to a free individual. It tolerates all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means.

After all, the pillars which support our liberties are the three branches of government, and the burden could not be carried by our own power alone. . . .

* * *

I conclude that detention of an alien would not be inconsistent with substantive due process, provided—and this is where my dissent begins—he is accorded procedural due process of law.34

Procedural due process is a different matter. And procedural due process, unlike substantive due process, is essentially in the keeping of the judicial branch. It invoked the special expertise that was not available to either the executive or the legislative branches to determine:

33. Id. at 218-19.
34. Id. at 222, 224.
Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.35

Jackson saw the evils of executive detention in the recent history of the totalitarian states, both Nazi Germany, the recent menace to civilization, and Communist Russia, then regarded as the current menace to civilization. Jackson conceded his anti-Russian bias, but suggested that bias extended to detesting imitation of their procedures, as well as their substantive principles. He concluded *Mezei* as he had begun *Knauff*:

Congress has ample power to determine whom we will admit to our shores and by what means it will effectuate its exclusion policy. The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with a fair notice of the charges.

It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.36

Allow me to shift from the somber mood by invoking two other opinions of Mr. Justice Jackson in this area of alien rights.

In *McGrath v. Kristensen*,37 the question was whether an alien, whose temporary visitor status was altered because the outbreak of war prevented his return to his homeland, had thus become a permanent alien subject to military service. If he had thus become a resident and chosen not to enter military service, he was subject to deportation. The Court charitably held that the temporary visitor was not subject to such conscription and therefore not subject to deportation.

Jackson's concurring opinion is noteworthy not for its substantive law—it contains none—but as a felicitous form of confession of

35. *Id.* at 224.
36. *Id.* at 228.
error. I quote it in part, for its lightening as well as enlightening effects:

I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some words of explanation. . . . I am entitled to say of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret. . . .

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It would be charitable to assume that neither the nominal addressee nor the nominal author of the opinion read it. That, I do not doubt, explains Mr. Stimson's acceptance of an answer so inadequate to his questions. But no such confession and avoidance can excuse the then Attorney General.

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. . . . Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." . . . Perhaps Dr. Johnson went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all.38

In Jordan v. De George,39 the Court held that conspiracy to defraud the United States of taxes on distilled spirits is a "crime involving moral turpitude" and the alien twice convicted must be banished from our shores. Justices Jackson, Black and Frankfurter dissented in an opinion written by Jackson. As usual, Jackson quickly and concisely stated the question:

Respondent, because he is an alien, and because he has been twice convicted of crimes the Court holds involve "moral turpitude," is punished with a life sentence of banishment in addition to the punishment which a citizen would suffer for the identical acts. Mr. Justice Black, Mr. Justice Frankfurter and I cannot agree, because we believe the phrase "crime involving moral turpitude," as found in the Immigration Act, has no sufficiently definite meaning to be a constitutional standard for deportation.40

38. Id. at 176-78 (citations omitted).
40. Id. at 232 (footnote omitted).
Jackson’s opinion is written in lighthearted tones that deride the sanctimonious and self-righteous grounds for Chief Justice Vin-son’s majority opinion. But the lightness of touch does not conceal the seriousness of his propositions:

. . . The Court concludes that fraud is “a contaminating component in any crime” and imports “moral turpitude.” The fraud involved here is nonpayment of a tax. The alien possessed and apparently trafficked in liquor without paying the Government its tax. That, of course, is a fraud on the revenues. But those who deplore the traffic regard it as much an exhibition of moral turpitude for the Government to share its revenues as for respondents to withhold them. Those others who enjoy the traffic are not notable for scruples as to whether liquor has a law-abiding pedigree. So far as this offense is concerned with whiskey, it is not particularly un-American, and we see no reason to strain to make the penalty for the same act so much more severe in the case of an alien “bootlegger” than it is in the case of the native “moonshiner.” I have never discovered that disregard of the Nation’s liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst.

But it is said he has cheated the revenues and the total is computed in high figures. If “moral turpitude” depends on the amount involved respondent is probably entitled to a place in its higher brackets. Whether by popular test the magnitude of the fraud would be an extenuating or an aggravating circumstance, we do not know. We would suppose the basic morality of a fraud on the revenues would be the same for petty as for great cheats. But we are not aware of any keen sentiment of revulsion against one who is a little nig-gardly on a customs declaration, or who evades a sales tax, a local cigarette tax, or fails to keep his account square with a parking meter. But perhaps what shocks is not the offense so much as the conviction.

