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JUSTICE FRANK MURPHY AND AMERICAN LABOR LAW

*Theodore J. St. Antoine**

INTRODUCTION

Working people and disfavored groups were central concerns of Frank Murphy, the last Michigan Law School graduate to sit on the United States Supreme Court. In the pages of this *Review*, just over a half century ago, Archibald Cox wrote of him: "It was natural . . . that his judicial work should be most significant in these two fields [labor law and civil rights] and especially in the areas where they coalesce."¹ In this Essay, after a brief overview of Murphy the man, his days at the University of Michigan, and his career prior to the Court appointment, I shall review some of the major labor and employment decisions analyzed by Professor Cox and assess their continuing impact on American law.

I. THE MAN, THE UNIVERSITY YEARS, AND THE POLITICAL CAREER

Frank Murphy was a study in contrasts. He was born in 1890 and grew up in a small town in the rural "thumb" area of Michigan, enjoying a fun-filled, Tom Sawyer-like boyhood.² Harbor Beach was always "home," the one place where he could return to find peace.³ Yet from an early age Murphy aspired to the social cachet of the best metropolitan clubs, and he became a masterly big-city politician, one of the great, if not the greatest, of Detroit mayors.⁴ He was known as a ladies' man, attracted by, and attractive to, a bevy of rich socialites, but he never married. True to one Irish-Catholic stereotype, as biographer Sidney Fine put it, Murphy's pious and loving but demanding

* James E. & Sarah A. Degan Professor Emeritus of Law, University of Michigan Law School. A.B., Fordham; J.D., University of Michigan. — Ed. I am much indebted to Sidney Fine, whose monumental three-volume biography of the Justice has provided nearly all my background information on Murphy. See *infra* notes 2, 18, 25.

1. Archibald Cox, *The Influence of Mr. Justice Murphy on Labor Law*, 48 MICH. L. REV. 767, 767 (1950).

2. SIDNEY FINE, FRANK MURPHY: THE DETROIT YEARS 2-5, 14 (1975).

3. *Id.* at 17, 36.

4. *Id.* at 36, 358-59, 455-56.

mother remained the “darling” of his life.⁵ And, probably in reaction to his father’s alcoholism, Murphy never drank. Lastly, for all his middle-class upbringing and ambition to rise in the world, Murphy as a youngster learned political activism on behalf of the oppressed from his lawyer father (primarily, to be sure, the oppressed in Ireland), as well as racial and religious tolerance from his mother.⁶

Murphy was an indifferent student at the University of Michigan, which he entered in 1908. Nonetheless, he described his life in Ann Arbor as “simply one grand thing after another.”⁷ He declined an invitation from a college fraternity that denied membership to a Jewish friend but wound up as head of the Sigma Chi chapter. He was a leader in a wide variety of extracurricular activities, became renowned as a campus orator, and was elected to several college honorary societies. For a sociology course, Murphy wrote a paper on “Politics and the Laborer,” reflecting his progressive views and presaging his future advocacy of workers’ causes. All students with less than stellar academic records, however, should take heart from his performance in the Law Department. In his senior year, Murphy had two B’s, eight C’s, a D, and an E (failure). He managed to receive his law degree on time in 1914 only because the faculty, the day before graduation, granted his petition for two additional credit hours (with a D grade), retroactively, in a first-year property course.⁸ A demonstrative man, Murphy later wrote his mother about the University, “I love and worship the place.”⁹

Following graduation, Murphy spent three highly successful years as a trial lawyer in a substantial Detroit firm. On the side, he taught night school in a poor immigrant neighborhood, an experience that was one of the “shaping influences” of his life.¹⁰ In 1917, Murphy became an Army officer, thanks to an intensive ROTC program. He arrived at the French front the day Armistice was declared, apparently upset that “Fate” had “called off the war” and prevented him from leading troops in combat.¹¹ Murphy returned to Detroit to become First Assistant U.S. Attorney in 1919.¹² Thus began a career in public service that, with little interruption, would last a lifetime.

5. *Id.* at 6-14, 17, 84-89.

6. *Id.* at 10-12. Murphy did not attend Catholic schools (there were none in Harbor Beach), and it was only after he became mayor of Detroit that he found support for his views on the welfare state in the social encyclicals of the Popes. *Id.* at 254-55.

7. *Id.* at 18; *see also id.* at 19-28.

8. *Id.* at 26.

9. *Id.* at 27.

10. *Id.* at 34.

11. *Id.* at 48.

12. *Id.* at 58.

In 1923, Murphy became the youngest person ever elected to the bench in Detroit's Recorder's (Criminal) Court.¹³ He emerged as a hero for the city's African Americans when he presided over the famous Sweet trials, in which Clarence Darrow, helped by Murphy's evidentiary rulings and jury instructions, secured the acquittal of a black householder who had fired on a white mob outside his home.¹⁴ A combination of blacks and white ethnics elected Murphy as mayor of Detroit in 1929.¹⁵ Detroit was one of the hardest hit economically of American cities during the Great Depression, but Murphy was credited with considerable success in confronting the intertwined problems of welfare benefits and city finance.¹⁶ He was overwhelmingly reelected in 1931.¹⁷ Then President Roosevelt, mindful of the importance of the Catholic vote to the Democrats, stepped in and appointed Murphy, first, as governor-general and, later, as high commissioner of the Philippines. He served from 1933 to 1936, when the exigencies of Michigan politics and Roosevelt's reelection hopes called for Murphy's return to run for governor.¹⁸ He won in a close race, riding Roosevelt's coattails rather than the other way around.¹⁹

The governorship made Murphy a major national figure. The most dramatic event was the great sit-down strike at General Motors ("GM") in 1936-37. Workers at several Flint plants, seeking to organize on behalf of the United Automobile Workers ("UAW"), occupied the buildings and refused to leave. Murphy regarded the action as an illegal trespass and he called out the National Guard to maintain order. But the Governor was opposed to bloodshed and refused to use the Guard or State Police to eject the strikers forcibly.²⁰ Instead, Murphy personally intervened as mediator between GM and the UAW. He proved adept in the role, and the strike was eventually settled, with GM recognizing the UAW as the bargaining representative for its members.²¹ A close observer declared the result "the high point in Frank Murphy's entire career," and *Time* talked about "Murphy for President in 1940."²²

Despite the plaudits immediately accorded Murphy for his success in handling the Flint situation, other sit-down strikes continued to

13. *Id.* at 117.

14. *Id.* at 167.

15. *Id.* at 220-21.

16. *Id.* at 387.

17. *Id.* at 439.

18. SIDNEY FINE, FRANK MURPHY: THE NEW DEAL YEARS 20, 231 (1979).

19. *Id.* at 250-51.

20. *Id.* at 298-99, 303.

21. *Id.* at 319-22.

22. *Id.* at 323-25.

plague Michigan, and the state remained predominantly Republican. Murphy was defeated handily in his bid for reelection in 1938.²³ Shortly thereafter President Roosevelt appointed him Attorney General.²⁴ Murphy took on his new duties with gusto. He played significant roles in the appointment of several distinguished members of the Supreme Court and the courts of appeals; helped expand antitrust enforcement, not only against corporations but also against professional organizations and labor unions; and relentlessly pursued tax evaders, underworld kingpins, and entrenched political bosses of both parties.²⁵ His short tenure as Attorney General has been authoritatively described as "one of the most remarkable years of service in the history of the Justice Department."²⁶

In November 1939, Roosevelt told Murphy he was the President's choice to fill the Supreme Court vacancy left by the death of Pierce Butler, another Catholic from the Midwest. Murphy resisted. He felt he was being kicked upstairs, away from the active life he prized, and he still harbored visions of the presidency. Moreover, this was also one of the few times this notoriously ambitious man seemed genuinely humble. He regarded the Supreme Court as "beyond his grasp" and "fear[ed] that my work will be mediocre up there."²⁷ When the formal announcement of Murphy's nomination was made in January, however, there was "almost universal praise."²⁸ Murphy's admirers realized he was no legal scholar but believed his familiarity with government, political savvy, and big heart more than offset any deficiency.

