THE INFLUENCE OF MR. JUSTICE MURPHY ON LABOR LAW

Archibald Cox
Harvard University

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the First Amendment Commons, Judges Commons, Labor and Employment Law Commons, and the Legal Biography Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol48/iss6/8

This Tribute is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
THE INFLUENCE OF MR. JUSTICE MURPHY ON LABOR LAW

Archibald Cox*

WHEN Mr. Justice Murphy took his place on the Supreme Court in 1940, a period of major development in labor law was beginning. In 1935 Congress had laid one of the two principal foundation stones by enacting the Wagner Act. But the NLRA did not become effective in any practical sense until after its constitutionality was upheld in 1937, and it was in the next decade that the farthest reaching questions of interpretation and application were to be decided. The second stone was laid in 1938 when passage of the Fair Labor Standards Act committed the nation to the policy of guaranteeing both organized and unorganized workers the minimum labor standards "necessary for health, efficiency and general well-being of workers." The constitutionality of the FLSA, its scope, and perplexing questions vitally affecting its administration were determined during the Justice's tenure. Scarcely less important than the implementation of these statutory policies was to be the construction of a constitutional framework for state and Congressional regulation of strikes and picketing.

If one may judge from his opinions, Mr. Justice Murphy regarded the resolution of these problems as one of the vital aspects of the Court's work. His deep sympathy for common people, their welfare and aspirations, reached beyond workers in the mine, mill and factory, but his experiences in heavily industrialized Detroit and as Governor of Michigan gave him a special interest in labor law. Not a few labor cases also involved the assertion or curtailment of civil rights and thus raised the kind of issue for which the Justice felt the greatest concern. It was natural, therefore, that his judicial work should be most significant in these two fields and especially in the areas where they coalesce. The value of his judgments and opinions is evidenced not only by their number and contemporary importance but also by the enduring influence which those that are preeminent promise to exert.

* Professor of Law, Harvard University.—Ed.

4 Id., §2(a).
Mr. Justice Murphy's opinions in the general field of labor law are too numerous and their subject matter is too diverse to discuss them all in a single article. I have tried to choose not only the cases which will have lasting importance but also a representative number which reveal the quality of his judicial work.

I

Majority Rule and Minority Rights in Collective Bargaining

The Wagner Act made a system of industrial relations based upon collective bargaining the goal of our national labor policy. Its realization depended upon forging the statute into an effective instrument for protecting the workers' new rights of self-organization and collective bargaining. Some of the unfair labor practices, notably "interference, coercion and restraint," were cast in such general terms as to require judicial elaboration. There was need for careful definition of the relationship between the NLRB and the courts. And the efficacy of the statute in many situations also depended upon developing effective remedies for unfair labor practices.

In view of Mr. Justice Murphy's interest in organized labor it is somewhat surprising that he was not assigned a greater number of important opinions in cases arising under the NLRA. He spoke for the Court on no more than six occasions, but it may fairly be surmised that through his influence on his colleagues Mr. Justice Murphy's voice carried more weight in the development of this branch of labor law than the number of his opinions might seem to indicate.

The Justice brought to conference a firm belief in labor unions and collective bargaining. His experiences in Detroit and later as Governor of Michigan gave him insight into the needs and aspirations of industrial workers, which unionization and collective bargaining afforded

them opportunity to fulfill. The most dramatic instance of his belief in the long-run good sense and law-abiding character of working people occurred during the sit-down strikes of 1937 when he refused to call out the troops as a means of restoring to private owners properties which sit-down strikers had seized and held in defiance of law. That this revolutionary technique never took root in America may be partly attributable to the wisdom of Governor Murphy's restraint. The lesson was not forgotten when ten years later the government's injunction case against John L. Lewis came before the Court.

"It has been said that the actions of the defendants [in striking in violation of a court decree] threatened orderly constitutional government and the economic and social stability of the nation. Whatever may be the validity of those statements, we lack any power to ignore the plain mandates of Congress.... A judicial disregard of what Congress has decreed may seem justified for the moment in view of the crisis which gave birth to this case. But such a disregard may ultimately have more disastrous and lasting effects upon the economy of the nation than any action of an aggressive labor leader in disobeying a void court decree."  

