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Justice Murphy is commonly regarded as having been a libertarian activist. He was not highly regarded as a Justice during his lifetime and this opinion prevails today. Here Professor Howard sees Justice Murphy during his early years on the Supreme Court as a man of indecision rather than an uncompromising libertarian. Through an examination of first amendment cases between 1940-42, the author finds that Murphy displayed a common reaction to the responsibilities of a new Supreme Court Justice which differed from most only in intensity.

I.

Since his death in 1949, Justice Frank Murphy has come to occupy a discrete and not altogether flattering place in Supreme Court history. While a hero of a libertarian minority who revere the Court more for its literature than for its law, Murphy is one of the few Justices whose performance on the bench lowered rather than elevated his public stature. Decision after decision which he opposed in the 1940's have since fallen under the Warren Court's preoccupation with individual rights; controversy after controversy have since flared over ideological values among the Justices, as well as over methods of analysis among scholars outside; but seldom do contemporary judges cite his opinions for support, and in scholarly literature, he stands mainly as a prime exhibit of the vagaries of an eccentric judge. The truth is that Murphy, in dominant professional opinion, was regarded as a "weak sister" in his lifetime and remains so today.[1]

The reasons for his low professional repute are not hard to find. Irrespective whether the analysis proceeds by reading cases or by "scientific" measurements, the Murphy of customary portrayals was a Justice with a one-tracked mind. Competing social interests, whether they be federalism, social order, or the Court's own limitations in a diffused political system, were all subordinate to his passion for individual liberty and the mercy for underdogs which undoubtedly were his absorbing juridical concerns. The most extreme "libertarian activist" in living memory, so the analysis goes, Murphy was essen-

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1. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 793 (1956). See, *e.g.*, Kurland, Book Review, 22 U. CHI. L. REV. 297, 299 (1954).

tially a "lawless" natural justice judge whose vote was as predictable as his impassioned pen. The "McReynolds of the left," a man who thought "with his heart rather than his head," the Justice commonly has been pictured by his critics as a man who followed militantly liberal predilections without faltering—and without thought—from his first day on the Court to his last.[2] Of all modern Justices, none has come closer to being considered a left-wing automaton.

Whatever one's view of the Justice—and either encomium or panegyric would be irrelevant here—this customary portrait is considerably overdrawn. Contrary to accumulated myths, Murphy did not establish himself immediately as a libertarian firebrand on the Supreme Court. His initial impact on the development of law was ambivalent. Though he was determined, as he told President Roosevelt after his first day on the bench, "to give the best that is in me—to serve with credit to my country and yourself," probably no other Justice in this century began more aware of "how inadequate are the abilities that I bring to this work" or more disquieted by the great changes of status and function which appointment to the high tribunal invariably entails.[3] The early Murphy, accordingly, was almost the reverse of contemporary appraisals. Rather than a willful judge who was too ideologically-committed or too simple-minded to appreciate the complexities of the judicial process, he was a self-conscious freshman, restless over the personal and professional restraints of his new post, and diffident to the point of indecisiveness in exercising its responsibilities. Equivocation, not activism, was his primary trait.

The Justice's reaction was abnormal only in its intensity. Historically, a season of adjustment has been found necessary by virtually every new Justice, regardless of era or of prior occupation, before he became a fully effective member of the Court. Particularly since the Civil War, new Justices have attested with singular uniformity to the great personal and professional changes they have been called upon

2. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 190-92 (1954); SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 339-42 (1959); Mendelson, *The Neo-Behavorial Approach to the Judicial Process*, 57 AM. POL. SCI. REV. 593, 596 (1963). Roche, *The Utopian Pilgrimage of Mr. Justice Murphy*, 10 VAND. L. REV. 369 (1957); Rodell, The Progressive, Oct. 4, 1943. For general appraisals of the Justice's work, see articles in memorial issue, 48 MICH. L. REV. 737-810 (1950); Barnett, *Mr. Justice Murphy, Civil Liberties and the Holmes Tradition*, 32 CORNELL L.Q. 177 (1946); Fahy, *The Judicial Philosophy of Mr. Justice Murphy*, 60 YALE L.J. 812 (1951); Frank, *Justice Murphy: The Goals Attempted*, 59 YALE L.J. 1 (1949); Cressman, *Mr. Justice Murphy—A Preliminary Appraisal*, 50 COLUM. L. REV. 29 (1950); Gressman, *The Controversial Image of Mr. Justice Murphy*, 47 GEO. L.J. 631 (1959); Man, *Mr. Justice Murphy and the Supreme Court*, 36 VA. L. REV. 889 (1950).

3. Letter From Frank Murphy [hereinafter referred to as FM] to Franklin D. Roosevelt [hereinafter referred to as FDR], Feb. 5, 1940, Box 88, Murphy Papers, the Michigan Historical Collections of the University of Michigan [unless otherwise indicated, all correspondence cited here is drawn from this source].

to make. In the first place, the proprieties of the office, coupled with an always surprising work load, have usually, though not always, compelled a personal discipline whose magnitude few men fully anticipated. Newcomers, with rare exception, have made the necessary adjustments, but it is also a rare novitiate who has not felt constrained by public expectations or who escaped Chief Justice Taft's feelings of having entered a monastery.[4] The Court's most recent appointee described the move from Cabinet to Court graphically: "the Justice's phone never rings—even his best friends won't call him."[5] The sudden loneliness, for the type of men who become Justices, must be painful.

Professional changes, in the second place, have generally taxed new Justices of every background. Despite frequent demands that the Justices should have lower court experience, the very testimony of those who have had it suggests that, for all practical purposes, every new Justice must be considered a novice in the unique decisional system of the Court.[6] For one thing, the dynamics of decision by a relatively large group having ultimate appellate functions are bound to generate distinct modes of decision. Power for some purposes may be supreme, but it is always shared, not only among the nine Justices but among a multitude of actors in a polycentric legal system. Most new Justices, moreover, have found the disputes to be resolved "infinitely more complex" and the responsibilities much more personal than those they have encountered before.[7] Few have failed to be humbled thereby. While experienced lawyers or judges may have initial technical advantages, as opposed to the politician's experience in making hard choices of public policy, there is also a physical fact that only a very, very few men with long experience on a key court of appeals could possibly be intimate with the broad range of subjects rising for review. Justice Douglas' estimate of a decade to acquire that breadth, indeed, is not greatly less than the thirteen and one-half year average tenure of Justices since the Civil War.[8] And even if all of the personal and professional considerations were inoperative in particular cases, the Court's own internal

4. See, *e.g.*, MASON, BRANDEIS: A FREE MAN'S LIFE 514 (1947); 1 PUSEY, CHARLES EVANS HUGHES 276 (1951); 2 PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 961 (1939). Justice Murphy wrote after a year on the Court: "We are rushed beyond belief. . . ." Letter From FM to G. A. Richards, Dec. 16, 1940, Box 93.

5. Goldberg, *Reflections of the Newest Justice*, CONG. REC. 14418 (daily ed. Aug. 15, 1963).

6. See Frankfurter, *The Supreme Court in the Mirror of the Justices*, 105 U. PA. L. REV. 781 (1957).

7. Goldberg, *supra* note 5.

8. BLACK, THE PEOPLE AND THE COURT 180 (1960); Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 413 (1960).

procedures would produce a "freshman effect" of varying intensity and duration.

Institutional processes, while they are designed to ease assimilation burdens of new members, effectively create a transitional phase in which newcomers have lighter responsibilities and lighter influence. In conference, the freshman Justice speaks last and votes first, which means that the Chief Justice and the first senior Justices who disagree with him have first opportunity at the vital question of framing the issue. The recently opened papers of Justice Murphy, which include suggestive notes of conferences held between 1940 and 1947, confirm how significant the opportunity of first statement can be in the hands of a Chief Justice like Hughes, who frequently began the deliberations with an apt remark to set the mood and then proceeded to delineate the issues with great economy and dexterity. In the first *Flag Salute Case,* for example, Hughes opened the conference by remarking—"I come up to this case like a skittish horse to a brass band"—and then proceeded to analyze the problem in a fashion which was followed precisely, and with little debate, in the ultimate opinion of the Court. Hardly less influential are the positions of vigorous senior Justices such as Hugo Black, who appears to have structured the issues in conference more during this period than is commonly assumed. Although it is impossible to be systematic, the Murphy notes leave a distinct impression that issue-setting was primarily a function of the Chief Justice and the seniors who disagreed—during Hughes' regime, Stone, Roberts and Black; during Stone's, Roberts, Black and then Frankfurter. During the early 'forties, the often-observed role of Justice Frankfurter in this respect seems to have been less in conferences than *before* and *after* them for the reason that at this time his seniority was relatively low.[9]

Assignments as well as speaking order also are commonly made with the Justices' seniority and experience in view. After his first assignment, which by rumored custom the newcomer chooses, he is likely to serve an apprenticeship with large doses of tax and statutory routine. Judicial reputation itself, as a consequence, may depend substantially on such extraneous factors as personal longevity on the Court and how senior colleagues exercise their power of assignment. Justice Stone, for example, smarted under Chief Justice Taft, as did Murphy and Rutledge under him.[10] Frustration over what they

9. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). "Observations of Chief Justice Hughes," No. 690, 1939 Term, Box 129. The analyst cannot discount the possibility that, because of speaking order, Murphy's note-taking diminished toward the end of discussion, though for the most part the notes are extensive when a junior Justice sought to alter the issues significantly in important cases.

10. MASON, *op. cit. supra* note 1, at 260, 793.

regard as light work has been a common characteristic of junior Justices whose views were at variance with their Chief.