II. MURPHY AS SUPREME COURT JUSTICE

Because of illness,²⁹ Murphy did not take his judicial oath of office until early February 1940 and did not fully enter upon his duties at the Court until the end of the month.³⁰ By then the Court was in the middle of its annual term, and Murphy accepted as his first law clerk a

23. *Id.* at 508-11.

24. *Id.* at 528.

25. SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 32-34, 54-56 (1984) [hereinafter FINE (1984)].

26. *Id.* at 141-42.

27. *Id.* at 133.

28. *Id.* at 137.

29. The flu or bronchitis may have been partly psychosomatic. My senior partner during my active practice in Washington, D.C., was J. Albert Woll, who headed the Commercial Frauds Section at Justice during Murphy's year there. Woll visited Murphy in his bachelor's apartment in the Washington Hotel at the time of the Supreme Court nomination and was convinced that Murphy was exaggerating if not feigning his ailments, hoping against hope he could stave off the dreaded move to the "Marble Palace." Conversations with J. Albert Woll, Senior Partner, Woll, Mayer & St. Antoine (circa 1960).

30. FINE (1984), *supra* note 25, at 142-43.

young man who had clerked for a year on the Second Circuit and was recommended by Felix Frankfurter. Subsequently, Murphy concluded that this person was a Frankfurter "plant" within his chambers, and thereafter he chose no one as clerks except high-ranking graduates of the Michigan Law School. Even there, he tried to narrow his selection to a known group. His first three Michigan clerks all came from the class of 1940: John J. Adams, John H. Pickering, and Eugene Gressman. Adams served one year, Pickering two years, and Gressman five years, all one at a time in sequence. Murphy had two clerks during his last year, 1948-49, John R. Dykema, class of 1947, and Thomas L. Tolan, class of 1948.³¹

There seems no doubt that Murphy made the final decisions in cases before the Court, both on petitions for certiorari and on the merits. But he relied heavily on his clerks for summarizing petitions and drafting opinions, and he was even prepared to listen to their advice on how to vote, especially on certiorari petitions.³² The Justice was concerned with style as well as substance. John Pickering related that after Murphy satisfied himself about the technical aspects of a draft, he might gently admonish a clerk in a case that had particular appeal to him, "It needs a little poetry!"³³ Murphy was well aware of the power of a resounding, quotable phrase to enhance the persuasiveness of a decision. He also stressed that he wanted opinions that were short, simple, and readable, so that they could be "understandable to every American."³⁴

During his short nine years as a Justice, Murphy expressed himself, in concurrences and dissents as well as in opinions for the Court, in a number of significant decisions dealing with civil liberties, civil rights, and labor and employment law generally. I now turn to some of the most memorable and influential of those cases.

III. PICKETING AS FREE SPEECH: *THORNHILL*

New Justices are traditionally allowed to select their initial writing assignment, and Murphy could not have asked for anything more fitting than *Thornhill v. Alabama*.³⁵ Symbolic of Murphy's emphasis on the human element in the law, his very first words for the Court put the spotlight on the full name of the petitioner, Byron Thornhill, who had been convicted of the crime of picketing a business by carrying signs urging others not to deal with it. Thornhill was an employee of

31. *Id.* at 161-63.

32. *Id.* at 161-62.

33. Conversation with John H. Pickering, in Ann Arbor, Mich. (Oct. 13, 2001).

34. FINE (1984), *supra* note 25, at 162-63.

35. 310 U.S. 88 (1940).

the Brown Wood Preserving Company and president of a local union to which all but four of the Company's approximately one hundred workers belonged. The union had gone on strike for reasons not stated in the record. Thornhill was arrested "in company with six or eight other men . . . on the picket line," but there was no evidence of any violence or intimidation of persons seeking to work.³⁶ Thornhill was charged in almost the exact language of an Alabama statute making it a misdemeanor to "loiter" or "picket[]" for the purpose of "inducing other persons not to . . . have business dealings with, or be employed by" the picketed firm.³⁷

In his 1950 article in this *Review*, Professor Cox commented:

The situation must have stirred Mr. Justice Murphy's deepest emotions: a worker in a company town convicted of crime for peacefully seeking to improve his lot; the offense, expressing his grievance and asking sympathetic action by the only available means. . . . Liberty of expression was also involved. Mr. Justice Murphy valued liberty of expression as a basic political ideal indispensable to representative government. The depth of his concern may also be attributable to his natural rights philosophy and devout religious beliefs.³⁸

Up to this time even peaceful picketing had been regarded primarily as an economic weapon, subject to regulation or prohibition by the states.³⁹ Nevertheless, Justice Murphy set about boldly to reverse Thornhill's conviction. He immediately invoked the First Amendment's protection of freedom of speech, a "fundamental personal right[]" secured by the Fourteenth Amendment against abridgment by a state.⁴⁰ He then declared that the Alabama statute had to be tested on its face, because Thornhill had been charged and found guilty in the general terms of the statute, which "purport[ed] to license the dissemination of ideas."⁴¹ The Alabama courts had authoritatively interpreted the statute as prohibiting a single individual from patrolling peacefully in front of an employer's establishment carrying a sign

36. *Id.* at 94-95.

37. *Id.* at 91-92 (quoting ALA. CODE § 3448 (1923)).

38. Cox, *supra* note 1, at 777.

39. *E.g.*, *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896); LUDWIG TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* § 111 (1940); *cf.* *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921). Under the common law tort theories of the time, labor activities like strikes and picketing could be enjoined if they had "unlawful objectives" or employed "unlawful means," very broadly defined. *See, e.g.*, *United Shoe Mach. Corp. v. Fitzgerald*, 130 N.E. 86, 87 (Mass. 1921); *RESTATEMENT OF TORTS* § 775 (1939). *But cf.* *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1937) ("Members of a union might . . . make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.") (dictum). The introduction of anti-injunction statutes, like the Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101-115 (1994)), and similar state laws, affected the availability of equitable remedies, but that is not our concern.

40. *Thornhill*, 310 U.S. at 95.

41. *Id.* at 96-97.

stating truthfully that the business did not employ union labor.⁴² The statute admitted of no exceptions and was thus invalid on its face: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."⁴³ In obvious reference to the "clear and present danger" test for limiting expression, Justice Murphy added: "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."⁴⁴

In spite of the sweeping language of *Thornhill*, and its apparent equating of picketing with free speech, its holding was actually a narrow one. Alabama would have outlawed all picketing per se. That it could not do. But having planted the flag of the First Amendment atop the mountain of peaceful picketing, Justice Murphy did little to indicate how far down the slope on the farther side the domain of free speech extended. Drawing the appropriate boundary line was left for future decisions.

During Murphy's tenure on the Court, several decisions extended First Amendment protections to "stranger" or nonemployee picketing, even in situations where no "labor dispute" existed under state law.⁴⁵ But over the dissents of Murphy and three other Justices, a majority of the Court held a state court could enjoin picketing aimed at exerting the "concerted pressure" of a group of employees to force a café owner to cease using a nonunion contractor in a construction project that was unrelated to the restaurant.⁴⁶ Murphy did not dissent, however, from a six-to-three decision sustaining a state court injunction against picketing that was peaceful in itself and yet "enmeshed with contemporaneously violent conduct."⁴⁷

42. *Id.* at 98-99 (citing *O'Rourke v. Birmingham*, 168 So. 206 (Ala. Ct. App. 1936), *cert. denied*, 168 So. 209 (Ala. 1936)).