Mr. Justice Murphy was also a strong and consistent spokesman both for administrative finality in determining whether unfair labor practices had occurred and for administrative discretion in forging a remedy. On a few occasions he spoke for the majority but his attitude on these issues appears more clearly in opinions dissenting from the invalidation of NLRB orders. Nevertheless it is plain that his votes to sustain the agency did not result from blind adherence to labor's cause. In cases involving the so-called "blanket cease and desist orders" he disagreed with Justices Black and Douglas and joined in narrowing the orders so that they would cover only those offenses the danger of which was foreshadowed by previous unfair practices.

Both Mr. Justice Murphy's faith in collective bargaining and his respect for administrative action may be illustrated by reference to two

---

10 See cases cited note 8, supra.
characteristic opinions involving wartime plant guards. As a security measure many war plants were required to increase the number of their guards and watchmen, who were organized as auxiliary military police under executive orders and War Department regulations. Their functions were (1) to provide protection against sabotage, espionage and natural hazards and (2) to serve with the Army in providing protection to the plant and its environs in emergency situations. The guards were subject to military instruction and duties but control was exercised through the plant management, except at drill and in emergencies. The War Department retained a veto power over employment and dismissal, but in other respects the relationship between the guards and the war contractor was that of employee and employer. It was the policy of the NLRB, which the War Department approved, to treat militarized guards as employees for the purposes of the NLRA, and to permit them to designate any bargaining representative the majority might choose, although they were required to bargain as a separate unit.

It is plain that this policy raised serious questions affecting both the loyalty of guards to their employer and the security of important war plants. NLRB orders requiring employers to bargain collectively with the unions designated by plant guards were set aside in the Sixth and Seventh Circuits, largely on the ground that the Board had disregarded the national welfare. The Supreme Court reversed the decrees of the courts below and reinstated the NLRB orders. Mr. Justice Murphy's opinions, in which he spoke for the Court, reveal both his sympathy for the workers' need for collective bargaining and his faith in their ability to adjust it to special circumstances. Watchmen and guards "do not lose the right to serve themselves" in matters affecting their own wages, hours and working conditions "merely because in other respects they represent a separate and individual interest of management." The special problems inherent in the relationship could be solved within the framework of the act.

"Union membership and collective bargaining are capable of being molded to fit the special representatives of deputized plant guards and we cannot assume, as a proposition of law, that they will not be so molded. If there is any danger that particular deputized guards may not faithfully perform their obligations to the public,  

the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agents."\(^{14}\)

But the Justice did not rest on his opinion alone. The courts were not the only guardians of the national welfare. "In the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest. . . . 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 to this case."\(^{15}\)

These cases developed the first great principle established by the Wagner Act—the right of employee self-organization. During Mr. Justice Murphy's tenure the Court was also called upon to particularize a second ideal—that of collective bargaining and majority rule. In a series of decisions the Court held that the existence of individual contracts will not excuse the employer from bargaining with the majority representative;\(^{16}\) that the employer cannot negotiate with an individual an effective agreement which subtracts from the collective bargain;\(^{17}\) that he may not change wages or conditions of employment unilaterally without the assent of the union unless an impasse in the bargaining has been reached;\(^{18}\) and that he may not negotiate general conditions of employment even with a numerical majority of his employees so long as they have a bargaining representative.\(^{19}\) Thus the negotiation of a collective bargaining agreement between the employer and the union, so far as the individual employees are concerned, is not unlike the legislative process of a state or municipality. Terms and conditions of

\(^{16}\) J. I. Case Co. v. NLRB, 321 U.S. 332, 64 S.Ct. 576 (1944).
\(^{19}\) Medo Photo Supply Co. v. NLRB, 321 U.S. 678, 64 S.Ct. 830 (1944).
employment can be made only with the assent of the majority of the workers who will be governed thereby. But the rules written into the collective agreement are the law of the plant binding upon majority and dissenters.

The possession of such power invites abuse when the wishes of the majority run counter to minority interests. The danger is shown by *Steele v. Louisville & Nashville R. Co.* The Brotherhood of Locomotive, Firemen and Enginemen was designated under the Railway Labor Act as the bargaining representative of the firemen employed by the Louisville & Nashville Railroad Company. The carrier employed both white and Negro firemen. White firemen were a majority and the Negroes were excluded from the union, although they would of course be bound by any collective bargaining agreement negotiated between the carrier and the union. Thereafter the union negotiated a contract containing seniority provisions which gave white firemen preference over Negroes in filling the best paid jobs. Whether based on racial prejudice or selfish economic considerations, this was a flagrant abuse of the majority's power. A Negro who lost his job as a result of the application of the discriminatory seniority provisions brought suit seeking injunctive and declaratory relief. The Alabama courts dismissed the bill of complaint.