Finally, and more subtly, the newcomer's vote and his role in the opinion-drafting process may be affected by his own personal responses to the very transitional difficulties at work. These reactions a simple vote cannot register; these reactions a Justice may be too proud to reveal; but for an understanding of the judicial process they are too important to ignore. In Justice Murphy's case, a minimum of three terms was required before he was assimilated confidently into the life and work of the Court. During that time, not only did his substantive views undergo subtle change, but his very "freshmanness" as a Justice affected the judicial process—and the law of the land.

II.

It has been easy to assume otherwise. Murphy arrived on the Supreme Court with an advance reputation as a militant and controversial crusader for civil liberties and the welfare state; and the public face presented by his opinions reinforced the belief that, for Murphy, judicial independence merely freed his passionate value commitments from whatever restraints that existed before. It was no accident that Murphy offended a profession which prides itself on subtle accommodation of competing values. Dispensing justice, by his own confession, was his notion of the judicial function; and Murphy's "justice" was of a peculiar sort. An instrumentalist toward law, whose philosophic equipment was a cluster of Thomism, Jeffersonianism, and social environmentalism, he was an evangelist of no mean talent at reducing complex issues to simple moral terms and endowing them with powerful prose. From his first major opinion in *Thornhill v. Alabama* to his last in the case of communist spy Gerhart Eisler, Murphy manifested a consistency of vote, a devotion to individual liberties, and a black-and-white style, especially in those uncompromising dissents which so frequently resembled essays in fundamentalist homiletics, that comparisons with the outpourings of Justice McReynolds were not unjustified.[11] Nevertheless, considerable caution is required before one can assume that his relatively simplistic opinions were the one-to-one projection of personal values. That strong beliefs existed and were voiced is obvious, but competing factors were also at work.

One reason for caution is that sharp contrast always existed between Murphy's public image and the private maker of decisions. In reality, the Justice was an enigmatic figure of extraordinary complexity.

11. Thornhill v. Alabama, 310 U.S. 88 (1940). Eisler v. United States, 338 U.S. 189, 193 (1949).

Priestly of mien, Murphy was also egocentric and a bundle of contradictions. But few were more genuinely considerate of others or more compassionate of their infirmities. Something of a religious ascetic, he neither smoked nor drank nor paid attention to money. But few public men took greater delight in earthy jokes, in the Washington cocktail circuit, or in the cultivation of celebrities from sports, government, and the stage. Murphy had been reared to a "life of service" by a burly Irish father and a dominating, idealistic mother in an Irish-clan, small town environment at Harbor Beach, Michigan—and he never quite outgrew either. He spoke gently, was unashamedly sentimental, and attempted to cloak a tough inner core and a volatile temperament behind an exterior of saintliness. A man without pretense of intellect, he nonetheless attracted men of great abilities to his side, was perhaps excessively sensitive to the advice and criticism of intellectuals, and in his various public offices fought zealously for ideas commonly considered ahead of his time. If any single generalization fits the many-faceted Murphy, it is that he was both a dedicated idealist and a showman whose compulsion for morality and humanitarianism in government were all bound up with personal needs for esteem and approval. God, America, and the Murphys were his trinity, as Francis Biddle once remarked; the principal reason for his meteoric rise to power was never intellect as such, but an extraordinary mixture of ethical passion, an intuitive political shrewdness, and sheer showmanship. Only Murphy, the mass educator, could have entered the Court describing it as "The Great Pulpit."[12]

Murphy as a politician always defied the easy label. Although he shared the isolationist and non-partisan yearnings of Midwestern Progressivism, he fit closest the militant liberals who acquired power as representatives of urban-based, minority protest. Even before the New Deal he drew national attention as a crusading criminal judge sensitive to minority rights and, above all, as the mayor of Detroit who pioneered public relief when depression struck. Yet it is useful to remember that he was also a purist in government, an enemy of party machines, and a politician of considerable magnetism and independence. Until the 1936 election, indeed, his chief political allies in Detroit were the American Legion, Father Charles E. Coughlin, and the local outlet of William Randolph Hearst!

Later, Murphy became a hero of the Left as an anti-colonialist Governor General and High Commissioner in the Philippines and then as Michigan's "labor governor" during the great sit-down strikes of 1937. There, on the same day that Roosevelt's Court packing plan was sent to Congress, he produced lasting notoriety by refusing to

12. BIDDLE, IN BRIEF AUTHORITY 92-94 (1962). The Buffalo News, Jan. 5, 1940.

enforce court orders evicting UAW strikers from General Motors plants with the prophetic remark: "We must love justice rather than its form."[13] Still, it is well to recall that as Governor General Murphy engaged Manuel Quezon and General Douglas MacArthur in a hard-nosed battle all the way to the White House to prevent what he regarded as the erosion of American authority in Manila; and while his policy toward mass civil disobedience virtually forced auto manufacturers to recognize CIO unions, it was also true that he quickened settlement of the great strikes by a private ultimatum to John L. Lewis—a fact he refused to reveal, even though it cost him re-election in 1938.[14]

Appointed Attorney General in 1939, pending a vacancy as Secretary of War, he quickly regained prestige for high quality judicial appointments, crusades against city machines, and efforts to reinforce civil liberties. He was responsible for the creation of a civil liberties unit in the Department of Justice. But he also provoked considerable public controversy, which flared just after he entered the Court, by backing the first government prosecution of alleged subversives, both communist and fascist, since 1917, in a politically inspired effort to undercut Martin Dies and HUAC, whose first victim, incidentally, had been himself. The "libertarian's libertarian" on the Court, in short, had a flair for the unexpected. Not only was he a man whom Cabinet officials predicted would be the first New Deal Justice to go conservative, but one who was also capable of writing the FBI chief after he arrived: "Unless we are pudding-headed we will drive from the land the hirelings who are here to undo the labors of our Fathers."[15]

Even to suggest these contrasts so sharply entails hazards, for as Harold Ickes once observed, Murphy had great talent at pouring on the butter and he went out of his way to do it.[16] Words instinctively attuned to the listener had to be taken, along with public preachments, as part of the Murphy style. That he was an honest and earnest reformer, not even his enemies denied. That government for him was a ministry, came very close to the truth. But the fervor, it should be recognized, was a way of expressing a result dramatically as well as a way of reaching it for one of the most colorful political

13. SELECTED ADDRESSES OF FRANK MURPHY 57 (1938).

14. See the author's *Frank Murphy and the Philippine Commonwealth*, 33 PACIFIC HISTORICAL REV. 45 (1964); *Frank Murphy and the Sit-Down Strikes of 1937*, 1 LABOR HISTORY 103 (1960); and *Hearings Before the Sub-Committee of the Committee on the Judiciary on Nomination of Frank Murphy To Be Attorney General of the United States*, 76th Cong., 1st Sess. (1939).

15. 3 ICKES, THE SECRET DIARY OF HAROLD L. ICKES 70 (1954). Letter From FM to J. Edgar Hoover, Sept. 7, 1940, Box 92.

16. ICKES, *op. cit. supra* note 15, at 88.

figures of recent times.

A final factor complicates the relationship of personality and judicial decision even more. Murphy entered the Court reluctantly and with an aggravated sense of inferiority. His appointment, indeed, was a paradox. On the one hand, following the death of Justice Butler in November 1939, Murphy was the "logical choice" for the vacancy. A Catholic and a progressive, a man of humble origin and a midwesterner, he satisfied to an unusual degree the "representational" criteria of religion, section, and political background traditionally used by Presidents in making selections to the high Court. What he lacked in judicial experience could be offset by political breadth unmatched among eligibles; besides, his seven years on the Detroit Recorder's Court still gave him longer judicial experience than any other Roosevelt appointee. Mass popularity as Attorney General assured easy confirmation; and not least in importance, his elevation to the Court made it possible for the President to relieve a nagging personnel logjam in his administration.[17]

Far from a Taft-like lust for the Court, however, Murphy exhibited an extraordinary resistance to it. Loyalty to the President demanded that he accept the post if Roosevelt desired. Refusal under the circumstances would not only embarrass the President but might leave a bundle of frustrated ambitions dangerously unstilled. But Murphy aspired to be Secretary of War, a post which Roosevelt had promised him, and he had genuine doubts, which cut far deeper than any modest exterior, about his technical proficiency for the Court. Like a romantic bride caught in a match arranged by realists, he responded to the speculations about his availability by the only thing he could safely do—berating his qualifications in public and in private and reminding the President of loftier motives.

Such had been his reaction when Roosevelt had asked him to run for Governor of Michigan in 1936. Now he was no less in earnest. Only four days after the death of Justice Butler, he replied to reporter Charles G. Ross' attack on the custom of religious representation on the Court by writing:

> I particularly agree with the observation that there "are other men in the United States better fitted intrinsically to sit on the Supreme Bench"!
>
> As I see it, the view that one of a certain faith should be succeeded by another of like faith is entirely unworthy.