43. *Id.* at 102. In *Carlson v. California*, 310 U.S. 106, 113 (1940), decided the same day as *Thornhill*, Justice Murphy elaborated: "[P]ublicizing 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 within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State."

44. *Thornhill*, 310 U.S. at 104-05; *cf.* *Schenck v. United States*, 249 U.S. 47, 52 (1919).

45. *Cafeteria Employees Union, Local 302 v. Angelos*, 320 U.S. 293, 294-96 (1943); *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 772-75 (1942); *AFL v. Swing*, 312 U.S. 321, 325-26 (1941).

46. *Carpenters & Joiners Union, Local 213 v. Ritter's Café*, 315 U.S. 722, 726-27 (1942) (emphasis added).

47. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292 (1941).

Perhaps the Court's definitive statement during Murphy's years on the bench regarding the constitutionally allowable limitations on picketing was its unanimous decision in *Giboney v. Empire Storage & Ice Co.*⁴⁸ The Court upheld a state court's enjoining of peaceful picketing whose "sole, unlawful immediate objective" was to induce wholesale distributors to agree with a union not to sell ice to nonunion peddlers.⁴⁹ This effort violated a state statute prohibiting combinations in restraint of trade.⁵⁰ Because the validity of the state antitrust legislation was accepted, it was easy to conclude that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control."⁵¹

Similarly, Osama bin Laden's oral instructions to his al-Qaeda network may be speech in the most conventional sense. They are still not immune from the regulatory power of government if they are in furtherance of a terrorist conspiracy.⁵² With *Giboney* as the touchstone, the critical factor would be the end pursued rather than the expressive means employed. If the end is unlawful, picketing or any other form of expression in direct furtherance of it can be restricted. If the objective — for example, the decision of an individual customer to refrain from purchasing a nonunion product — is lawful and cannot constitutionally be declared unlawful, then under this view peaceful picketing, like any other form of expression in furtherance of it, cannot be forbidden under the Constitution. The question is whether the *Thornhill/Giboney* analysis of Justice Murphy's era has survived — or should have survived — to the present day.

Since I have explored this issue at length elsewhere,⁵³ I shall be briefer here. There are at least four main overlapping objections to the concept of picketing as a form of free expression. They may all be covered by the notion that picketing is speech "plus" rather than pure

48. 336 U.S. 490 (1949).

49. *Id.* at 502.

50. *Id.* at 495.

51. *Id.* at 502.

52. See, e.g., *Fox v. Washington*, 236 U.S. 273, 277 (1915) (upholding statute condemning speech that encourages violations of law).

53. Theodore J. St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U. L. REV. 883 (1982). My approach was anticipated by Francis E. Jones, Jr., *Free Speech: Pickets on the Grass, Alas! — Amidst Confusion, a Constant Principle*, 29 S. CAL. L. REV. 137, 157 (1956) ("Picketing, like any other speech, is protected by the Constitution — as a means; however, like other speech, it will not be protected when used for the purpose of accomplishing an unlawful end."). For a vigorous exposition of the contrary point of view, see CHARLES O. GREGORY & HAROLD A. KATZ, *LABOR AND THE LAW* 289-329 (3d ed. 1979). See generally E. Merrick Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513 (1943); Edgar A. Jones, Jr., *Picketing and Coercion: A Reply*, 39 VA. L. REV. 1063 (1953).

speech. Justice Douglas summed it up: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."⁵⁴ Picketing or patrolling with signs is of course a physical activity and subject to trespass laws⁵⁵ and to a content-neutral regulation of the time, place, and manner.⁵⁶ The same would be true of a parade or other popular demonstration. Violent picketing or picketing "in a context of violence" may also be prohibited.⁵⁷ But that is no more than a particular application of the tort law of assaults.

More to the point is the contention that picketing induces action without regard to the ideas being communicated. If so, it is either because of physical fear or an instinctive reflex on the viewer's part, or because the picketing constitutes a "signal" for the viewer to engage in certain prearranged behavior. Truly coercive picketing has been discussed and need not detain us further. But if the viewer's reaction is a genuinely voluntary, though relatively unthinking, reflex, how can the picketing that triggers the reaction be distinguished from the cryptic bumper stickers "Vote Free Choice" or "Vote Right to Life"?⁵⁸ More convincingly, Professor Cox has contended:

54. *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring). *But cf.* Harry Kalven, Jr., *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1, 23 ("[A]ll speech is necessarily 'speech plus.'").

55. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978).

56. *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (barring sound trucks); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (regulating parades).

57. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

58. Cox, *supra* note 1, at 786 ("Nor can we seek to judge between appeals to reason and bare slogans arousing prejudice or emotion."). Picketing in certain situations might create a clear and present danger that a substantive evil would occur, while an oral or written communication delivered far from the scene or phrased in abstract terms might not. But that is a function of the immediacy and concreteness of the message rather than something inherent in the mode of communication. Speech other than picketing has been similarly analyzed. *See also* *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 678-79 (1951) (holding that a labor council's notice to its affiliated unions of a decision to picket a job site was "a signal in the nature of an order to the members of the affiliated unions to leave the job"); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911) (examining the status of an unfair list used to "signal" a boycott by unionized employees acting in concert); *cf.* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (*per curiam*) (holding that advocacy cannot be forbidden except when it is an "incitement to imminent lawless action"); *Yates v. United States*, 354 U.S. 298 (1957) (holding that statute prohibiting advocacy of overthrow of government was limited to advocacy of specific acts and did not cover advocacy of overthrow as abstract doctrine); Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 601 (1951) ("[T]he Court cannot long distinguish between the picket line and the unfair list. . . .").

[T]he constitutional decisions in picketing cases should depend, in part, on whether the “publicity” or “signal” aspect predominates. . . . The critical inquiry is whether the employees’ conduct involves an appeal to an uncoerced audience each individual in which is left free to choose his own course of conduct or invokes the power of an organized combination.⁵⁹

The Cox publicity-signal distinction is a good, practical characterization of the *Giboney*⁶⁰ unlawful-objective formulation in actual operation, although it fails to provide as satisfying a theoretical rationale as does the Court itself. Publicizing a labor dispute and appealing for the support of an individual member of the consuming public is seeking a lawful end. Signaling to an organized group of employees to bring concerted pressure to bear to force a neutral person to take sides may be aiming at an unlawful “secondary boycott.”⁶¹ At any rate, for forty years after *Thornhill*, whenever the Supreme Court dealt with peaceful picketing seeking the performance of a lawful act by the immediate or ultimate target of the picketing, uncoerced by organized employees or a group acting in concert, it consistently sustained the constitutional right of the picketers, in *Thornhill’s* words, “to advise customers and prospective customers . . . and thereby to induce such customers not to patronize” the target businesses.⁶² That included one case in which the Court majority engaged in some rather strained statutory interpretation to avoid a constitutional question. In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*,⁶³ the Court held that picketing addressed to customers only, asking them not to purchase one specific nonunion item at a supermarket carrying the usual multiplicity of other products, was not an illegal secondary boycott under the National Labor Relations Act (“NLRA”). *Thornhill* continued to ride high during the Warren Court years, and it remained a significant influence thereafter, even in cases

59. Cox, *supra* note 58, at 595, 602; *see also* Cox, *supra* note 1, at 787-93.

60. *See supra* notes 48-52 and accompanying text.