We should not forget that criminality is one thing—a matter of law—and that morality, ethics and religious teachings are another. Their relations have puzzled the best of men. Assassination, for example, whose criminality no one doubts, has been the subject of serious debate as to its morality. This does not make crime less crimi-nal, but it shows on what treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case. We usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it. In fact, what better reason is there? Uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds.41

41. *Id.* at 240-42 (footnote omitted).
I do not mean to tell you that Jackson was always on the side of angels, even in this area of the law. He had no difficulty writing a persuasive opinion for the Court that Congress could "constitutionally . . . deport a legally resident alien because of membership in the Communist Party which terminated before enactment of the Alien Registration Act, 1940." But he continued to insist, if still in dissent, that, before an alien may be deported, or convicted for not making himself available for deportation, the premises of the governmental act must be proved to a court in accordance with the requirements of due process of law.

The opinions of Jackson in this field reveal again that the essential feature of the liberal judge is his commitment to procedural due process, not as a technical device for having his way on the merits, but as the real safeguard for the individual against the impositions of government. Here the liberal doctrine requires little if any bowing to legislative authority, for it is here that the charge of the Constitution to the judiciary is the clearest. The opinions also reveal that, if a true judicial liberal will not rewrite a statute contrary to the clear language, intent, and purpose of the legislature, he may nevertheless, where the statute affords equal authority for two or more readings, choose that meaning which most closely corresponds with the benevolent concepts of substantive as well as procedural due process.

IV. THE ROYAL PREROGATIVE

You may find it difficult to think of the next case that I will discuss as a civil liberties case. After all, it involved a seizure of property, not life or liberty, and it was a contest between government and a huge corporate enterprise. Nevertheless, I think that the opinion is probably the most important that Jackson ever composed and is directed at a more fundamental issue of liberty than construction of any of the Bill of Rights. I speak, of course, of the Steel Seizure Case, in which Jackson wrote only a concurring opinion, while Mr. Justice Black spoke for the Court's majority.

The case arose during the course of a "police action" conducted by United Nations forces in Korea. Immediately before a strike call by the Steelworkers was to go into effect, President Truman issued an executive order directing the Secretary of Commerce to seize the steel mills and to keep them operating. The justification for the

order was that steel was an indispensable element for war production and that a work stoppage would endanger the national security. He relied on a conglomerate of powers set forth in Article II of the Constitution, but particularly on the Commander-in-Chief power.

One difficulty with the Truman exercise in implied powers of the Presidency that caused some concern to at least some of the Justices was that in the then recent controversy over the Taft-Hartley Law, the executive branch had sought a seizure power and been turned down by Congress.

Justice Black's opinion for the Court, on the question of prerogative raised by the steel companies effort to enjoin the seizure, was simple. There is some anomaly in the fact that his position was that of William Howard Taft, while the dissenters, led by Chief Justice Vinson, espoused the point of view of Theodore Roosevelt, about the powers of the Presidency.

For Justice Black, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." There was, indeed, no statutory authority for the President's action. Nor was there any Constitutional authority. The Government's claim was one that has become all too familiar. "[I]t is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution." His authority could not be inferred from the Commander-in-Chief Clause, that is concerned with military operations in the "theater of war." "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Thus, Mr. Justice Black in fact framed an opinion that stated there were no implied powers of the Presidency. The President was the agent of the legislature and had no lawmaking powers of his own. As Mr. Justice Frankfurter noted in his concurrence: "... the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Mr. Justice Black has written, ..."

The dissent of Mr. Chief Justice Vinson was equally uncomplicated. The President had found an emergency that required emergency action, at least until Congress acted. This power may be

45. Id. at 585.
46. Id. at 587.
47. Id.
48. Id. at 589.
inferred not only from the Commander-in-Chief provision but also from the President's duty to "take Care that the Laws be faithfully executed, ...".49

Mr. Justice Jackson, with his experience as Attorney General at the outbreak of World War II, was cognizant of the realities as well as the theories of presidential action. He was unable to reduce the issues to the simple question that had been the subject of the majority and the dissenters' opinions. He suggested an outline that has since become regarded as the rule of the case, despite the fact that he wrote only for himself:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. ... 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.50

Mr. Justice Jackson then went into an extensive analysis and concluded that in light of the refusal of Congress to give the President the power of seizure when he asked for it, the present situation fell into the third category and the seizure was invalid. Again, a reading of the full opinion will demonstrate to the reader the strength of the mind of an advocate with keen analytic skills and

49. U.S. Const. art. II, § 3.
50. 343 U.S. 579, 635-38 (1952) (footnotes omitted).
extraordinary powers of rhetoric. But he was an advocate for the Constitution and not for either of the contending parties or other interests. It was not the steel mills nor the steel workers nor the legislature nor the executive that weighted his arguments. It was rather a realization that no more fundamental question about our democratic system in a modern age could be raised. He demonstrated that, however casebook editors might classify the case, it was a case of civil liberties because freedom was at stake.