When it became apparent in early December that the President's mind was running in the same groove as virtually everyone else's, Murphy gave the President a list of prominent eligibles, along with

17. BIDDLE, *op. cit. supra* note 12, at 86-87. N.Y. Times, Nov. 21, 1939, P. 22:5.

a letter of scarcely concealed reproach. After listing the ideal criteria of mind and spirit desired in the post, he wrote:

> We must think only of the nation itself. . . . Members of the Supreme Court are not called upon nor expected to represent any single interest or group, area or class of persons. They speak for the country as a whole. Considerations of residential area or class interest, creed or racial extraction, ought therefore to be subordinated if not entirely disregarded.[18]

When the inevitable was finally announced on January 4, 1940, his anguish was unconcealed. With straightforward candor he unburdened himself to his old parish priest, to whom he wrote: "I am not too happy about going on the Court. A better choice could have been made. I fear that my work will be mediocre there while on the firing line where I have been trained to action I could do much better." "It has been a difficult decision for me," he added to Stephen Hannagan, "but two decades back I put on a uniform and I am still a soldier."[19]

Resignation tinged with pride was the principal reaction of the Court's newest Justice, and even if it could be tacitly assumed, as did Roosevelt, that he would not remain on the bench for long, Murphy could not resist a parting reproach of the process which put him there. "I appreciate the honor," he told newsmen, "but I consider myself unworthy of it and I think a far better selection could have been made."[20]

Compounding the paradox and his sensitivity was the fact that he also entered the Supreme Court under fire. To be sure, criticism was not aimed at preventing his confirmation by the Senate, as in the case of Justice Brandeis. Nor was an attack mounted to frighten him into different ways, as in the case of Chief Justice Hughes. Murphy's crusades had generated mass popularity for himself as a capable, if not "ideal attorney general"; his appointment was well-received in the mass media and confirmed by the Senate without so much as a roll call vote.[21] But the very reasons for that public response, flamboyant political activism accompanied by high-powered publicity in the Department of Justice, created a strongly adverse reaction among administration liberals and a strategically located group of New Deal lawyers, above all Solicitor General Robert H.

18. Letter From FM to Charles G. Ross, Nov. 20, 1939, Box 81. Letter From FM to FDR, Dec. 9, 1939, Box 82.

19. Letter From FM to William Murphy, Jan. 8, 1940; Letter From FM to Stephen Hannagan, Jan. 6, 1940, Box 86.

20. ICKES, *op. cit. supra* note 15, at 110. Press release, MS., Jan. 4, 1940, Fort Wayne Journal-Gazette, Jan. 4, 1940.

21. Miami Daily News, Jan. 5, 1940. New Orleans Times-Picayune, Jan. 9, 1940. CONG. REC. 329 (daily ed. Jan. 15, 1940).

Jackson, that played no little part in his elevation to the Court.

The Jackson-Murphy collision of 1939, which was actually a relationship of aloofness rather than one of personal feuding, was an affair too complex for detailed analysis here. Suffice it to say that a combination of ambition, personality conflicts, and policy differences, especially between Murphy's crusades and Jackson's "lawyerly way," provoked friction in the Department of Justice.[22] To relieve it and to honor his promises to place Jackson and Biddle in the two top posts of the Department, while at the same time placing a Catholic on the Court who would "be for us," were major considerations in the President's choice. But when Murphy resisted it publicly, made statements that implied distrust of Jackson's willingness to carry out politically-potent crusades, and delayed entry to the Court for Florida vacations, a sudden flurry of criticism, some spontaneous and some inspired, appeared in the national press concerning his "witch hunts" as Attorney General and his personal qualifications for the Court.[23] Although his trips actually were taken with the approval of Chief Justice Hughes, Murphy was accused of being personally miserable in the job and of being chastised by Hughes for indifference and ineptitude in the work of the Court.[24] Although Vice Presidents were seldom created that way, reports circulated that he had pleaded with Michigan party leaders to obtain the vice presidential nomination for him so badly did he want off the bench.[25] *The Macon News-Telegraph* commented of the Court's new member:

> To put it mildly, the people who pay Mr. Murphy a salary of $20,000 a year are wondering when he is going to work. . . . The fact of the matter is that the entire career of Murphy is one of the most discreditable in the history of American politics. . . . Maybe Black was not the last word in public indecency, after all.[26]

In retrospect, much of the criticism was petty gossip that did little justice to the principals or to the genuine issues of policy and approach between them. It paled beside the regular feuds of the New Deal; and for the most part, Murphy took the criticism stoically. "Pay little attention to some of the news stories," he told his Detroit friend Henry A. Montgomery. "Remember this is an election year—

22. See GERHART, ROBERT H. JACKSON: AMERICA'S ADVOCATE 161-98 (1958). BIDDLE, *op. cit. supra* note 12, at 86-87, 92-94.

23. GERHART, *loc. cit. supra* note 22; WHITEHEAD, THE FBI STORY 170-78 (1956). The N.Y. Times, Feb. 29, 1940, p. 14.

24. Letter From FM to Charles Evans Hughes, Jan. 20, 1940; Letter From Edward G. Kemp to FM, Jan. 20 and 22, 1940, Box 87.

25. The Detroit News, March 1, 1940. *Even Hand*, Time, Feb. 26, 1940.

26. *Loafing on His Job*, The Macon News-Telegraph, MS copy; reprinted, The Detroit News, Feb. 27, 1940.

an old timer like yourself knows how the daggers fly during such a period. I cannot conceive of my leaving the Court for any reason."[27] The persistence of the gossip about the "missing and misbehaving" new Justice, however, became a source of real concern. At the suggestion of his clerk, he cancelled speaking engagements, publications, and memberships. After another news story appeared in late February that he was "disinterested and lackadaiscal" in the work of the Court, he wrote the Chief Justice: "No one could be happier than I am to labor with you and my brethren in this vineyard. The statement is all untrue."[28] Ever eager to defend the reputation of his Court, the Chief Justice engineered a denial of his alleged criticism in *The New York Times* the following day, which substantially silenced most of the "groundless yarns."[29]

The effects, nevertheless, were enduring. Murphy, all his adult life, had excelled as a champion of moral rectitude before a mass audience; now the critical constituency had shifted to a professional elite. Murphy, all his political life, had won praise for attracting intelligence and integrity into government; now his own were under fire. Having crossed swords with militant liberals as well as strategically placed lawyers who regarded him as an incompetent, political interloper in a technical legal world, he entered the Court with a widely circulated reputation as a misfit.

The result, as in the cases of Justices Davis and Black, was to aggravate his self-consciousness and his sense of being on trial. In February, 1940, he wrote Reverend Leo T. Butler:

> After three weeks now I have been a full-fledged Associate Justice—at least as far as the title is concerned—but otherwise I feel very much the "freshman" member that I am and having had a taste of actual work on the Bench I am beginning to sense more fully the vast responsibility that this Court bears. I cannot hope to equal what others have done in meeting that responsibility, but even though I cannot be brilliant I can try to do the work that is before me thoughtfully and with devotion to the great cause that we all serve.[30]

27. Letter From FM to Henry A. Montgomery, Feb. 27, 1940, Box 89. To Judge Frank Picard, he wrote: "That sort of thing can't be helped. It comes to those in high places and when one of my mediocrity is up then he looms up as a greater target. It is a price one pays for distinction and those of us who are good stuff roll with the punches and thank the Lord for his manifold blessings. I don't like it but with the others I have to take it. Right now it is doubly offensive to me for I alone am not concerned—there is the Court to think of—the Supreme Court with its traditions and its place in the hearts of our people. Were it not for this the arrows would hurt little; experts have shot them at me in the past and thus far they have fallen harmlessly to the ground." Letter From FM to Judge Frank Picard, March 21, 1940, Box 89.

28. The Washington Star, Feb. 17, 1940. The Brooklyn Eagle, Feb. 27, 1940. Letter from FM to Charles Evans Hughes, Feb. 28, 1940, Box 89.

29. The N.Y. Times, March 1, 1940, p. 12:6.

30. FRANK, MR. JUSTICE BLACK 108 (1949). Letter From FM to Leo T. Butler, Feb. 28, 1940. Box 89. KING, LINCOLN'S MANAGER, DAVID DAVIS 191, 201 (1960).

"To one like myself, who always thought of the Court as something venerable even though human," he added to Claude G. Bowers, "it is a strange, indescribable thrill to share in this work. I believe I am beginning to appreciate the magnitude of the responsibility that it entails, and I wonder all the more at the faith that the President and friends like yourself have placed in me. It is a new sea, and I do not know where my course will take me, but a 'mighty effort.' "[31] Murphy made his "mighty effort," but powerful feelings of inadequacy had potent and unexpected effects on some of the great civil liberties landmarks of the day.

III.

Perhaps the most striking instance of a "freshman effect" is the very case which did so much to establish Murphy's reputation as a "libertarian activist," *Thornhill v. Alabama.* In his first major opinion and its companion, *Carlson v. California,* Murphy launched one of the Court's boldest and most controversial experiments with freedom of expression—the doctrine that constitutional guarantees of free communication include peaceful picketing.[32] The picketing doctrine, which was undoubtedly his foremost single contribution to the development of the first amendment, justifiably caused commentators to place Murphy in an ideological niche. Both the State of Alabama and Shasta County, California, had made it a misdemeanor for anyone to go near, to loiter, or to picket a place of business without just cause or legal excuse. Though no question of the peaceful, truthful, or limited character of the picketing existed in either case, Thornhill had been convicted for asking a worker not to cross a picket line and Carlson for carrying signs. When the convictions were appealed with AFL assistance, the Supreme Court responded with three unusual steps.

First, instead of merely reversing the convictions, the Court nullified the ordinances "on their face," on the theory that they were so broadly prohibitive of free speech as to amount to a prior restraint. Second, the assumption which established the Court's jurisdiction, that peaceful picketing is a form of communication, Justice Murphy made explicit in broad libertarian terms. "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial

31. Letter From FM to Claude G. Bowers, Feb. 28, 1940. Box 89.

32. Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940). Contrary to general impression, Murphy's first published opinion was in Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n, 309 U.S. 560 (1940), though *Thornhill* may well have been his first assignment.

society," he declared.[33] In the circumstances of our times, as the Court ruled in *Carlson*, "publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as the liberty of communication which is secured to every person by the Fourteenth Amendment. . . ."[34] Finally, while reserving judgment as to the scope of state power to regulate picketing by narrowly drawn statutes aimed at specific evils, the Court offered the clear and present danger test, as strictly conceived by Justice Brandeis in *Whitney v. California*, to measure the breadth of this newly federalized freedom.[35] Justice McReynolds alone dissented without opinion.