61. Section 8(b)(4)(B) of the National Labor Relations Act forbids so-called secondary boycotts, whereby a union forces a neutral or secondary party not to deal with the union’s primary target in a labor dispute. 29 U.S.C. § 158(b)(4)(B) (1994); *see, e.g., Denver Bldg.*, 341 U.S. at 677-78 (picketing against general contractor to force him to dismiss nonunion subcontractor). *See generally* Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962). For historical background, *see* Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEXAS L. REV. 919 (1988). Another unlawful end would be getting an employer to force his employees to join a union. *See, e.g., Int’l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 285-86 (1957).

62. *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940); *see also* cases cited *supra* note 45.

63. 377 U.S. 58 (1964). Justice Black, concurring, believed Congress intended to proscribe secondary consumer picketing like that in *Tree Fruits*, but he would have found the statute so construed unconstitutional. *Id.* at 76. (Black, J., concurring); *cf. Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidating ordinance on basis of Equal Protection Clause — although the First Amendment was “intertwined” — because it forbade picketing next to a school but exempted peaceful picketing during a labor dispute there).

outside the labor field.⁶⁴

The *Thornhill/Giboney* doctrine⁶⁵ suffered a major setback in 1980. In *NLRB v. Retail Clerks Local 1001 (Safeco)*,⁶⁶ the Supreme Court held, 6-3, that picketing asking consumers not to buy a nonunion product being distributed by a second party could be forbidden as an unlawful boycott under the NLRA where the distributor derived ninety percent of its income from the sale of the picketed product. The constitutional question received short shrift, a single paragraph, in a four-member opinion by Justice Powell.⁶⁷ Nowhere is there the slightest indication that the Supreme Court precedents⁶⁸ relied on were distinguishable in that they dealt with appeals for concerted employee action or action by unionized workers presumably subject to group loyalties and discipline. Nowhere is it recognized that *Safeco* was the first time the Court had ever clearly upheld a ban on peaceful picketing addressed to, and calling for seemingly lawful responses by, individual consumers acting on their own.

Justices Blackmun and Stevens, concurring in part, did not join in Justice Powell's "cursory discussion" of the free speech issue, thus leaving the Court without a majority opinion on the constitutional question.⁶⁹ Unfortunately, their own efforts leave much to be desired. Justice Blackmun reasoned limply: "I am reluctant to hold unconstitutional Congress's striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."⁷⁰ Where was the evidence that consumers were coerced, either in this case or generally?

Justice Stevens has more interesting things to say, but I also find inadequate his distinction between picketing and handbilling: "[T]he principal reason why handbills containing the same message are so much less effective than labor picketing is that the former *depend entirely on the persuasive force of the idea*."⁷¹ Cannot the handbiller confront the approaching customer with the same pair of beady eyes as the picketer? Or is it the sign on the stick that bothered Justice

64. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982) (picketing in support of black boycott of white merchants to promote desegregation).

65. See *supra* notes 48-52 and accompanying text.

66. 447 U.S. 607 (1980).

67. *Id.* at 616.

68. E.g., *IBEW Local 501 v. NLRB*, 341 U.S. 694, 705 (1951), cited in *Safeco*, 447 U.S. at 616.

69. *Safeco*, 447 U.S. at 616-17 (Blackmun, J., concurring); *id.* at 618 (Stevens, J., concurring).

70. *Id.* at 617-18.

71. *Id.* at 619 (emphasis added).

Stevens? Unless we expect the stick to be wielded as a weapon, it would surely seem improper to forbid the picket sign but not the handbill merely because the placard may be more visible and thus more likely to catch a busy shopper's eye.⁷² And what if the placards were not carried on sticks but, as has been done, were draped over the shoulders of elderly men and women? Finally, suppose the pickets were not union organizers at all, but an African-American civil rights group peacefully urging moviegoers not to attend *The Birth of a Nation*?

The three dissenters in *Safeco* — Justices Brennan, White, and Marshall — did not even attempt to grapple with the First Amendment issue. They contented themselves with the statutory question, concluding that the NLRA did not forbid peaceful consumer picketing aimed solely at a nonunion product rather than the neutral distributor's business as such, regardless of the percentage of the neutral's sales represented by that product.⁷³

Professor Cox, while recognizing the deficiencies of the *Safeco* opinions, still believes the decision "can be fitted into the body of first amendment [sic] law if picketing is classified with commercial advertising as economic speech."⁷⁴ There is certainly logic in that position, especially if it were a question of first impression. But although Justice Murphy is nothing like the legal craftsman of a Cox or of some of the Justices who have wrestled with the problem of picketing over the years, one has little doubt where Murphy would stand on relegating picketing to the category of commercial advertising. Said he in *Thornhill's* companion decision, *Carlson v. California*,⁷⁵ "[t]he carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern." One can hear in those lines the ring of "a little poetry."⁷⁶

Ironically, an even more conservative Court than the one that had decided *Safeco*, and sharply limited the constitutional status of picketing, later handed labor unions a major organizing weapon by maintaining the distinction between picketing and handbilling, and by sus-

72. Cf. *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 775 (1942) (Douglas, J., concurring) (querying whether a state "can prohibit picketing when it is effective but may not prohibit it when it is ineffective").

73. *Safeco*, 447 U.S. at 622-24 (Brennan, J., dissenting).

74. ARCHIBALD COX, *FREEDOM OF EXPRESSION* 47 (1980); cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988) ("We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection.").

75. 310 U.S. 106, 112-13 (1940). Even the more conservative and scholarly Justice Frankfurter was ready to concede, "Peaceful picketing is the workingman's means of communication." *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

76. See *supra* note 33.

taining the right to handbill customers with much the same sort of strained statutory construction used by the Warren Court to exempt a limited form of consumer picketing in *Tree Fruits*.⁷⁷ In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,⁷⁸ a union had a dispute with a building contractor over its allegedly substandard wages and fringe benefits. The contractor was hired to construct a department store in a shopping mall. The union peacefully distributed handbills at the entrances of the mall, urging customers not to patronize any of the shops in the mall until all construction was done by contractors paying "fair wages and fringe benefits." The handbills made clear, however, that the union was not seeking a work stoppage by any store employees. The National Labor Relations Board ("NLRB") ruled the consumer handbilling was "coercion" of the secondary employers in violation of section 8(b)(4)(B) of the NLRA.⁷⁹

In an opinion by Justice White, six members of the Court observed that the Board's construction of the statute would pose serious questions as to its validity under the First Amendment.⁸⁰ Here there was no picketing or patrolling. Picketing is "qualitatively different"; handbills "depend entirely on the persuasive force of the idea."⁸¹ Justice White declared: "The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion . . ."⁸² Justice White went on to note for the Court that the NLRB's reading would prohibit newspaper, radio, and television appeals to the same effect as the handbills. Nothing in the language or legislative history of section 8(b)(4), the Court concluded, prevented interpreting it as not reaching peaceful handbilling, and thus the constitutional questions were avoided.⁸³ *DeBartolo* has significantly expanded the publicity tactics

77. See *supra* note 63 and accompanying text.

78. 485 U.S. 568 (1988).

79. *Id.* at 570, 573 (quoting 273 N.L.R.B. 1431, 1432 (1985) (internal quotation omitted)). The Court of Appeals for the Eleventh Circuit had denied enforcement. 796 F.2d 1328 (11th Cir. 1986) (per curiam).