Since then we have gained further experience with the problem of the imperial presidency. None should think that the Korean War was not an immediate precedent for the Viet Nam War. None should think that Watergate was an idiosyncratic event caused by the eccentricities of an egocentric President with royal pretensions. Recent history reveals that the Watergate syndrome, with its secret acts and enemy lists, with its Louis XIV complex—"l'etat, c'est moi"—may be found to a greater or lesser degree in each of Nixon's predecessors, even back to the President that Jackson served as Attorney General.

What Jackson understood and stated here was a concept that is fundamental to the cause of the liberal jurists: Democracy and a constitutional system of checks and balances are also relevant to the liberty of Americans. The failure of democracy and the consequent failure of limited authority in any of the three branches of the national government could be catastrophic. And yet, even now we approach the catastrophe without recognizing the need for fundamental changes in the existent distribution of powers. Choosing men of good will for leadership is not sufficient, as Madame Gandhi has taught us so well.

Jackson's conclusion was

that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience. 51

It is important that everyone at least see the portrait of government as painted by Jackson in his opinion in the Steel Seizure case. For it will be ignored only at the price of all civil rights and civil liberties:

51. Id. at 652.
In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President’s paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communication. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

. . . I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

The essence of our free Government is “leave to live by no man’s leave, underneath the law”—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not
even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.52

And so endeth the text of the liberal judges' creed on separation of powers, or more correctly checks and balances, as the sine qua non for a democratic society with freedom for individuals in that society, which is, as I have suggested the goal of both liberals and libertarians.

V. EQUALITY AS CIVIL LIBERTY

It is since Jackson's time that the Supreme Court has turned its attention to imposing an egalitarianism on American life. Equal protection of the laws, prior to the decision of the Court in Brown v. Board of Education,53 was a narrow conception of comparatively little moment in the life of the Constitution. As known to that time, it was a concept that Jackson liked as a lesser restraint on the states than the due process clause with its substantive content. Thus, he said in Railway Express Agency, Inc. v. New York:

My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court. While claims of a denial of equal protection are frequently asserted, they are rarely sustained. . . .

. . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable

52. Id. at 653-55 (footnotes omitted).
differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation. 54

Those with any familiarity with the development of the equal protection clause since Jackson’s departure will readily see that his concept of the standard and reason for the equal protection clause is no longer deemed appropriate. His was a notion of equal treatment by the law. The later notions are more concerned with the use of the law—the unequal use of the law—to bring about equality of condition. Substantive equal protection has been substituted for substantive due process as a means by which the courts undertake to make policy determinations about the wisdom and desirability of statutes. The equal protection clause no longer serves merely to void laws that are not equal in their application. The choice is no longer left to the legislature to decide to enlarge or diminish the class to bring about equality of treatment. The laws are themselves rewritten by the courts to conform to judicial notions of social justice.

I find it difficult to believe that Mr. Justice Jackson would have taken kindly to the changed concept of equal protection of the laws. In a recent lecture at the University of Chicago, Professor Paul A. Freund noted Oliver Wendell Holmes’s remark that the Constitution did not incorporate Herbert Spencer’s Social Statics and went on to suggest that neither does the Constitution incorporate Professor John Rawl’s “Social Ecstatics.” 55 But Holmes was wrong and so, too, is Freund. The Constitution of Holmes’s day, with its concepts of liberty of contract and substantive due process, did indeed incorporate Spencer’s Social Statics, and the current Constitution, at least through the Warren Court, may as easily be said to invoke Rawl’s A Theory of Justice. Rawl’s proposition is that any inequality of condition has to be justified and if it cannot be justified it has to be rectified. We have come a very long way from the Jacksonian

notion of the purpose and effect of the equal protection clause.

Let this not be taken to suggest dissent by Jackson from the decision in the Brown case. Clearly the exclusion of children from a public school because of the color of their skins would fall afoul of the standard stated by Jackson in the Railway Express case. Mr. Justice Jackson must have thought so. He was in a hospital bed suffering from a heart attack when the time came to hand down the Brown decision. He left that bed—it is said against doctors’ orders—to demonstrate that the decision of the Court in Brown was one supported by all nine Justices by sitting with his brethren on the fateful day of that decision. He died before the Court was faced with the problems of executing its judgment.