The picketing decisions, though their outcome was expected, were a *tour de force*. Rendered with surprising unanimity, their language and effect were revolutionary. Prior to the decision it was problematic whether picketing was even legal in many states, let alone a federal constitutional right. While a generation of union efforts had preceded the decision with mixed results, and while Justice Brandeis in 1937 had dropped a famous dictum that picketing might be speech, the question of limits on state power was fresh. The *Thornhill* decision thus not only enlarged the concept of speech, but also federalized "the voice of labor," and made picketing a matter of constitutional import, all at the expense of traditional state rules.[36]

Furthermore, the opinion contained significant seeds for the development of civil liberties law generally. For the first time the Court applied the clear and present danger test beyond the problem of seditious utterance for which it was designed. The opinion also embraced the concept that the social value of ideas justifies their constitutional status, a concept which became a double-edged sword in subsequent censorship cases. And it strengthened a new stream of precedents which nullified overly-broad statutes affecting free speech "on their face."[37] This form of analysis, which was then in vogue, one suspects, largely because of Chief Justice Hughes, made serious inroads into the Court's requirement of standing, by relieving the challenger's burden of proving that a statute was unconstitutional as applied to him. All told, the Justices were clearly departing from their normal precautions of saving statutes by confining them to the

33. Thornhill v. Alabama, 310 U.S. 88, 101-03.
34. Carlson v. California, 310 U.S. 106, 113 (1940).
35. Whitney v. California, 274 U.S. 357, 376-77 (1927).
36. Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180 (1942). See also Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937); Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037, 1054 (1943).
37. See Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939). *Cf.* Whitney v. California, 274 U.S. 357, 358 (1927) (Brandeis, J.); Stromberg v. California, 283 U.S. 359, 368, 370 (1931).

facts or by reading into them high standards of intent. The decisions, as the *Washington Post* and *The Nation* then observed, were of "far reaching importance." "Justice Murphy has made a fine debut."[38]

Precisely because such sweeping decisions came so early, and produced such subsequent controversy, the picketing cases supported common assumptions that Justice Murphy followed "Jacobinism and class consciousness" without regard to competing values.[39] The libertarian character of the cases, however, cannot be explained merely on the ground that the Justice was so dim-witted or so ideologically obsessed that the issues were not understood. However justifiable the criticism of *Thornhill*, and much of it was, the case is a relatively poor example of how "hyperactive concern for individual rights" can lead to folly.[40] The *Thornhill* decision is better comprehended as a case of misunderstood intent, a problem not uncommon for constitutional innovations where great forces stand to win or to lose large stakes. *Thornhill* also provides a classic illustration of a freshman Justice at work and how his very newness on the Court may influence judicial decision. In the picketing cases, the Supreme Court faced a dual task of adjusting concepts of liberty to the industrial age and of assimilating a new member to itself. That the two were related in fact demonstrates anew the complexity of the judicial process.

An aftermath of misunderstood intent was perhaps inherent in the substantive dilemma of the case. How could the element of communication in picketing be defended without weakening state power to preserve other interests? Despite their neglect in subsequent debates, the facts as presented by union counsel did not permit easy avoidance of the question whether peaceful picketing was sheltered by the Constitution. Thornhill had been arrested after seven weeks of unmolested picketing during a strike; arrest came only after he had asked an employee not to cross the picket line; and only Thornhill, the union leader, had been arrested. There was no violence, no sign of intimidation, and no immediate threat of injury. There had been only, as Chief Justice Hughes argued in conference, an effort to persuade. The Alabama Supreme Court had construed Thornhill's verbal appeal, nonetheless, as proof of the harmful intent which was an essential element of the statutory offense. A clear consensus developed among the Justices, as the case was discussed, that state power to regulate labor relations had been used to cloak a suppression of free speech and that the Court had a duty to intervene against what the Chief called "arbitrary legislation."[41]

38. 150 THE NATION 553 (1940); The Washington Post, April 23, 1940.
39. Hutcheson, Book Review, 30 A.B.A.J. 106 (1944).
40. PRITCHETT, THE ROOSEVELT COURT 285 (1948).
41. Conference notes, undated, No. 514, Box 129.

The only basis of intervention was the fourteenth amendment. Because of the sensitivity of recently appointed Justices to past restriction of state regulatory power by that route, however, consensus also formed that this new limitation on state authority should be held to a minimum. The intent of most Justices, beyond question, was to protect the communicative aspect of picketing while leaving the abuses of speech and the evils of the practice under traditional state control. "Our job as I see it," Justice Murphy noted to his clerk, "is to write a reversal without serious prejudice to the police power of the state which I believe is imperative to safeguard without unduly curtailing the right to free expression."[42] The real question was how.

To state the general proposition was easier than to accommodate the interests at stake. Compounding the problems ordinarily presented by a delicate question of public policy was the fact that he was new to the decisional modes of the Court and, in a sense, abnormally on his own. While the assignment itself probably had resulted from his labor experience and the tradition that new Justices cut teeth on the case of their choice, the same tradition also would soften internal criticism normally to be expected in a case of such moment. Labor experience would be of little real value to the precise issue. Neither, for that matter, would rich experience in law. Close precedents did not exist. Though he had no serious objection against using it, the Justice recognized that Brandeis' *Senn* statement was "dictum only" and not precisely apposite.[43] All he had for guidance were the general sense of conference and analogous cases of overly broad ordinances governing handbill circulation and radical activities.

Cautious before an important issue of national policy, on the one hand, and personally diffident on the other, the Justice improvised for *Thornhill* a system of decision within his office which established a pattern for the "big cases" until about 1943, when confidence fully returned. This pattern of decision was at once a revival of past techniques, with its heavy delegation of authority, and a microcasm of the Supreme Court at work. The pattern was unusual, not only because of its heavy reliance on others, but also because on a few occasions Murphy even resorted to help from outside the Court, especially from his life-long intimate, most trusted confidante, and Washington roommate, Edward G. Kemp, whose views, in the half-dozen or so cases in which he was consulted, bore a strong resemblance to those of Chief Justice Stone.[44]

42. *Ibid.* Note From FM to clerk, dated April 1940, No. 514, Box 129.
43. See note 37 *supra.* Marginal note on draft opinion, No. 514, Box 129.
44. Consulting Kemp raises a touchy normative issue in an adversary system, in

The normal sequence was that Justice Murphy, after discussing the case at conference and with his clerk, would set the clerk to writing on the basis of general direction in notes and memoranda prepared by himself. After soliciting criticism from the clerks, other Justices, and occasionally from Kemp, Murphy would circulate the usual draft opinion among the Justices for the same process to begin again. His major opinions thus were collegial in a double sense. The clerks were chiefly responsible for research and the details of writing under his supervision. Kemp was used, as Murphy always had used him, as a conservative foil and as a guard against his own impulsiveness. Rarely, if ever, did Kemp's views influence the outcome. Murphy kept the power of decision to himself. His role as a Justice, though he invited a remarkable degree of internal debate among his staff, was the role which he always had carved for himself—to make the policy decision and then to persuade. In his freshman years, particularly, his office resembled a kind of miniature court, in which a dialogue of opposing views was encouraged, before the Justice committed his vote or his pen. His very diffidence as a newcomer made him all the more attentive to the differences of opinion which he stimulated in order to avoid error. The very strength of his consciousness as a fledgling judge weakened whatever ideological compulsion has been thought to exist. Judging, for Murphy, was an agonizing process.

Though a full reconstruction is impossible because identities have not been preserved, the process of self-persuasion had important consequences for the picketing doctrine. The problem of the case, as perceived by the opinion drafters, was not one of selling a public policy, but how to fulfill the official task of translating a general consensus about a result into a workable balance of interests. That problem rapidly reduced itself to establishing the precise nature and scope of the right on which Thornhill's reversal could be justified. Was it an assembly, was it free speech, or could reversal be placed on a lesser and safer ground? Drafting the opinion became a process of choosing among alternatives, each championed by a different spokesman around the Justice, and each to a certain degree distasteful.

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one sense more serious than the Justice's commonly assumed dependence on law clerks, because Kemp was also general counsel of the Budget Bureau. Besides *Thornhill* and *Meadowmoor* mentioned here, Kemp criticized Murphy's draft opinions in Schneiderman v. United States, 320 U.S. 118 (1943); Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1943); and Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1944). Only in the latter, in which Kemp drew from special competence gained as Murphy's legal adviser in the Philippines, can any influence be detected, and that concerned mainly technical trade information available from the government rather than the "policy" decision before the Court. In all these cases, the Justice voted and wrote counter to Kemp's advice.

The result, as frequently occurs for the Court as a whole, was an opinion that suffered not so much because it played policy favorites as because it was divided unto itself.

Upon receiving the case, the Justice provided his clerk with a general outline of his views, which were inchoate. Then he fished for bait. "We ought to review the true nature and extent of the right of assembly," he wrote. "Does it include picketing as we know it?"[45] With the clerk's reply on March 30, 1940, the real debate was on. The clerk replied:

> I agree entirely on the necessity of writing so as not to prejudice the power of the state to keep the peace and set limits to the rights of contestants in an industrial dispute. The historical right of assembly *may not* include picketing. I doubt that it does. It occurs to me, however, that no right of *assembly* is involved where the statute is *construed* so as to apply to *one man speaking to another in a public street.* The presence of two is an essential to any freedom of discussion. Can we not avoid the extremely difficult point you raise? It seems to me that the right of assembly is less well defined than any other.[46]

In the clerk's view, reversal could be justified on two possible grounds: (1) the fact that guilt turned on purpose rather than on conduct, or (2) the fact that "petitioner is not being punished for picketing, but for speaking." By concentrating on speech, the Court could narrow the opinion by the usual disclaimers, and avoid the larger question of state power to control picketing as such.[47] Apparently the Justice accepted the proposals, and the opinion began to be drafted on that basis, with Murphy also writing some broad rhetorical paragraphs, which he ultimately discarded, to establish his credentials in the "Great Pulpit."