80. *DeBartolo*, 485 U.S. at 575. There were no dissents. Justices O'Connor and Scalia concurred in the judgment. Justice Kennedy did not participate. For Justice White the handbills did not appear "typical commercial speech" advertising the price or merits of a product since they "pressed the merits of unionism to the community" and "the dangers of inadequate wages to the economy." But even as commercial speech the handbills would present "serious constitutional issues." *Id.* at 576.

81. *Id.* at 580 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 311 n.17 (1979) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950)) (internal quotation omitted); see also *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (internal quotation omitted)).

82. *DeBartolo*, 485 U.S. at 580.

83. *Id.* at 588.

available to labor organizations and has led to so-called corporate campaigns against nonunion firms through widespread nonpicketing appeals to suppliers and customers.⁸⁴ Frank Murphy, a doughty champion of free speech in all its forms, would have applauded this later development even as he regretted *Safeco's* restrictions on peaceful consumer picketing.

IV. EMPLOYER FREE SPEECH: *VIRGINIA ELECTRIC*

Virginia Electric & Power Co. had long been hostile to labor organizations.⁸⁵ Its president had told the employees a union was “entirely unnecessary.” Later, by a posted bulletin and oral statements at meetings, the Company urged employees to create an “inside” or “[i]ndependent” organization, rather than join an AFL or CIO affiliate. Meanwhile, the Company kept meetings of a rival CIO union under surveillance and warned workers they would be discharged for “messing with” the CIO. An independent union was duly formed and the Company negotiated a contract with it. Four workers were fired for refusing to join the independent or for supporting another organization. The NLRB ruled that the Company had committed unfair labor practices by coercing employees and discriminating against them for union activity, and by “dominating” the inside union. What is most significant for our purposes, however, is that the Board, as Justice Murphy stated in his opinion for the Supreme Court, “specifically found that the bulletin of April 26 and the speeches of May 24 ‘interfered with, restrained and coerced’ the Company’s employees in the exercise of their rights guaranteed by § 7 of the Act.”⁸⁶

Justice Murphy would not have been troubled if the Board’s order had been based on the “totality of the Company’s activities,” so that the Court would not have to consider the “coercive effect of the bulletin and the speeches in isolation.”⁸⁷ The problem was that the Board had treated the “utterances” themselves as unfair labor practices and had apparently not “raised them to the stature of coercion by reliance on the surrounding circumstances.”⁸⁸ With only an oblique reference to the First Amendment, cited as grounds for an employer argument

84. See, e.g., *Brown & Root v. La. State AFL-CIO*, 10 F.3d 316 (1994) (lobbying); cf. *Sequoia Constr., Inc. v. Int’l Union of Operating Eng’rs, Local Union No. 12*, 136 L.R.R.M. (BNA) 2021 (D. Nev. 1990) (leaflets and newspaper article). See generally Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149; James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEXAS L. REV. 889 (1991).

85. *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 470-74 (1941).

86. *Id.* at 476-77 (quoting NLRB order).

87. *Id.* at 477.

88. *Id.* at 479.

that the NLRB's finding of coercion on the basis of the bulletin and speeches was "repugnant" to it, Justice Murphy declared: "Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems The employer in this case is as free now as ever to take any side it may choose on this controversial issue."⁸⁹ The solution was a remand to the Board for a "redetermination of the issues in the light of this opinion."⁹⁰

Archibald Cox, in his half-century-old article in this *Review*, described the dilemma confronting Murphy in *Virginia Electric* as follows: "The case must have given the Justice great difficulty. Few judges have placed as high a value on liberty of expression. But he also believed with equal sincerity that collective bargaining was essential in modern industry, and ordinarily he voted to uphold an exercise of administrative discretion."⁹¹ Professor Cox went on to suggest that Murphy's conflicted allegiances may have led to the uncertainties in the opinion that for a time masked its importance. There is no doubt, however, about its ultimate influence.

Prior to *Virginia Electric*, as eminent a jurist as Learned Hand was prepared to uphold the Board in striking down an employer's argumentative communications to employees as inherently coercive: "What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart."⁹² Thereafter, a whole series of courts of appeals' decisions reversed NLRB findings of violations based on statements of argument and opinion.⁹³ In the subsequent Taft-Hartley amendments to the NLRA, the essence of the *Virginia Electric* rationale was written into section 8(c).⁹⁴ Although section 8(c) could be read literally to require the coercive nature of a message to be determined on the face of the statement, several courts of appeals have held in effect that the full position of Justice Murphy in *Virginia Electric* should be implemented. In appraising a communication, the "totality" of the employer's conduct must be considered and not merely the "isolated words cut off from the relevant circumstances."⁹⁵

89. *Id.* at 477.

90. *Id.* at 480.

91. Cox, *supra* note 1, at 784.

92. *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

93. *E.g.*, *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *NLRB v. Am. Tube Bending Co.*, 134 F.2d 993 (2d Cir. 1943); *Jacksonville Paper Co. v. NLRB*, 137 F.2d 148 (5th Cir. 1943).

94. Codified at 29 U.S.C. § 158(c) (1994): "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

95. *E.g.*, *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 302-03 (2d Cir. 1967); *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 811 (4th Cir. 1965); *NLRB v. Kropp Forge Co.*, 178 F.2d

Today the most vexing problem regarding employer speech is probably distinguishing between allowable "predictions" and forbidden threats. In *NLRB v. Gissel Packing Co.*,⁹⁶ the Supreme Court put it this way:

[An employer] may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation . . . and as such without the protection of the First Amendment.

Drawing the line has not proven easy for the NLRB and the courts. Courts of appeals have often reversed the Board's findings of violations when employers told employees that a union victory in a representation election would result in the outsourcing of certain operations,⁹⁷ a substantial reduction in business,⁹⁸ or an imperiling of jobs that were dependent on low costs.⁹⁹ In such cases the courts have primarily focused on whether the employers' statements were factually supportable.

One might speculate that Justice Murphy would have been more concerned with direct evidence of coercion on the part of the employers, as demonstrated by the "totality of [their] activities."¹⁰⁰ As a champion of free speech, he was wary of looking at employer communications in isolation. As a practical man, he was likely aware that making a prediction "carefully phrased on the basis of objective facts" could be more attributable to good legal counsel than to innocent motivation. Thus, in analyzing a statement to employees on its face, Murphy might have been willing to accord employers greater latitude than did *Gissel*. *Virginia Electric* indicates his focus would have been on the entire set of circumstances in which the utterance occurred, and the "different coloration" that a statement takes on "by virtue of the accompanying circumstances."¹⁰¹

822, 828-29 (7th Cir. 1949). *But cf.* *Surprenant Mfg. Co. v. NLRB*, 341 F.2d 756, 758-60 (6th Cir. 1965); *Wellington Mill Div., West Point Mfg. Co. v. NLRB*, 330 F.2d 579, 583 (4th Cir. 1964).

96. 395 U.S. 575, 618 (1969).

97. *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1429 (2d Cir. 1996).

98. *DTR Indus. v. NLRB*, 39 F. 3d 106 (6th Cir. 1994).

99. *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130 (D.C. Cir. 1994).

100. *See supra* text accompanying note 87.

101. *See Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898, 909-10 (D.C. Cir. 1966).