I am sure, too, that Mr. Justice Jackson had qualms about the Brown decision. They did not, however, go to the merits of the judgment, but rather to the lack of justification for it in the Court’s opinion, a lack of candor as well as a lack of authority. And even more was he troubled by the question whether the substantial revision of the social structure of the nation could be achieved through judicial rather than legislative and executive action.56 With the power of hindsight, can we say, even today, that his troubles were not real ones?

VI. Conclusion

Let me conclude by attempting to respond to the question implicit in my assignment for tonight. It was the sponsors of this lecture who stated the title: “Justice Robert Jackson—Impact on Civil Rights and Civil Liberties.” They might have ended the title with a question mark, although in fact they did not. Assuming that they had invoked the inquisitive mood and asked what effect did Justice Jackson have on the constititutional law of civil rights and civil liberties, I should have to respond by saying that Jackson’s impact has been very small indeed.

Jackson’s tenure on the Court ended on 9 October 1954 with his sudden death shortly after the Court reconvened for its 1954 term. Clearly his work was far from finished. But had he remained, it would probably have merely been an extension of the frustrations that he suffered throughout most of his judicial tenure.

The Warren Court, as it has come to be called, was clearly a libertarian court, with the ideas of Justices Black and Douglas in the ascendant. There was no room here for the liberal mode.

56. See Kluger, Simple Justice (1975).
Absolutes of constitutional meaning precluded the balances and conditions that Jackson asserted. Rules were no longer tailored to the resolution of particular cases. They were now "prophylactic" as the modern jargon would have it, promulgated not to cure existent ills but to foreclose future ailments, real and imaginary. True, Mr. Justice Black, toward the end of his career, often looked more like a liberal than a libertarian.57 But by then, the Court had passed its leader.

Now, the Warren Court, too, is dead. But Jackson and judicial liberalism are not revived. On its way from Warren Court doctrine to Burger Court doctrine, if it can be called that, the Court has again bypassed the liberal tradition. It tends to write absolutes of its own. The Jacksonian dedication to reason, to the need to explain constitutional opinions, especially those that make changes in the law, weighs very lightly, if at all, on the current Court's membership. Suffice it for them that judgments are reached together with a lengthy exegesis that more often hides than reveals reasons for the decision.

I would say that neither Jackson's attitudes nor his craftsmanship, whether in the realm of civil liberties or elsewhere, has left a deep mark on the jurisprudence of the Supreme Court. But he has left an intellectual inheritance that may, like a phoenix, rise again.

This lecture was not, therefore, intended as a testimonial to the present importance of the judicial efforts of Robert H. Jackson. But, as Mr. Justice Holmes once wrote:

When his work is finished it is too late for praise to give the encouragement which all need, and of which the successful get too little. Still, there is a pleasure in bearing one's testimony even at that late time, and thus in justifying the imagination of posthumous power on which all idealists and men not seeking the immediate rewards of success must live.58

Mr. Justice Jackson was such an idealist, although a practical one. He saw that individual responsibility was the necessary concomitant of individual freedom. He saw that, in the end, the errors of representative government were more tolerable for free men, than the perfections of the corporate Leviathan.

Let me close with Jackson's own last words of testament. He died after preparing but before delivering the Godkin lectures at Harvard. His peroration for those lectures should be meaningful, in light of current events, for both liberal and libertarian:

58. Holmes, Collected Legal Papers 283 (1920).
In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so. Whether the political conscience is relieved because the responsibility here is made largely a legal one, I cannot say, but of this I am sure: any court which undertakes by its legal processes to enforce civil liberties needs the support of an enlightened and vigorous public opinion which will be intelligent and discriminating as to what cases really are civil liberties cases and what questions really are involved in those cases. I do not think the American public is enlightened on this subject.

Sometimes one is tempted to quote his former self, not only to pay his respects to the author but to demonstrate the consistency of his views, if not their correctness. On the 150th anniversary of the Supreme Court, speaking for the executive branch of the Government as Attorney General, I said to the Justices:

"However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time than upon the merits which is its own."

Mr. Justice Jackson was not a man for all seasons. At least his was not the dominant voice on the Court that he graced. Nor was it the voice of the Warren Court that succeeded his. And it appears not to be that of the present Court that falls outside the teachings both of our liberal and our libertarian Justices. But perhaps his can be the mode of the Court of the future. That can be so, however, only if his efforts and ideas are kept alive by continued study of them by new generations of lawyers and law teachers. It is to encourage that possibility that I have offered these remarks. It is to you that I give the charge. And so I wish you Godspeed.