When the first draft was completed, however, sober second thoughts set in. "I still think the act of speaking was only evidentiary of the purpose or intent that made the picketing unlawful, not the offense itself," came a rebuttal to the clerk's theory from an unknown critic, who might have been another Justice, but who sounded like Kemp. "You still have the problem whether the state can prohibit picketing, and it seems dangerous to view it (as union counsel would like) merely as a question of free speech. . . . It is unrealistic too. The decision would become a virtual bar to the effective exercise of public authority in these matters." How could the Court reverse without ignoring the fact that the statute did not outlaw speech or picketing as such but only picketing accompanied by specific intent to harm?

45. Note From FM to clerk, April 1940, No. 514, Box 129.
46. Note From clerk to FM, March 30, 1940, No. 514, Box 129.
47. Unsigned memo, March 30, 1940, No. 514, Box 129.

How could the Court reverse without also ignoring the fact that Thornhill was picketing as well as speaking? Worse still, how could the Court reverse without immunizing all conduct accompanied by utterance from effective state control?[48]

Presumably, the Justices in voting for reversal had rejected this either-or view of the problem. But the rebuttal, which closely resembled Alabama's position, was so clearly at odds with the theory of the draft opinion that Justice Murphy became worried. Broadening the consultations, he suggested visits by the clerk to Justice Stone and even to the retired Justice Brandeis, "if convenient," to help resolve doubts. The Justice took soundings himself, and in a long note to the clerk, he indicated the depth of his concern. "The opinion as drafted seems to me to be predicated upon a misconception of the true nature of the offense charged & the evil at which the statute is directed," he wrote. "I am not sure of this but am disturbed by it."

> Are we to assume that the act complained of and prohibited was the act of speaking to a prospective employee, informing him there was a strike and saying that they didn't want anyone to go in there and work? Counsel for def. astutely drew our attention to that feature of the defendant's conduct to the virtual exclusion of the other features of the case and the main purpose of the statute.
>
> Whether the mere act of speaking to a prospective worker, for the purpose prescribed by the statute could itself be made a penal offense or enjoined without infringement of the broad fundamental right of free speech it is hardly necessary to decide.
>
> Wasn't the actual offense loitering and picketing, for the purpose, etc.? And wasn't the conversation evidence only of the intent or purpose—I don't know—but we ought to answer this in our own minds before we get on to the wrong track. . . .
>
> Read the provisions of the British Trade disputes and Trade Union Act of 1927. Of course the reference to intimidation in this act *is important*— But what about Legislative prerogative? Are we getting off onto a novel doctrine?
>
> I am moved by Brandeis, great champion of labor unions in *Duplex v. Deering*. You will recall his admonition that it is the duty not of the judges but of the legislature to declare the limits of permissible contest and to declare the duties which the new situation demands. To go so far as to say that legislatures may not regulate the practice of picketing in the public interest because of *incidental* infringement on free speech and assembly, in an area of dispute, may be to extend Constitutional guarantees far beyond reasonable limits. I am not at all sure of this but we must think straight & clear about it.

Then came the fateful question of the Roosevelt Court:

48. Unsigned, five page memo, March 30, 1940, No. 514, Box 129.

> Are we moving—in our desire to maintain free speech and assembly—the freedoms concerning which in my thought and actions I place above nearly every other consideration—in the direction of paralyzing popular government and making democracy if we go the full length—of such logic—ridiculous and impotent?
>
> The notes you have prepared are careful & I believe correctly express the view adopted by the court in conference. But if on second sober breath we can steer this case away from the pitfalls & still keep fidelity to the freedoms that is just what we ought to do.[49]

To avoid the pitfalls required additional efforts to limit the new principle. The first problem was to describe the scope of affected conduct. Picketing, as the Justice noted during his conversations, "is a variable term," covering behavior that ranged from informational protests to outright coercion. While the opinion nowhere expressly equated all picketing and free speech, was it safe to leave implicit or in footnote references the Court's cognizance of those variations? "Haven't we got to analyze picketing?" the Justice asked. Some solace could be found, of course, in listing examples of conduct, *e.g.*, picketing en masse, which the Court had no intention of wresting from state control; and Murphy's second draft added several which were the very ones that the Justices, after much travail, later outlined.[50] Yet, how could either picketing or its evils be so precisely defined without deciding cases not before the Court?

A second and related problem was the remedy for the indefiniteness of Alabama's statute. The basic flaw, by common consensus, was its absolute character, its failure to distinguish the coercive aspects of picketing from harmless forms; and toward the final phase of drafting, greater attention was focused on this aspect of the case. "I agree," Murphy told his clerk, "that *part* of the answer is insistence on statutes precisely framed & free from nebulousness when they undertake to set limits on a citizen's right of expression."[51] That insistence had the additional advantage of being in the stream of recent precedents, such as *Lovell v. Griffin*, which nullified unrestricted public authority to license handbill distribution without up-

49. Handwritten memos From FM to clerk, undated, No. 514, Box 129.

50. Handwritten Note, undated. His marginal criticism of the second draft contained an addition in his hand to foreclose any implication that "picketing in such numbers or otherwise conducted to present a threat of violence or injury or [which] constitutes annoyance or substantial interference with the right of privacy or free exercise of other rights may not be regulated by a statute narrowly drawn to cover the precise situation." No. 514, Box 129. The irony is that, after much disputation in which he also took part, the picketing doctrine has been narrowed to a fairly similar status. See International Bhd. of Teamsters v. Vogt, 354 U.S. 284 (1957); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court of California, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

51. Handwritten Note From FM to clerk, undated, No. 514, Box 129.

setting it when narrowly focused.[52] The parallel Murphy regarded as clear because he believed an irreducible element of censorship was involved in Alabama's wholesale prohibition of picketing. Moreover, he was attracted to the notion that the Court ought to void overly-broad ordinances affecting free speech "on their face." After all, if a statute admitted no exceptions, the whole people would be restrained by its coercive effects as much as the petitioner; and how better could the Court induce states to take a less disastrous alternative than to nullify their blanket prohibitions outright?[53]

Still, Murphy had long advocated the clear and present danger test as the "true course" to follow in dilemmas of liberty versus authority, and *Thornhill* offered an opportunity to advance a revival of the test already begun in *Herndon v. Lowry*.[54] The problem, he conceded, was essentially one of balancing interests. Where states failed to do so, the remedy was judgment "on the face." Where closer situations occurred, clear and present danger would provide an ample guide to mark the boundary of individual freedom and state power. That mixture, however, was the rub. Out of zeal to explain both the principle and its limits as a total problem, the Justice left uncertain the essential basis of the particular judgment. Was Thornhill's conviction reversed because the statute was overly-broad, because his speech in fact had been suppressed, or because his behavior contained no threats of immediate injury? Janus-faced, the opinion which Murphy circulated among the other Justices was all three.

That fact, perhaps as much as the courtesy which Justices traditionally extend to new colleagues, accounts for the opinion's unruffled reception when circulated among the others. The opinion contained something for everyone. Only Justice Stone raised serious criticism, and even his was not directed to the basic premise that picketing was speech and therefore constitutionally regulated. While encouraging Murphy in making painstaking analysis, Stone had misgivings mainly about the wisdom of nullifying the statute on its face. It is doubtful that Justice Stone had favored inclusion of that procedure in the first paragraph of his *Carolene* footnote, and this case illustrated the reasons for hesitation.[55] To void an ordinance on its face meant that it could never be applied to anyone under any circumstances, but Stone had no difficulty imagining conduct to

52. See note 37 *supra*. See also Stromberg v. California, 283 U.S. 359 (1931).

53. Note, 61 HARV. L. REV. 1208 (1948).

54. 301 U.S. 242 (1937). *The Test of Patriotism*, 2 NAT'L LAW. GUILD Q. 165-70 (1939).

55. Letter From Harlan F. Stone to FM, April 19, 1940, No. 514, Box 129. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). MASON, *op. cit. supra* note 1, at 793; Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 580 (1948).

which Alabama's statute could be applied. What, for example, if Thornhill had picketed in order to throw a brick? Here, of course, he thought some measure of free speech was involved because Thornhill spoke while walking up and down, and Stone was inclined to go along with the reversal on the basis of the Court's analogous conclusion in the *Stromberg* case. But preferring an opinion closer to the facts, he withheld agreement until assured that no one else had similar reservations.[56]

No one did. Four Justices—Hughes, Stone, Frankfurter, and Douglas—did object to Murphy's casual assertion that the workers' interest in industrial conditions "transcended" that of employers. To make unnecessary comparisons would have been a serious tactical error, as Justice Stone cautioned, by inviting criticism of social predilections and by rubbing the fur of employers the wrong way.[57] But a quick patch suggested by the Chief Justice overcame that transgression, and the case went to conference. "Well we are ready to proceed with our mutton," remarked the Chief, who seemed to be the driving force against the statute; and after Stone acquiesced, the Court agreed to accept language mutually agreeable to Justices Black and Murphy to express the result in *Carlson v. California.*[58] The only significant change wrought by the processes of collegial thought during circulation of that opinion was deletion of Murphy's string of examples of conduct on which the Court expressed no opinion in favor of a tighter, general statement that state power to control specific evils by narrowly drawn statutes remained untouched.[59]

Otherwise, no record exists in the Murphy papers that any Justice protested the conceptual basis of the picketing decisions, whether the association of picketing with speech or the clear and present danger test. No record exists that any Justice questioned the fusion of multiple analytical strands to link the doctrine to the small array of precedent available. And no record exists to suggest that other Justices besides Stone and McReynolds considered the Court's action to be precipitate. "I cannot agree! but I do not care to expand dissent," Justice McReynolds commented. The rest was a chorus of approval across the judicial spectrum. "A fine piece of work," "a grand expression of noble governmental policies," was the response of recent Roosevelt appointees; but Justice Roberts' reaction differed little: "Yes, sir! A carefully balanced and discriminating treatment

56. Letter From Harlan F. Stone to FM, April 19, 1940, No. 514, Box 129. Stromberg v. California, 283 U.S. 359 (1931).

57. *Ibid.* Comments on first circulated slip opinion, No. 514, Box 129.