V. THE RIGHT TO ORGANIZE: THE PLANT GUARD CASES

Two cases that were hardly headliners in the annals of Supreme Court jurisprudence are worth mentioning as demonstrations of Justice Murphy's belief in the value of employee self-organization and collective bargaining. During World War II, War Department Regulations issued pursuant to a Presidential Executive Order required plant guards in defense industries to become civilian auxiliaries of the military police of the Army. Private management retained control over hiring, compensation, dismissal, and other working conditions, but the military could exercise veto power over hiring and firing. Guards received some military training and were subject to military service elsewhere. The regulations permitted collective bargaining, but the guards would generally have to be in separate bargaining units from the production and maintenance employees.¹⁰² In two cases reaching the Supreme Court, the NLRB had certified unions as representatives of such guards and ordered bargaining, but courts of appeals had denied enforcement. In *NLRB v. E.C. Atkins & Co.*,¹⁰³ the reviewing court held the militarized guards were not "employees" within the meaning of the NLRA. In *NLRB v. Jones & Laughlin Steel Corp.*,¹⁰⁴ the court had held that the guards could not join the same union that represented production and maintenance employees, even though the guards were in a separate unit. In both instances the courts also relied in substantial part on the notion that unionization of the militarized guards was contrary to the national welfare.¹⁰⁵

For a person like Frank Murphy, the two decisions must have written themselves. Of course the guards were still employees.¹⁰⁶ The Labor Board was performing its delegated function of defining statutory terms. It was entitled to recognize economic realities and was not confined to traditional technical concepts. The company maintained sufficient control over the guards to retain its status as employer. Similarly, in the second case, the Board's policy of permitting the guards to select a union that also represented production employees in another unit was not unreasonable.¹⁰⁷ It would limit the guards' freedom of choice to deny them representation by the only union that may have had sufficient experience with the employer effectively to bar-

102. To preclude conflicts of interest, the 1947 Taft-Hartley amendments added to § 9(b) of the NLRA a requirement that guards could not be represented by a union admitting employees other than guards to membership. Act of June 23, 1947, ch. 120, tit. I (codified at 29 U.S.C. § 159(b) (1994)).

103. 155 F.2d 567 (7th Cir. 1946), *vacated by* 331 U.S. 398 (1947).

104. 146 F.2d 718 (6th Cir. 1944), *vacated by* 331 U.S. 416 (1947).

105. 331 U.S. 416, 420 (1947); *see also Atkins*, 331 U.S. at 401.

106. *Atkins*, 331 U.S. at 403-14.

107. *Jones & Laughlin*, 331 U.S. at 422-26.

gain for them. There are no signs of misgivings as the opinion marches briskly forward.

Justice Murphy also had little difficulty with what many persons, including the dissenting Justices, must have found most troublesome in these two situations, namely, the potential risk to national security in having militarized guards at defense plants join a union. In a passage permeated with his faith in the virtues of both collective bargaining and the American worker, he wrote:

[T]he collective bargaining process is flexible enough to allow for the increased responsibilities placed upon the militarized guards. . . . Moreover, the Board has discovered no serious question as to any conflict between loyalties to the Army and to the union, the Board finding no basis to assume that membership in a union tends to undermine the patriotism of militarized guards or that loyalty to the United States would be secondary in their minds to loyalty to the union.¹⁰⁸

In reversing the courts below, Justice Murphy reiterated one of his common themes. The judiciary does not possess all wisdom and should often defer to the specialized expertise of administrative agencies or executive departments:

Here we have the Board's considered and consistent judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties and obligations do not suffer thereby. In agreement with that viewpoint has been the War Department, the agency most directly concerned with the military aspects of the problem

Under such circumstances, it would be folly on our part to disregard or to upset the policy the Board has applied in this case.¹⁰⁹

Congress and subsequent Supreme Courts decisions have not always shown such deference to the NLRB. Amendments to the NLRA in 1947 restricted guards to unions composed exclusively of guards¹¹⁰ and expressly excluded "independent contractors" (like newspaper delivery persons) and "supervisors" from the category of "employees" covered by the Act.¹¹¹ And in several instances the Court has disagreed with the Board, holding, for example, that the faculty members of a "mature" university were managerial employees¹¹² and that registered nurses and certain licensed practical nurses were supervisory personnel.¹¹³ These groups were thereby excluded from the coverage

108. *Id.* at 423-24.

109. *Atkins*, 331 U.S. at 414-15.

110. *See supra* note 102.

111. NLRA § 2(3), 29 U.S.C. § 152(3) (1994), *overturning* *NLRB v. Hearst Publ'g, Inc.*, 322 U.S. 111 (1944).

112. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (5-4 decision).

113. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (5-4 decision); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994) (5-4 decision). *See generally*

of the Act. Justice Murphy would have strongly resisted these judicial denials of the statute's protections through such inroads on the term "employee."

VI. UNIONS' DUTY OF FAIR REPRESENTATION: *STEELE*

Justice Murphy's fondness for collective bargaining did not blind him to its failings. One of the most indefensible took center stage in *Steele v. Louisville & Nashville Railroad Co.*¹¹⁴ Section 2, Fourth of the Railway Labor Act ("RLA")¹¹⁵ made the Brotherhood of Locomotive Firemen and Enginemen, as the representative of a majority of the firemen on the Louisville Railroad, the exclusive bargaining agent for all the firemen, whether union members or not. Most of the firemen were white and belonged to the Brotherhood. A substantial minority were black and were excluded from membership under the union's constitution. Without notice to the black firemen and without an opportunity for them to be heard, the Brotherhood and the railroad entered into a collective-bargaining agreement that sharply restricted the blacks' access to firemen's jobs and was apparently designed to exclude them ultimately from such employment altogether.

Chief Justice Stone, writing for the Court, declared that constitutional questions would be presented if the Act conferred exclusive bargaining power on the representative of a class of employees "without any commensurate statutory duty" toward the members of that class.¹¹⁶ He concluded that Congress had no such intent. Instead, the Court held that the RLA,

read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.¹¹⁷

More specifically, in negotiating contracts with a carrier, a union is required "to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."¹¹⁸

That was not quite enough for Justice Murphy. He seethed:

David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals under the NLRA*, 89 COLUM. L. REV. 1775 (1989).

114. 323 U.S. 192 (1944).

115. 45 U.S.C. § 152, Fourth (1994).

116. *Steele*, 323 U.S. at 198.

117. *Id.* at 202-03.

118. *Id.* at 204.

The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be.¹¹⁹

Softening his stance somewhat, Murphy went on to acknowledge his willingness to read the statute as forbidding any action by a bargaining representative that would violate individuals' constitutional rights. He was not sure, however, that this was the basis for the Court's construction of the statute. Murphy wanted no avoidance of the constitutional question. Instead, he wanted it "squarely faced": "No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States."¹²⁰

Both Justice Murphy, in his heated, almost evangelical style, and Chief Justice Stone, in his cooler, more legalistic manner, displayed a remarkable measure of legal imagination in their handling of the Railway Labor Act in *Steele*. That the Congresses that passed the original RLA in 1926¹²¹ and amended it in 1934¹²² had any notion they were adopting some sort of Fair Employment Practices Act *sub silentio*, a whole generation before the hard-fought battle over Title VII of the 1964 Civil Rights Act,¹²³ can only be described as a breathtaking legal fiction. Yet as meticulous a craftsman as Archibald Cox saluted the Stone opinion as "a classic example of the law's capacity for growth through the shaping of its fundamental traditions to meet the problems created by new institutions."¹²⁴ Cox added that Justice Murphy's "constitutional condemnation of 'this ugly example of economic cruelty' restated the law's concern for democratic aspirations in terms that common men would understand, and by doing so he helped to keep their faith alive."¹²⁵

The union duty of fair representation that was developed under the Railway Labor Act has now been extended to the National Labor

119. *Id.* at 208 (Murphy, J., concurring).

120. *Id.* at 208, 209.

121. 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1994)).

122. Railway Labor Act Amendments of 1934, ch. 691, 48 Stat. 1185 (codified as amended at 45 U.S.C. §§ 151-152 (1994)).

123. 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e (1994)). For different accounts of the legislative struggle, see Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 263, 265-71 (Herbert Hill & James E. Jones, Jr. eds., 1993); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 437-47 (1965).