On certiorari the judgment was reversed. The Supreme Court unanimously held, in an opinion by the Chief Justice, that the Railway Labor Act by fair implication imposed 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." The ruling did not mean that no distinctions could be made in collective bargaining between members of the bargaining unit. But "discriminations based on race alone are obviously irrelevant and invidious," and the duty of fair representation imposed on the statutory bargaining representative is "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." The right asserted derived from the federal statute and in the absence of an adequate administrative remedy was cognizable by the federal courts.

21 Id. at 202-203.
22 Id. at 203.
23 Id. at 202.
In their arguments in the Steele case the plaintiffs had contended that the Fifth Amendment was violated by the negotiation of a collective bargaining agreement which discriminated against Negroes. By placing the union's duty upon the statute the Court avoided the decision of the constitutional issue. Mr. Chief Justice Stone's opinion should become 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. Out of the instinctive Anglo-American distrust for unlimited power grew the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. . . ." 24 By a fusion of common law technique and statutory interpretation the opinion made the principle an integral part of the law of collective bargaining and thereby supplied the necessary counterpoise to majority rule.

To Mr. Justice Murphy this was an unsatisfactory disposition of the controversy. No careful reader of his opinions could deny the force of his writing or question his competence to deal with legal doctrines and complex facts. But he saw issues of law, however complex, as problems of human life and his mind went quickly to what he deemed the simple, but basic elements of a case. 25 Rules of judicial restraint or sophisticated analyses were so much legalistic folderol if they kept him from dealing with simple truths. 26 His conception of his role as a judge also made him unusually outspoken. For Mr. Justice Murphy freedom of expression merged with freedom of conscience, and if he had articulated his philosophy of liberty, I believe, he would have agreed that there is a privilege to speak because one's conscience lays on him as a man the obligation to express his thoughts. 27 The Justice carried this compulsion into his judicial work. When the Court perceived an injustice, the considerations of sound judicial administration

24 Ibid.
should yield to the obligation to condemn the wrong. In the Steele case, therefore, the decision should have been placed on constitutional grounds. "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."28 The quoted sentence refers to racial discrimination but I have no doubt that it represents his persistent conception of the duties of the Court.29

Since the Justice's opinion in the Steele case was only a brief concurrence, we cannot know how he would have developed his reasoning. In laying on collective bargaining representatives the duty of fair representation which is implicit in a democratic institution the Chief Justice established the legal foundations for a body of law protecting individual workers and minorities of all kinds against abuse of the powers which collective bargaining gives to the majority.30 A sharper protest against racial discrimination without the Chief Justice's careful development of legal doctrine would have been a lesser contribution to the law's solution of this increasingly important problem of industrial life. Yet there will be few to regret the concurring opinion. When plainly spoken, the words of a Supreme Court justice have an influence beyond the law. Like others among his best opinions, Mr. 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. The opinions gained as political documents what they sacrificed in conventional judicial administration and legal technique.

II

Freedom of Speech in Labor Relations

A. Thornhill v. Alabama31

Under the traditional common law analysis concerted employee activities were tortious and enjoindable if their objective was "unlawful"

29 The same impatience is expressed in a concurring opinion in Oyama v. California, 332 U.S. 633 at 650-674, 68 S.Ct. 269 (1948). Note also his desire to deal with general constitutional issues which the other members of the Court held not to be ripe for decision. A.F. of L. v. Watson, 327 U.S. 582 at 606, 66 S.Ct. 761 (1946); Rescue Army v. Municipal Court, 331 U.S. 549 at 585, 67 S.Ct. 1409 (1947).
31 310 U.S. 88, 60 S.Ct. 736 (1940).
or if the workers resorted to "unlawful means." "Unlawful," in the former case, did not mean that the workers were asking the employer to commit a crime or to make a concession which the law withheld. It meant merely that the workers' demand was one for which the judges thought that the workers ought not be allowed either to leave their jobs in concert or to persuade others so to do. Closed shop contracts were lawful and, when executed, would be enforced by the courts. Nevertheless a strike or picketing to secure the execution of a closed shop contract would be enjoined. It was lawful for an employer and union to bargain collectively. But if the employees wished to bargain collectively and the employer refused, some courts held that the employees could not lawfully strike and picket the employer because collective bargaining was an "unlawful objective" of concerted activities.