58. Conference Note, April 20, 1940, Box 90; Undated Note From FM to clerk, No. 514, Box 129.

59. *Ibid.* Draft opinion, No. 667, Box 129.

of this troublesome subject."[60] The consensus of the Court seemed to be expressed by the Justice who wrote on his *Carlson* slip opinion:

> This gives me a chance to say what I put very inadequately on the *Thornhill* opinion—that this is work of the very best judicial quality. It decides extremely important issues fearlessly but also circumspectly, in language that rises to the heights of the great argument, appropriate to the profound issues canvassed & the best traditions of the Court. I warmly congratulate you & rejoice to be with you.[61]

Most striking, in view of the aftermath, was not what the other Justices said in reviewing the *Thornhill* opinion, but what they did *not* say. Even discounting their friendly encouragement to a newcomer, even discounting their jockeying for his future support, the response of Murphy's colleagues made it difficult to believe that they were seriously dissatisfied with his attempt to strike a judicious balance between individual freedom and state control.

If the foregoing proposition is accurate that the Justices at the time considered the *Thornhill* opinion to be sufficiently guarded, seldom have they miscalculated more. Denounced by eminent authorities as "quixotic," as "one of the greatest pieces of folly ever perpetrated by the Supreme Court," *Thornhill* has met criticism seldom equalled since 1937.[62] Scarcely an aspect of the opinion, whether judging "on the face," limiting state law, or the public information premise, has escaped scholarly attack save the one of most contemporary interest—the casual application of the fourteenth amendment to private property. Thornhill had been picketing in a company town.[63]

It is not our purpose to revive the sound and fury which the decision provoked, particularly the subsequent "jurisprudence by epithets" among scholars based upon assumptions that picketing was either pure speech or pure coercion.[64] From the perspective of a quarter century, it is clear that the Justices assumed otherwise and that their problem, accordingly, was how to draw lines. Given the nature of the economic interests and of the governmental relation-

60. Comments on final circulation, No. 514, Box 129.

61. Slip opinion No. 667, Box 129.

62. PRITCHETT, *op. cit. supra* note 40, at 285. GREGORY, LABOR AND THE LAW 328 (2d rev. ed. 1958).

63. See, *e.g.*, Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951); Green, *The Supreme Court, the Bill of Rights, and the State*, 97 U. PA. L. REV. 608, 624 (1949); Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191 (1950); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180 (1942).

64. Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023 (1953). See Jaffe, *supra* note 36, at 1054. Cox, *The Influence of Mr. Justice Murphy on Labor Law*, 48 MICH. L. REV. 767, 774 n.28 (1950).

ships at stake, the doctrine was bound to be controversial; given the magnitude of the constitutional breakthrough, a degree of confusion regarding its sweep was not unusual. Refinement case by case, as well as reading more into the opinion than it contained, were inevitable. However, it is also clear that the opinion itself was partially, though not exclusively, responsible for the ultimate surgery it received. For the *Thornhill* opinion could be interpreted either as merely condemning blanket restrictions on picketing or as investing the practice with such constitutional status that it was removed from all local regulation except under conditions of clear and present danger, which proved to be an elusive test. Even so, that weakness can hardly be explained as an accidental convergence of a doctrinaire Justice and a freshman status which led his colleagues to drown their misgivings in the customs of the Court.[65] The main difficulty with *Thornhill* was not that no attempt was made to guard the opinion, but that it was made by a Justice who was unsure of himself and caught in a complex crossfire between rival doctrines and powerful personalities, both among older Justices and the new. The main problem of craftsmanship in *Thornhill,* one is tempted to say, was that Justice Murphy was trying too hard.

IV.

And so it went for the next several months. Murphy entered the Court greatly agitated over the military unpreparedness of the United States and "sickened with the apathy of our people."[66] He also arrived fresh from battle and a mass education campaign to set a balanced civil liberties policy for a period of national emergency. But a series of Jehovah's Witness cases, which placed both values in conflict, seemed to disquiet well-settled views. In the *Gobitis*[67] case, for instance, Murphy did not share the belief of Hughes and certain New Deal Justices that the framers would have considered the compulsory flag salute inoffensive to the first amendment. His first reaction was to prepare a dissent on the ground that so "officious and unnecessary" an intrusion on religious conscience could only be made under national emergency power in direst extremity; but his policy orientation was so blatant and untenable as a legal proposition that he held his tongue.[68] Apart from the appeal of "self-restraint," the

65. Wallace Mendelson has explained the absence of qualifying opinions on this ground. Mendelson, *Neo-Behavioralism—A Rebuttal,* 57 AM. POL. SCI. REV. 951, 952 (1963). See note 32 *supra.*

66. Letter From FM to Joseph R. Hayden, April 9, 1940, Box 90.

67. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). "Observations of Chief Justice Hughes," April 25, 1940, No. 690, Box 129.

68. Handwritten draft, No. 690, Box 129.

controlling factor in Murphy's acquiescence seemed to be that the petitioner merely sought reinstatement into a public school following expulsion for refusing to salute. Had a penalty for truancy attached, a far more serious question would have resulted, along with a response that foreshadowed his subsequent confessional in *Jones v. Opelika* and *West Virginia Board of Education v. Barnette.* Even in 1940, Justice Stone's discussion of accommodating interests struck Murphy as "sensible."[69]

On the other hand, while Justice Murphy approved absorption of the right of free worship into the fourteenth amendment in *Cantwell v. Connecticut,* he drafted a concurrence expressing the view that Justice Roberts' opinion inadequately preserved state authority to control group coercion and public fighting by religious sects. He was willing to join the opinion on the question of licenses, he said, in contrast to the *Terminiello* situation of 1949, only because it lent no countenance "to the view that verbal attacks on particular races or creeds, inciting violence and breaches of the peace, have the sanction of the Constitution." Yet this opinion, too, he withheld after Justice Roberts strengthened references to state licensing power and his clerk advised that he "should not give the appearance of making a speech about civil and religious liberties especially in view of the fact [that] you already have expressed your stand on these matters in the Thornhill case." "There is always danger," the clerk cautioned, "that a casual expression, intended to give the State power to control street fighting, may be used by an unfriendly court to deprive minority groups of all freedom of expression."[70]

While Murphy's recent experience as Attorney General made him sensitive to problems created by religious disorders, competing impulses to safeguard liberty, as well as uncertainty as how to make his influence felt, threw him into real ambivalence. Slowly, the Justice was learning his trade throughout the first term, but indecisiveness was the main result, along with plain discomfort. At the beginning of the summer recess, he could hold his feelings no longer. Offering the President his services rather than taking a vacation, he wrote Roosevelt:

> My faith is of the militant kind. . . . It has been my hope that you would go forward with your original plans for me. But I myself would want those

69. Typed draft and unsigned, undated memo, No. 690, Box 129. Jones v. Opelika, 316 U.S. 584, 641 (1942); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943). Marginal note, slip opinion, No. 690, Box 129.

70. Cantwell v. Conn., 310 U.S. 296 (1940); undated draft concurrence; clerk to FM, May 3, 1940. Justice Stone also would have concurred regarding state licensing power, but decided not to after Justice Roberts deleted sections of the opinion which questioned whether state regulation of solicitation constituted a prior restraint. Copy Stone to Roberts, May 2, 1940, No. 632, Box 129.

> plans changed if it were in the country's best interest to do so. You must be free in judgment. You will be best served by men of humility and a will. You have always done me more than justice. You owe me naught. I am your debtor.[71]

Although the President found him no errand that summer, Roosevelt apparently gave serious consideration to re-appointing him Attorney General or as High Commissioner to the Philippines in 1941.[72] Murphy probably would have accepted the former position, though he agonized long about it; but in the end neither opportunity came. The result was a Justice who became resigned, and then reasonably happy on the Court, but in the intervening months of the 1940-1941 terms, the pattern of equivocation and vacillation resumed.

In the *Meadowmoor Dairies*[73] case, for example, which was the first opportunity to test the reach of the picketing doctrine, the Justice itched to write in defense of *Thornhill* when the majority of that case split for the first time. There, in an opinion by Justice Frankfurter, the Court upheld state power to enjoin picketing, in itself peaceful, after prolonged violence had occurred in a dispute. Although Murphy voted in the majority against Justices Black, Reed, and Douglas, he was dissatisfied with the draft opinions of both Frankfurter and Black, whom he thought manifested "judicial jitters." "Both opinions," he told his new clerk, "are eloquent and emotional and as I view them not in good order." Justice Frankfurter, in his judgment, was excessively cautious about stressing the facts of violence. Justice Black, he believed, minimized that violence and distorted the injunction in order to fit it under *Thornhill* and *Carlson*. Neither, he thought, adequately applied the governing principles of those cases to the situation at hand. "We might even do it ourselves," Murphy hinted, to "indicate their true scope and meaning."[74] Quite simply, he believed, *Thornhill* confirmed rather than denied state power to control picketing in circumstances of violence.

Setting the wheels in motion to write, the Justice stimulated another debate in his own camp, which ranged from Kemp's unreconstructed argument that peaceful picketing was not synonymous with free discussion to doubts akin to Justice Black's, whether peaceful picketing, even when entangled with past violence, could be en-

71. Letter From FM to FDR, June 10, 1940. Franklin D. Roosevelt Library: Official Files 41A, United States Supreme Court.