124. Cox, *supra* note 1, at 773.

125. *Id.* at 774.

Relations Act.¹²⁶ A union breaches this duty, however, only when its treatment of a member is "arbitrary, discriminatory, or in bad faith," or it acts in a "perfunctory fashion."¹²⁷ Mere negligence in representing a member's interests is not enough.¹²⁸ In addition, somewhat belatedly and more questionably as a technical matter, the NLRB has declared a union's unfair representation to be an unfair labor practice.¹²⁹ My hunch is Justice Murphy would have been reasonably comfortable with all these developments. He would not have expected impeccable judgment from modestly educated union business agents making close calls under severe time pressures. At the same time, he would not have worried unduly about technical impediments to such a practical step as the Labor Board's assuming jurisdiction over breaches of the duty of fair representation as unfair labor practices.

Sixteen years after its *Steele* decision on racial discrimination, the Supreme Court faced another case in which the Railway Labor Act had to be interpreted so as to avoid constitutional questions. Section 2, Eleventh of the Act¹³⁰ authorizes carriers and unions to enter into union-shop agreements, whereby employees must become union members (or pay the equivalent of regular union dues) as a condition of employment. Moreover, the RLA's provision, unlike a similar section in the NLRA, overrides any state law to the contrary. The Court had previously held that this was sufficient "governmental action" to raise issues under the First Amendment and the Due Process Clause, even though the union-shop agreements were entered into by private parties.¹³¹ The question presented in *International Ass'n of Machinists v. Street*,¹³² however, was whether it was a violation of the First Amendment for a union to use dues money collected under the compulsion of the union-shop agreement for political purposes to which an employee objects.

126. *Syres v. Oil Workers Int'l Union, Local 23*, 350 U.S. 892 (1955) (mem.); see also *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("wide range of reasonableness must be allowed a statutory bargaining representative"). See generally *THE CHANGING LAW OF FAIR REPRESENTATION* (Jean T. McKelvey ed., 1985).

127. *Vaca v. Sipes*, 386 U.S. 171, 190, 191 (1967).

128. *United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990).

129. *Local 12, United Rubber, Cork, Linoleum & Plastic Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966); *Metal Workers Local 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Board dissenters argued that the listing of employee rights in § 7 of the original NLRA of 1935 was unchanged by the 1947 amendments. Section 7 could not have contained an implied fair-representation duty binding on labor organizations, therefore, since only employers (who by themselves have no such duty) were subject in 1935 to the Act's unfair labor practice provisions.

130. 45 U.S.C. § 152 (1994).

131. *Ry. Employees' [sic] Dep't v. Hanson*, 351 U.S. 225, 232 (1956) (holding RLA § 2, Eleventh not unconstitutional on its face).

132. 367 U.S. 740 (1961).

Justice Brennan played the role in *Street* that Chief Justice Stone had played in *Steele*. Through a tortuous reading of the legislative history, he concluded for the Court that “[o]ne looks in vain for any suggestion that Congress also meant in § 2, Eleventh to provide that unions with a means for forcing employees, over their objection, to support political causes which they oppose.”¹³³ The statute itself forbade such expenditures, and the constitutional question could be skirted. Blunt old Justice Black, taking a part analogous to Murphy’s in the earlier case, would have none of this: “The end result of what the Court is doing is to distort this statute so as to deprive unions of rights I think Congress tried to give them”¹³⁴ But in Black’s eyes, Section 2, Eleventh, properly interpreted, violated the free speech guarantees of the First Amendment. Justice Frankfurter, joined by Justice Harlan, would have interpreted the statute as did Justice Black but would have upheld its validity.¹³⁵

Justice Murphy would have been torn by *Street*. He would likely have agreed with Justices Black and Frankfurter on the meaning of Section 2, Eleventh and he would have seen through the right-to-work rhetoric of the corporate lawyers promoting the challenge to the statute.¹³⁶ He would also have recognized, like Justice Frankfurter, that striking down unions’ political expenditures “would greatly embarrass if not frustrate conventional labor activities which have become institutionalized through time.”¹³⁷ But Justice Murphy’s ultimate allegiance, as in *Virginia Electric*,¹³⁸ was to freedom of expression, and he probably would not have been offended by the final resolution in *Street* and its progeny. A union may not “collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.”¹³⁹ Except in right-to-work states forbidding union shops, however, unions may still prevent “free riders” by securing agreements entitling them to obtain from all employees their pro rata share of the organization’s costs in negotiating and administering the labor contract and related activities. In the absence of an employee’s objection, dues money may also be used for political or ideological purposes.¹⁴⁰

133. *Id.* at 764.

134. *Id.* at 785 (Black, J., dissenting).

135. *Id.* at 799-801 (Frankfurter, J., dissenting).

136. It is only fair to mention that I drafted the *amicus* brief for the AFL-CIO in *Street*.

137. *Street*, 367 U.S. at 818 (Frankfurter, J., dissenting).

138. *See supra* text accompanying notes 85-91.

139. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447 (1984); *see also* *Communications Workers v. Beck*, 487 U.S. 735 (1988) (employees subject to NLRA); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (public sector employees).

140. *See generally* Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1 (1989). Other federal and state stat-

VII. FAIR LABOR STANDARDS: THE "PORTAL-TO-PORTAL" CASES

In *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123* ("TCI"),¹⁴¹ the question was whether the Fair Labor Standards Act ("FLSA"),¹⁴² as it then read, included as "hours" of the "workweek" the time iron ore miners spent traveling underground from the mine entrance to the "working face" where they drilled and extracted ore. If so, the mines owed substantial sums to their employees. The travel time had been excluded in calculating the forty-hour workweek, after which the employers were required to pay time-and-a-half overtime.

Justice Murphy was in his element while writing the opinion for the Supreme Court. "Such an issue," he declared, "can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion."¹⁴³ At this point the mineowners presumably knew they were in trouble. It got worse. Justice Murphy went on to describe riding underground in the so-called skips, or ore boxcars:

[S]ince the skips usually clear the low mine ceilings by only a few inches, the miners are compelled to bend over . . . with bodies contorted and heads drawn below the level of the skip top. Broken ribs, injured arms and legs, and bloody heads often result; even fatalities are not unknown.

The length of the rides in the dark, moist, malodorous shafts varies in the different mines from 3,000 feet to 12,000 feet. The miners then climb out . . . and continue their journeys on foot for distances up to two miles. . . . The air is increasingly warm and humid, the ventilation poor. Odors of human sewage . . . permeate the atmosphere Water, muck and stray pieces of ore often make the footing uncertain At all times the miners are subject to the hazards of falling rocks.¹⁴⁴

Not surprisingly, Justice Murphy concluded that the underground travel time thus spent by the miners, done for the benefit and under the supervision of the employers, was includable in the "workweek" for the purposes of determining entitlement to overtime. The FLSA applied "portal to portal." Justices Frankfurter and Jackson concurred in separate opinions, emphasizing that two lower courts had found that the miners' travel possessed the characteristics of "work" as

utes expressly limit a union's political contributions and expenditures. See generally Robert M. Cohan, Comment, *Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context*, 51 TEXAS L. REV. 936 (1973).

141. 321 U.S. 590 (1944).

142. Fair Labor Standards Act of 1938, ch. 676, § 7(a), 52 Stat. 1060, 1063, § 7(a) (codified at 29 U.S.C. § 207(a) (1994)).

143. *TCI*, 321 U.S. at 592.