As applied to the means, the term "unlawful" was used to condemn employee conduct which the court thought improper even in pursuit of a lawful objective. There could be no complaint about many applications of this generalization but others interdicted labor activities which the community approved. One doctrine was especially objectionable to organized labor—the doctrine that all picketing, however peacefully conducted, was inherently unlawful whatever the objective might be.

It is habitual to think of the enactment of the Norris-LaGuardia Act in 1933 as marking the decline of the labor injunction. In a measure the appraisal is justified. Thereafter there were not many cases in which the lower federal courts enjoined peaceful labor activities, and the Supreme Court soon made it plain that the act should not be grudgingly applied. A number of states adopted similar anti-injunction laws. Many employers came to realize that industrial relations could not be conducted by deputy sheriffs armed with equity decrees. Nevertheless there is danger of over-emphasizing the extent

---

32 TORTS RESTATEMENT §775.
of these developments. In many states the old common law doctrines retained their full force.\footnote{Teller, Labor Disputes and Collective Bargaining §112 (1940).} Other communities, some of them seeking to attract new industries from unionized areas, revived earlier statutes or enacted new laws restricting labor activities. In Alabama, for example, it remained a misdemeanor for any person

"... without a just cause or excuse, [to] go near to or loiter about the premises or place of business of any other person ... engaged in a lawful business, for the purpose, or with the intent of influencing or inducing other persons not to trade with ... or be employed by such persons. ..."

... or to

"... picket the works or place of business of such other persons ... for the purpose of hindering, delaying, or interfering with or injuring any lawful business."\footnote{Ala. Code (1923) §3448.}

Shasta County, California, enacted a similar ordinance as an emergency law in 1938.\footnote{Carlson v. California, 310 U.S. 106, 60 S.Ct. 746 (1940); Record on Appeal, 68A.} In anti-union areas such laws were powerful weapons against the spread of labor organization.

In 1937 Byron Thornhill was convicted of violating the Alabama anti-picketing statute quoted above.\footnote{Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940). Most of the facts stated above may be found in the official report. Others are taken from the record on appeal.} He was an employee of the Brown Wood Preserving Company and president of the local A.F. of L. union to which most of its employees belonged. The plant employed 100 men. It was located in the little company town of Brownville and most of the employees lived, traded and got their mail on company property. Just before Thanksgiving the union called a strike; the record does not show why. Six or eight pickets were stationed at each of the tents set up to protect them from the weather but so far as the record shows, there was not a whisper of violence. When the company sought to resume operations a deputy-sheriff in its employ arrested Thornhill for picketing the entrance to the plant and asking a fellow employee not to return to work; so far as appears Thornhill went up to him alone. The deputy "heard no harsh words and saw nothing threatening in the manner of either man."\footnote{R. 12.} After trial a judgment of conviction was entered.

\footnote{The record does not show the size of Brownville, but it was, and is, too small to appear in the Alabama Official and Statistical Register.}
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. Here was an aspect of the underdog’s battle for better living standards, and that was enough to make the question important. 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. Freedom of speech, in the Justice’s view, was essential to freedom of conscience. Suppression of speech was an affront to human dignity because it forbade the individual to follow the duty of speech laid upon him by his conscience.

But in 1940 even one stirred by such beliefs could find little in accepted legal doctrines to prevent states and municipalities from enforcing statutes, ordinances or judge-made law outlawing peaceful picketing. Mr. Justice Brandeis had declared in 1937 that “members of a union might, without special statutory organization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.” Yet the dictum was spoken in a case sustaining the constitutionality of a state anti-injunction law, and there seems to have been little reason to suppose that it foreshadowed a departure from the traditional practice of leaving it to the states to work

---

45 Arnold, “Mr. Justice Murphy,” 63 Harv. L. Rev. 289 (1949).
46 Mr. Justice Murphy’s concern for freedom of conscience was expressed most effectively in cases dealing with religious liberty, but he also stressed it in other connections. In a case involving the use of listening devices to pry into the privacy of one suspected of crime, he declared:

“Suffice it to say that the spiritual freedom of the individual depends in no small measure upon the preservation of that right [of privacy].” Goldman v. United States, 316 U.S. 129 at 136-137, 62 S.Ct. 993 (1942). See also Schneiderman v. United States, 320 U.S. 118 at 138-139, 63 S.Ct. 1333 (1943).