72. Unsent Letter From FM to FDR, July 28, 1941, Box 98. Letter From FM to FDR, December 22, 1941. Roosevelt Library, Official Files 400—Philippine Islands. Copy, Telegram From Manuel Quezon to Michael Elizalde, June 16, 1941, Box 97. Letter From Joseph R. Hayden to FM, June 4, 10, 1941, Box 97. *Cf.* BIDDLE, *op. cit. supra* note 12, at 164-165.

73. Milk Wagon Driver's Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

74. Note From FM to clerk, undated, No. 1, 1940 Term, Box 129.

joined when other remedies were adequate to protect the interests of employers and of the state.[75] The advice of his clerk, heavy as it was with *real politik*, kept the Justice quiet. Despite his lament that the Justice's junior position had lost him the assignment, the clerk advised him frankly not to waste his eminently strategic position by adding another opinion to those of Justices Frankfurter, Black, and Reed. Said he:

> All three will try to woo you. Wouldn't it be better to work out your own views? Then pick the opinion that comes the closest. Then start work (a la Stone) on that. The name of Murphy in this case means much. It adds great weight to the opinion bearing it since you wrote Thornhill. I'd act accordingly.[76]

Needing little encouragement, Murphy went quietly to work on Justice Frankfurter, whose opinion he thought basically "followed a sound legal path." The fruits of one of his first efforts at internal "bargaining" were sweet. Though anxious to avoid words that might heat up the atmosphere, Justice Frankfurter was willing to absorb Murphy's suggestions into his opinion.[77] "We do not qualify the *Thornhill* and *Carlson* decisions," he wrote for the Court. "We reaffirm them." "Peaceful picketing is the workingman's means of communication. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." The pattern of violence here was "precisely the kind of situation which the *Thornhill* opinion excluded from its scope."[78] No one could doubt the power of a state to protect the public peace and welfare.

Notwithstanding his libertarian "image," Murphy began his Court career with that principle fully in view. While its concrete translation was still imprecise, both in his mind and in the Court's articulation of it from case to case, there can be no doubt that, as the Justices began to explore the reaches of the first amendment, Murphy was operating on relativistic premises. While the judiciary had "no more solemn duty" than to protect freedom of utterance, he then wrote in an unpublished passage, "that guarantee, while precious, is not absolute at all times and places, and all circumstances." While the Constitution afforded individual action wide latitude, he asserted in *Gobitis*, "in all things that are essential and appropriate for the maintenance of an orderly and healthy society and the protection

75. Note From Edward G. Kemp to clerk, Feb. 7, 1941; Note From clerk to FM, Feb. 10, 1941, No. 1, 1940 Term, Box 129.

76. Note From clerk to FM, Feb. 7, 1941, No. 1, 1940 Term, Box 129.

77. Note From FM to clerk, undated; Letter From Felix Frankfurter to FM, Feb. 7, 1941, No. 1, 1940 Term, Box 129.

78. 312 U.S. 287, 293, 297 (1941).

of public morals, the acts of the individual are subject to the will of the group."[79] That he was not more vocal in articulating his restrictive side was a function of the same factors at work in *Thornhill*, now operating in reverse—his unsettled outlook as a newcomer and the interplay of principle and of personality on the Court. But the fact is that Murphy, throughout his first two terms, acted on a dual theory of the free speech problem. Some words, such as "group defamation," were inherently "bad"; all others were situational. Not only had his picketing opinions expressly exempted from their scope graduated ordinances aimed at specific evils, but his behavior in *Cantwell* and *Meadowmoor* was intended to strengthen that principle. Even when the Court dismissed *Thornhill* as irrelevant in *Cox v. New Hampshire*, which sustained licensing of religious parades, he joined in approving retroactive narrowing of the ordinance in order to squeeze it under the *Cantwell* rule.[80] His two main opinions in the 1941 term, moreover, were attempts to bolster public power all the more.

In *Chaplinsky v. New Hampshire*, an easy case involving a Jehovah's Witness who cursed a public officer, two restrictive themes of *Thornhill* actually dovetailed. Dismissing the claim to free worship out of hand, Murphy gave vent to some remarkable assumptions for an "absolutist." Of the free speech claim, he wrote:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or intend to incite an immediate breach of the peace. It has been well observed that such utterances are no central part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[81]

Argument was simply unnecessary that these epithets fell into the class of "fighting words." Yet, what was the difference between them and the equally provocative insults used by Jehovah's Wituesses and fringe political groups which the Justice later voted to shelter? The *Chaplinsky* opinion, which was considered "well-executed" by

79. Unpublished, first circulated opinion, p. 11, NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941), No. 25-26, 1941 Term, Box 130; handwritten draft in Minersville School Dist. v. Gobitis, *supra* note 68.

80. Cox v. New Hampshire, 312 U.S. 569, 578 (1941).

81. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

his colleagues, has been cited frequently in support of less obvious censorship cases—and rightly so. Murphy's dismissal of certain words as inherently bad rested on the same assumptions of social value and of state control which he expressed in *Thornhill*, which have justified censors from time immemorial, and which both he and the Court, in other circumstances, later repudiated. Even though similar premises reign explicitly in the obscenity field and implicitly elsewhere, it was early, not late Murphy that gave them voice.[82]

No better example of the contrast exists, for all its "pro-labor" overtones, than *NLRB v. Virginia Electric & Power Co.*[83] In that case, which presented the Court's first opportunity to reconcile the first amendment and the Wagner Act, Justice Murphy was all set to advance *Thornhill's* restrictive force. To counter implications that the rights of workers and employers might differ, his draft opinion went out of its way to assert that picketing was subject to reasonable regulation or even outright prohibition as circumstances might require. Legislation fairly aimed at substantial public evils, he wrote—"and only so far as the necessities of the case require"—could not be nullified by the "mere circumstance" that "freedom of utterance is incidentally and indirectly curtailed." Otherwise, legislative power to protect any other social interest would be paralyzed.[84] The message was muffled, however, out of necessity of "massing" the Court.

The *Virginia Electric* case, for ample reason, was one of Justice Murphy's most difficult, ambiguous, and yet important opinions. In contrast to *Thornhill*, no consensus existed beyond the general proposition, which he freely expressed, that "language which merges with conduct does not necessarily place that conduct beyond legislative reach." Even a clear disagreement as to the facts, which characterized *Meadowmoor*, failed to emerge. Enmeshed with the free speech question raised by the company's bulletins to its employees were other issues regarding the agency's findings of company discrimination as well as its authority to order back wages and the disablement of a company-dominated union. All these issues fragmented the Court into several directions. Older Justices, such as Stone, who viewed the facts as close, stumbled at the threshold question of company domination even before reaching the free speech problem. Justice Byrnes, who manifested the typical discomforts of a rookie out of step, was admittedly off-tangent on the wage issue. And a sharp division developed between Justice Frankfurter and the rest

82. Comment on slip opinion, No. 255, 1941 Term, Box 130. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUPREME COURT REV. 1, 9.

83. 314 U.S. 469 (1941).

84. See note 79 *supra*.

of Murphy's majority, Justices Black, Reed, and Douglas, regarding the Board's finding that the company bulletins constituted an unfair labor practice "on their face."[85] The multiplicity of issues meant that Murphy's task, in contrast to earlier opinions, was not merely to express a consensus, but to find one—to assemble a majority and to keep it intact. The inevitable price was sacrifice of his own views.

To Murphy, the problem of reconciling the *Thornhill* doctrine and the Wagner Act was not inherently difficult. Distinguishing *Thornhill* as a condemnation of blanket prohibitions on speech, he treated the *Virginia Electric* problem as simply another example of the exclusionary theme of *Thornhill* and *Cantwell.* And leaning heavily on Judge Learned Hand's analysis of the free speech issue in the *Federbush*[86] case, he wrote a lengthy opinion in support of the Board's judgment, which Chief Justice Stone and Justice Frankfurter rightfully criticized for resembling fact-finding rather than judicial review.[87]

The sticking point was the fact that the NLRB had found the company bulletins advocating company unionism to be coercive "on their face." Justice Frankfurter, in a series of incisive memoranda, objected strenuously to basing the Board order on utterance alone. Failure to make a specific finding that the utterance was related to other evidence of coercion, he maintained, meant that an employer lost his right to speak about unionism merely because of his status as an employer. Justices Black and Douglas, with whom Murphy originally agreed, believed no less vigorously that the Board order was based upon the totality of the company's conduct. "This will have to be handled deftly," Murphy commented to his clerk after Justices Frankfurter and Black responded to his request for elaboration of their views. "It is doubtful that they can be reconciled."[88] While Frankfurter's memoranda appeared to lay the basis of a forceful dissent, Justice Black and Douglas' position raised difficult issues of administrative review. As Murphy indicated to Justice Black,

> F. F. is right in saying that the Board did single out the bulletin and the speeches as violations of the Act in and of themselves. You will note that I admit this but attempted to duck the issue (which I don't like) by saying that it was part of a complex, adopting a somewhat unrealistic approaeh.[89]

85. Undated conference note; comments on first circulated opinion; note, James F. Byrnes to FM, undated. Copy, Felix Frankfurter to Hugo L. Black, December 18, 1941, No. 25-26, 1941 Term, Box 130.

86. NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941).

87. See note 78 *supra.* Harlan F. Stone to FM, Dec. 20, 1941, No. 25-26, 1941 Term, Box 130.

88. Note, Felix Frankfurter to FM, undated; Copy, Frankfurter to Black, December 18, 1941; memos, FM to clerk, undated, No. 25-26, 1941 Term, Box 130.