144. *Id.* at 596.

commonly understood.¹⁴⁵ Justice Roberts, joined by Chief Justice Vinson, dissented on the grounds it had long been the custom and practice in the related coal-mining industry to pay only for work at the mine face, and the FLSA should be interpreted in light of that history.

Justice Murphy, speaking this time for a bare majority of the Court, extended the *TCI* decision to the bituminous-coal-mining industry in *Jewel Ridge Coal Corp. v. Local 6167, United Mine Workers*.¹⁴⁶ The major factual difference was that in coal mining there was a universal fifty-year custom and usage, confirmed by “every collective bargaining agreement which was ever made,” not to treat underground travel time as work time.¹⁴⁷ Justice Murphy brushed this aside: “The Fair Labor Standards Act was not designed to codify or perpetuate those customs or contracts which allow an employer to claim all of an employee’s time while compensating him only for a part of it.”¹⁴⁸

Justice Jackson now dissented, supported by Chief Justice Vinson and Justices Roberts and Frankfurter. In a long recital of the historical background, Jackson stressed that the Mine Workers and the coal mine operators, in presentations to the Wage and Hour Administration, had all opposed construing the FLSA to require payment for travel time. That was the price for securing higher wage levels through collective bargaining. For Justice Jackson, the majority’s decision would “impair for all organized labor the credit of collective bargaining, the only means left by which there could be a reliable settlement of marginal questions concerning hours of work or compensation.”¹⁴⁹

With Justice Murphy once more leading the way, the Supreme Court took a final, ill-fated step in *Anderson v. Mt. Clemens Pottery Co.*¹⁵⁰ The Company employed about 1200 employees at its pottery plant, with around ninety-five percent of them compensated on the basis of piece work. As calculated by the employer, the workers’ eight-hour day did not include the time spent walking from the time clock to their workbenches or preparing themselves or the machinery there. Total walking time during a day was estimated at two to twelve minutes or more daily, and preparation time another three or four minutes. On behalf of the majority, Justice Murphy stated that the time spent walking and engaging in preliminary activities would have to be counted as compensable under the Act. The activities were performed solely on the employer’s premises and involved “physical or mental

145. *Id.* at 604 (Frankfurter, J., concurring); *id.* at 605 (Jackson, J., concurring).

146. 325 U.S. 161 (1945).

147. *Id.* at 166 (quoting 53 F. Supp. 935, 950 (D. Va. 1944) (internal quotation omitted)).

148. *Id.* at 167 (quoting *TCI*, 321 U.S. at 602 (internal quotation omitted)).

149. *Id.* at 195.

150. 328 U.S. 680 (1946).

exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”¹⁵¹ The time for this thus “differed vitally from the time spent in traveling from workers’ homes to the factory.”¹⁵² Justices Frankfurter and Burton dissented. Justice Jackson did not participate.

Unlike *TCI* and *Jewell Ridge, Mt. Clemens Pottery* could potentially apply to any large industrial operation. And it differed so much in degree as to amount to a difference in kind. Riding or walking substantial distances through “dark, moist, malodorous” — and hazardous — underground shafts is one thing, and walking a short way through a modern factory is quite another. Archibald Cox had little if any difficulty classifying the former as “work,” regardless of custom or contract, but the latter was more problematic.¹⁵³ The statute’s policy against overlong hours did not help. For Professor Cox, the choice came down to “the judge’s conception of his proper role in our society.”¹⁵⁴ Should judges leave major reforms to elective bodies or undertake, under the guise of statutory construction, those reforms seen as desirable, so long as no apparent legislative intent is ignored?

The judicial activism of Justice Murphy, in Cox’s view, was grounded in two factors:

He thought in terms of fair play, decent standards of living, oppression, justice and injustice He believed also . . . that the authority of a Supreme Court Justice carried weight beyond the litigants; therefore he should speak out against persecution or oppression even though affirmation or reversal of the judgment did not so require.¹⁵⁵

Cox felt, however, that the portal-to-portal cases showed the shortcomings of this judicial philosophy. Case-by-case adjudication, he said, is based on too narrow a record for broad generalizations, and the principles developed in one setting may be applied too mechanically in later, quite diverse settings.¹⁵⁶ But surely those are not inherent deficiencies in an activist philosophy, whatever else may be its failings. A careful judge should be well aware that the very strength of case-by-case adjudication is attention to particular circumstances and that any change in relevant circumstances may call for a change in the governing principle. Rightly or wrongly, Justices Frankfurter and Jackson had no trouble distinguishing among *TCI*, *Jewell Ridge*, and *Mt. Clemens*.

151. *Id.* at 691-92 (quoting *TCI*, 321 U.S. at 598 (internal quotation omitted)).

152. *Mt. Clemens*, 328 U.S. at 691.

153. Cox, *supra* note 1, at 807-08.

154. *Id.* at 808.

155. *Id.* at 809.

156. *Id.*

Nevertheless, Professor Cox was undoubtedly correct that the activist judge runs the risk of misgauging public sentiment and creating a backlash against the very causes he or she seeks to advance.¹⁵⁷ *Mt. Clemens Pottery* would have exposed American industry to potentially heavy liabilities, and Congress swiftly responded with the Portal-to-Portal Act of 1947.¹⁵⁸ In effect, the Act overturned the Supreme Court decisions on travel and preparation time, except insofar as their results were supported by custom, practice, or contract. But in fact the collective-bargaining agreements of miners thereafter did proceed to provide compensation for their underground travel time.¹⁵⁹ Justice Murphy may have lost some battles, but his stirring words were heeded, and he won a major war.

CONCLUSION

Frank Murphy was not a great scholar or legal craftsman. Yet he brought to the law and the art of judging some eminently worthy values. Among them was an unceasing determination to see realized in the daily lives of ordinary people such basic human rights as freedom of expression, fair and equal treatment, personal dignity, and the capacity to form organizations to promote their political, economic, and social well-being. In pursuing these objectives Murphy had a keen understanding of the practical role of government at all levels. For example, he sensed early on and heartily approved of the extraordinary impact the new federal and state administrative agencies of the 1930s would have on the life of the nation. As biographer Sidney Fine observes: "He was a New Dealer before there was a New Deal, an advocate of the welfare state before there was a welfare state, and a pioneer in the transformation of the federal system that occurred during the Roosevelt era."¹⁶⁰

For all his commitment to workers' causes, however, and his firm belief in the merits of unionization and collective bargaining, Murphy could rise above such loyalties at the dictate of an overarching principle like free speech. *Virginia Electric*¹⁶¹ is the proof. For a sophisticated and skeptical age, which tends to depreciate a Frank Murphy

157. *Id.* at 810.

158. 61 Stat. 84, 29 U.S.C. §§ 251, 254 (1994). Section 4 of the Act provides that, in the absence of custom, practice, or contract to the contrary, the FLSA's minimum wage and overtime requirements do not apply to an employee's time spent in (1) "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities" and (2) "activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. § 254(a).

159. Cox, *supra* note 1, at 810.

160. FINE (1984), *supra* note 25, at 595.

161. See *supra* notes 85-91 and accompanying text.

with his simple faith and technical limitations, there may be a lesson here. The ultimate test of judicial character is the willingness to place principle¹⁶² ahead of partisan causes. Justice Murphy met that test.

162. For Justice Murphy, of course, it might have to be a living, breathing, *vital* principle — free speech, nondiscrimination, or something of equally practical meaning — and not an arid, abstract “formality” of legal doctrine. *See supra* note 143 and accompanying text. As Attorney General, also, Murphy gained a reputation for placing principle before political or other factional interests. *See supra* text accompanying note 25.