It was also in cases concerning religious liberty that the Justice related freedom of expression to a conscientious duty to speak. “Important as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many more individuals—the right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living person.” Jones v. Opelika, 316 U.S. 584, 611 at 621, 62 S.Ct. 1231 (1942). I have not found this view expressed in other cases, but the Justice’s opinions convey the impression that if he had articulated his philosophy, he would have agreed with the passage in Hocking, Freedom of the Press 97-98 (1947) which is quoted in Freund, On Understanding the Supreme Court 118 (1949): “If a man is burdened with an idea; he not only desires to express it; he ought to express it. . . . It is the duty of every man to his belief. . . . In any case, one’s relation to what he himself sees constitutes for him a major obligation, and the freedom of expression here merges with freedom of conscience.” It is clear that the Justice felt and acted upon this obligation as a judge. See p. 773, supra.

out by statute or court decision their own definitions of "lawful" and "unlawful" labor objectives and to regulate "lawful" and "unlawful" means. The Supreme Court itself had often approved federal injunctions restricting peaceful labor activities.\(^48\)

Despite the lack of precedent Thornhill's conviction was reversed. Mr. Justice Murphy's opinion points first to the settled rule that the Fourteenth Amendment secures freedom of speech against abridgment by a state. "In the circumstances of our times," he continued, "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."\(^49\) The statute in question condemns giving publicity to the facts of labor dispute "whether by printed sign, by pamphlet, by word of mouth or otherwise . . . so long as it occurs in the vicinity of the scene of the dispute."\(^50\) To secure reversal of his conviction Thornhill need not show that as applied to him the statute is invalid. Since the information was in the loose words of the statute, and since the statute's very existence endangers freedom of discussion, it is proper to judge the act upon its face. "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. . . . We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in §3448."\(^51\)

The crux of the decision is the holding that the validity of the statute should be determined upon its face. From that premise the conclusion followed that the conviction should be reversed if any of the activities condemned by the statute constituted an exercise of freedom of expression. The Alabama courts had already held that the statute forbade picketing of a retail establishment by a single picket who, without speaking, carried a sign truthfully stating that the store employed non-union labor.\(^52\) Under this interpretation, which was binding on the Supreme Court, the statute proscribed all picketing at the scene.


\(^{49}\) 310 U.S. 88 at 102, 60 S.Ct. 736 (1940).

\(^{50}\) Id. at 101.

\(^{51}\) Id. at 104-105.

of a labor dispute. The Court was required to decide, and did decide, therefore, nothing more than that peaceful picketing of some kind is conduct protected by the First and Fourteenth Amendments. But whatever the possible limitations two new constitutional doctrines were clearly laid down: First, peaceful picketing, viewed in isolation and apart from any concerted activities to which it is related, is a form of communication protected by the First and Fourteenth Amendments; therefore the states may not treat picketing as inherently unlawful either by statute or by judicial decisions reviving the common law rule. Second, the injury to a lawful business which results if the pickets succeed in their appeal does not justify interdiction of the picketing.

Revolutionary as was the narrow holding it is not surprising that the language of the opinion received still greater attention. Its phrases are those of the First Amendment. There are references to the clear and present danger test.\textsuperscript{53} Without further qualification peaceful picketing is described as a practicable and effective means "whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."\textsuperscript{54} The point was stated still more strongly in \textit{Carlson v. California},\textsuperscript{55} a companion case decided on the same day:

"For reasons set forth in our opinion in \textit{Thornhill v. Alabama}, supra, 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 within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State."

Subsequent cases extended the \textit{Thornhill} doctrine. In \textit{American Federation of Labor v. Swing}\textsuperscript{56} the Court set aside a decree restraining a union from picketing a beauty parlor where it was seeking to negotiate a closed shop contract. None of the employees of the beauty parlor were on strike and none belonged to the union. Nevertheless the Court declared that "the right of free communication cannot . . . be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."\textsuperscript{57} While the \textit{Swing} case thus made it clear that the constitutional right to engage in picketing extends