89. Memo, Dec. 16, 1941; handwritten note, FM to Hugo L. Black, undated, No. 25-26, 1941 Term, Box 130.

His opinion, in other words, considered what the Board omitted. Since several Justices rejected that procedure, and since the Court could hardly deny the Board's heavy reliance on the bulletins, Murphy was caught in a squeeze. The only alternatives were to stick to his guns that the bulletins alone coerced, thus pushing Hand's theory to the limit and risking the disintegration of his majority, or to duck the issue in still another way suggested by Justice Frankfurter and agreeable to Justices Stone and Byrnes—remanding the case for the Board's reasoned judgment whether, in context, the bulletins actually coerced.[90]

Seeking "to win as many of the Court as possible," Murphy chose the remand. That option at least made it possible for a united Court to set the general contours of permissible employer speech, which was accomplished by borrowing language from both sides. In a word, utterance which merged with conduct could be considered as evidence of unfair labor practice, but utterance in isolation could not. Speech, to be restrained, required consideration in "the surrounding circumstances."[91]

But the price of articulating a vague general principle was heavy. What began as a major personal opportunity to resolve controversial issues of public policy ended in a substantial capitulation to the views of Justice Frankfurter and a retreat into obscurity. To assemble a majority favoring remand, Murphy had to scuttle two-thirds of his own opinion dealing with the rest of the Board's judgment; and to justify that remand, he had to obscure what he himself had considered clear from the start. Remand was necessary, he explained for the Court, because the record left uncertain whether the Board had considered the bulletins in context or in isolation. That may have been true for the Court as a whole, but internal criticism was inescapable that the result seemed "incoherent and fumbling."[92] The Justices were altering the question into a hypothetical one they had not been asked; were they also inviting a different conclusion by the Board?

Whereas *Thornhill* lacked coherence because of Justice Murphy's own imprecision, in *Virginia Electric* the Court itself created ambivalence, where none existed before, for the sake of half a loaf. For Murphy, the case was a sobering lesson of the cost of "massing" the Justices to agreement. "If you can get the Court together on this,"

90. Unsigned memo to FM, Dec. 16, 1941; Memos From Harlan F. Stone to FM, Dec. 18 and 20, 1941; Note From James F. Byrnes to FM, undated, No. 25-26, 1941 Term, Box 130.

91. FM to Hugo L. Black, undated, No. 25-26, 1941 Term, Box 130, 314 U.S. 469, 477-79 (1941).

92. Unsigned, undated memo regarding rider to second draft, No. 25-26, 1941 Term, Box 130.

Justice Byrnes observed nonetheless, "you will render a real service."[93] The Supreme Court was beginning to divide unexpectedly and sharply over the scope of both the first amendment and appellate review. The *Virginia Electric* case became an important germ in the development of labor law precisely because the Justices were willing to compromise. In the last analysis, little of principle divided them; little was lost and much was gained by accepting the requirement of a reasoned judgment on the part of the Board. As Murphy's clerk commented when the case returned in 1943: "We did the Board a service by making it think."[94]

More important, *Meadowmoor* and *Virginia Electric* together went a long way toward resolving the doubts created by the *Thornhill* decision. As applied, they contained a principle that worked both ways. The NLRB used it to restrain employers' speech in context of coercion, which was easily established in the parent case; but the principle also upset a long line of decisions which assumed that employers had no permissible interest in employee self-organization issues. Its reasoning permitted lower courts to sustain employer's speech *qua* speech, and was eventually frozen into the Taft-Hartley Act to give a broad statutory guarantee to the employer's right to communicate. Curiously, Murphy's somewhat ambiguous *Virginia Electric* opinion, perhaps for the very reason that it did not proclaim the employer's right to speak with dramatic fervor, may have longer life as a precedent in the development of statutory and case law controlling labor relations than the sweep of the *Thornhill* doctrine where he started with the Constitution—and from scratch.[95]

The fate of the picketing doctrine, in this respect, was not untypical of the competing principles which the Court advanced to protect first amendment freedoms in the 1940's. The Court of that day was experimenting at the threshold of a great dialogue over personal freedom which is not yet resolved. More than the *Thornhill* doctrine—for example, the full *Carolene* rationale or the clear and present danger test—has since fallen from favor. One of the ironies of the decade was simultaneous adjudication of first amendment freedoms by use of inconsistent doctrines. Time was required for the Court's internal dialogue to harden, and what was true of the institution as a whole was also true for individual members. The Murphy of the first two terms was not the Murphy of the *Yamashita*,[96] *Bridges*,[97] and *Eisler*[98] cases. And if the previous examples have failed to con-

93. Comment on slip opinion, final circulation, No. 25-26, 1941 Term, Box 130.
94. Cert. note, No. 709, 1942 Term, Box 132.
95. Cox, *supra* note 64, at 785.
96. *In re* Yamashita, 327 U.S. 1 (1946).
97. Bridges v. Wixon, 326 U.S. 135 (1945).
98. Eisler v. United States, 338 U.S. 189 (1949).

vince, the last two from the 1940-41 terms should at least create doubt.

In *Hines v. Davidowitz*,[99] which preempted the field of alien registration from state control, Murphy originally voted with the majority in favor of preemption. But under the badgering of his clerk that this conclusion conflicted with the Court's stand in commerce cases, the Justice began to waver toward Justice Stone's position that no conflict existed.[100] Murphy even began to prepare a dissent until he was persuaded that to do more than join Stone's dissent would be impolitic. Then, after having criticized Justice Black's "tendency to spread into the field of policy," he ended where he had started, convinced that Justice Black's opinion was "exceptionally well done."[101]

A change of mind in *Hines* would not have altered the result, but similar wavering became critical in the *Bridges* and *Times-Mirror* contempt cases, the leading modern cases concerning press interference with fair trial. Two rights, both ardently believed in, there collided; and there Justice Murphy became an agonizing "swingman." Voting in the fall of 1940 to quash the contempt citation of *Times-Mirror*, as his clerk recommended for both cases, Murphy at the same time voted to approve Harry Bridges' contempt citation under the admitted influence of Justice Frankfurter's "beautiful statement" in conference defending judicial power to protect fairness of trial. Towards spring, however, when the opinions were nearing completion, the Justice began to share his clerk's original doubts whether the trial judge even had been aware of Bridges' threats, much less whether they presented a clear and present danger to the trial. Was the Court forgetting the facts?[102]

Justice Frankfurter, of course, believed the record was barren of such facts, and that no liberty was of greater value than fair trial. Murphy had no quarrel with that proposition as such, but he queried its concrete application in a factual setting he regarded as very close. Fully aware that to retrieve his vote would stalemate the Court after months of labor and would leave it with no alternative but to order reargument, he finally wrote Justice Frankfurter: "The still-new robe never hangs heavier than when my conscience confronts me. Months of reflection and study compel me to give it voice. And so I have

99. Hines v. Davidowitz, 312 U.S. 52 (1941).

100. Memos, clerk to FM, Jan. 4, and Jan. 14, 1940; also undated memo, clerk to FM, No. 22, 1940 Term, Box 130.

101. Memos From FM to clerk, undated; comment on slip opinion, No. 22, 1940 Term, Box 130.

102. Bridge v. California, 314 U.S. 252 (1941). Conference note, undated, "memorandum on the merits," undated, No. 19-64, 1940 Term, Box 130.

advised the Chief Justice and Justice Black that my vote . . . must be in reversal."[103]

So to reverse had deep implications. Reargument in the fall of 1941, plus Justice Jackson's fresh vote, produced the opposite result. Reversal gave Justice Black an opportunity to write a leading opinion which, first, significantly reduced the power of state judges to control the press and, second, significantly advanced the clear and present danger test as a "working principle" to reconcile competing claims of liberty and authority. The Justices did not say in so many words that freedom of expression was "preferred," but the momentum was plain. Finally, the *Bridges* case, along with Murphy's first dissent over the discretion of the NLRB in the *Phelps Dodge* case, marked the beginning of a drift in which Justice Murphy, much to his own surprise, found himself veering from the leadership of Felix Frankfurter, whom he had assumed would be his spiritual and intellectual knight, to that of Hugo L. Black.[104]

The picketing doctrine and the *Bridges* case inevitably became exhibits in recurring disputes over the role of the Court in protecting first amendment freedoms. Their symbolic and doctrinal importance, however, have tended to obscure both the frequently narrow factual divisions involved and a pertinent element of the Murphy story. The truth is that Justice Murphy's views underwent evolution on the Supreme Court, and the starting point of that evolution was surprisingly hesitant and non-doctrinaire. Murphy might admit, as he did to Chief Justice Stone in the *Bridges* case, that "conscience and judgment are inseparable, and the former allows the latter no alternative."[105] He might leave unrebuked his clerk's observation in *Hines* that judicial opinions in close cases perforce rationalize policy choices. But the very instability of his choices as a newcomer, the almost overwillingness to be persuaded, play havoc with customary explanations of his behavior, whether expressed by ideological identification or by the numbers. Justice Murphy as a beginner was not an "activist" automaton. He was a man of indecision—a man so cross-pressured by the complexities of choice, as aggravated by his own relations to it, that he found it difficult to make up his mind. Justice Murphy's freshman years may have been an extreme case in this respect; but at a time of ferment over methods of analysis, they support the view that utility still inheres in the venerable tool of judicial biography.[106]

103. Note From clerk to FM, undated; FM to Felix Frankfurter, May 29, 1941, No. 19-64, 1940 Term, Box 130.

104. 314 U.S. 252, 263 (1941); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 200 (1941).

105. FM to Harlan F. Stone, May 29, 1941, No. 19-64, 1940 Term, Box 130.

106. Peltason, *Supreme Court Biography and the Study of Public Law*, in ESSAYS ON THE AMERICAN CONSTITUTION 215 (Dietze ed. 1964).