\textsuperscript{53} 310 U.S. 88 at 95-96, 105, 60 S.Ct. 736 (1940).
\textsuperscript{54} Id. at 104.
\textsuperscript{55} 310 U.S. 106 at 113, 60 S.Ct. 746 (1940).
\textsuperscript{56} 312 U.S. 321, 61 S.Ct. 568 (1941).
\textsuperscript{57} Id. at 326.
to those who are not employees, the *Wohl* case took the next step by deciding that the right to picket exists even though by state law no "labor dispute" is in progress. 58 Even as the latter opinion was handed down, however, the Court seemed to retreat from some of the more extreme implications of the new doctrine, for on the same day a majority of the Justices held in *Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 59 that a state court might enjoin a union from picketing a cafe in order to exert economic pressure on its owner for the purpose of compelling him to cease dealing with a non-union building contractor with whom the union was in dispute. The decision was put on the ground that since the arrangement between the cafe owner and the contractor had no connection with the restaurant business, the state might constitutionally seek to localize the labor dispute. Mr. Justice Murphy and Mr. Justice Douglas joined in the dissenting opinion written by Mr. Justice Black. Mr. Justice Reed filed a separate dissenting opinion. All three opinions, however, continued to speak the language of the First Amendment. And in a unanimous decision during the next term the Court explicitly reaffirmed "the right of workers to state their case and to appeal for public support in an orderly and peaceful manner." 60

The *Thornhill* doctrine gave rise to no little confusion with respect to the power of the state legislatures and state courts to regulate the use of picketing, strikes and similar economic weapons. Clearly the Court had overturned on constitutional grounds the old rule that picketing was an unlawful means of carrying on concerted activities even when it was peaceful and the objective was lawful. Clearly the Court had also invalidated the statutes and common law doctrines which condemned "stranger picketing." But beyond this point there has been no agreement. Some courts concluded that the association of peaceful picketing with freedom of speech compelled the conclusion that peaceful picketing could never be enjoined in the absence of a clear and present danger of great public injury. 61 In other states the courts concluded

---

that picketing could be restrained if the objective was unlawful, not in the sense that it offended state legislation but in the sense that it was insufficient to justify the intentional infliction of injury upon the employer.\textsuperscript{62} Thus one of the important questions left open by the Supreme Court decisions was the significance, if any, of the objective of the picketing in a particular controversy.

A second major issue was the bearing of the \textit{Thornhill} doctrine on the power of the states to regulate organized strikes and boycotts. Few would deny that peaceful picketing is itself an economic weapon. More often than not the picket line is simply the method which a union uses to notify its members and the members of affiliated organizations that union discipline will be imposed if they work in, or pick up or deliver goods at, the picketed establishments. Yet the Supreme Court had spoken of picketing without qualification,\textsuperscript{63} and this seemed to imply that the association of picketing with freedom of speech covered picketing which was an integral part of organized economic action as well as mere patrolling for the purpose of eliciting public support through an appeal for sympathy. If so, was it not a logical deduction that all labor's economic weapons, including the strike, have an equally broad constitutional immunity? This was the conclusion of three federal judges.\textsuperscript{64}

"The right to peaceably strike or to participate in one, to work or refuse to work, \ldots like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community."

Not every court accepted this reasoning\textsuperscript{65} but if it was correct, much of our recent state and federal legislation would be invalid.

\begin{itemize}
\item \textit{N.Y.S. (2d) 450 (1945)} (both holding that peaceful picketing whose purpose was to compel an employer to violate the state labor relations act would not be enjoined).
\item \textsuperscript{62} Thus, the Supreme Judicial Court of Massachusetts adhered to its doctrine that although a closed shop contract is valid and enforceable, picketing to secure the execution of such a contract is for an unlawful objective and will be enjoined. \textit{Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N.E. (2d) 1 (1943). Accord, Silkworth v. Local No. 575, 309 Mich. 746, 16 N.W. (2d) 145 (1944).}
\item \textsuperscript{63} Actually neither Mr. Justice Murphy's opinions nor those immediately following use the word "picketing" to describe the conduct which the states had unconstitutionally attempted to forbid. But plainly picketing was being described.
\item \textsuperscript{65} In Society of the New York Hospital v. Hanson, 185 Misc. 937, 59 N.Y.S. (2d) 91 (1945), Justice Pecora distinguished between the right to picket and the right to strike, holding that the latter might be enjoined even though the former was immune. In a dissenting opinion in Hughes v. Superior Court, 32 Cal. (2d) 850 at 871, 198 P. (2d) 885
\end{itemize}
Some uncertainty is the inevitable product of any sudden change in basic constitutional doctrine. In this case, however, the confusion was multiplied by the opinion. The boldness and force of its reasoning were equalled by the generality of its words. The justice made no such effort to show the place of the ruling in the stream of labor law as is characteristic of the best opinions of Mr. Chief Justice Stone. These are faults so far as the function of Supreme Court opinions is to guide other, inferior tribunals and to serve as precedents in later cases. But if through their impact on a wider audience the opinions influence not merely our legal doctrines but our national thought, then the occasion was ripe for a ringing declaration of the right of the workingman to publicize his cause. Mr. Justice Murphy was more concerned with speaking out against intolerance and oppression than with legal craftsmanship.

The severe limitations of this philosophy are evident in occasional cases. In Thornhill's case the gains from the forthright declaration outweighed the costs. The limits implicit in the doctrine from the beginning are now becoming so clear as to suggest they should have been perceived much earlier. Curiously, the seed of their development is to be found in an opinion by Mr. Justice Murphy dealing with an employer's freedom to express his views concerning labor unions.

B. NLRB v. Virginia Electric & Power Co.

Shortly after the Wagner Act was held constitutional, organizational activities among the employees of Virginia Electric & Power Co. were intensified. The company first posted a bulletin which, while it called attention to the right to join a union, emphasized the desirability of continuing individual bargaining. “For the last fifteen years this Company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees. . . .” Earlier the president had told the employees that a union was “entirely unnecessary,” and the company not only questioned em-

(1948), Judge Traynor drew the distinction between “publicity picketing” and “signal picketing” which is discussed below.

66 See note 25, supra.
68 Id. at 471, note 5.
employees concerning union activities but paid for espionage. A month after publication of the bulletin the company directed the employees to select representatives to discuss the Wagner Act with company officials. Thereupon meetings were held at which company officials read identical speeches, pointing out the practical inconveniences of individual bargaining and suggesting that negotiations ought to be conducted through representatives chosen under the Wagner Act.

"In view of your request to bargain directly with the Company, and in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and advisers, adopt your own by-laws and rules, and select your representatives to meet with the Company officials whenever you desire." 69

The events which followed underscored the company's preference for an "inside" organization. Committee meetings arranged with the cooperation of supervisors were held on company property and in some instances on company time. Membership applications were distributed throughout the system; many were signed on company time. As soon as a majority of the employees became members, the Independent was recognized and a contract was signed providing for a closed shop, the check-off and a wage increase. CIO meetings were kept under surveillance and employees were warned that "messing with the CIO" would lead to discharge. One employee who had spoken out against formation of the company union was discharged for his activity. The NLRB held that the bulletin and speeches had interfered with, restrained, and coerced the employees in the exercise of their statutory right of self-organization.

To Mr. Justice Murphy, issues of law, however complex, arose out of problems of human life, and his mind went quickly to what he deemed the simple, but basic elements of the case. But the basic elements in the Virginia Electric litigation, unlike Thornhill's case, were not ranged wholly on one side. The employer invoked the constitutional right to freedom of speech. But it was invoked to impede, if not defeat, the workers' freedom in choosing representatives through whom to bargain for higher labor standards. Arguments addressed by an employer to his employees in opposition to labor unions would instill the fear that the employer might use his economic power to punish disre-

69 Id. at 473-474, note 7.
gard of his desires. For this reason the conflict between employer freedom of speech and employee freedom of association was inescapable. One might resolve the issue in favor of the employees as the board had done repeatedly, either by holding that the employers lacked a legitimate interest entitling them to speak during the selection of a bargaining representative or by ruling that the privilege of free speech is not available when the listeners are economically dependent upon the speaker’s power. The alternative was to overturn a long series of NLRB decisions and sacrifice the interest in employee organization to freedom of expression. If so, a line would have to be drawn between the speech permitted and the threats forbidden by the statute.

The Supreme Court, speaking through Mr. Justice Murphy, chose to advance the interest in freedom of speech. 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. Perhaps it was this conflict between ideals both of which Justice Murphy held important which caused the vagueness and ambiguities of the opinion. For a time they concealed its importance and, unhappily, prevented full recognition of the Justice’s role in extending the protection of the First Amendment to both employees and employers. Yet in the light of subsequent events the line which the Court drew is sufficiently plain. Apart from the other alleged misconduct the bulletin and speech were not unlawful. “Neither the Act nor the Board’s order here enjoins the

70 Compare Learned Hand, C.J., in NLRB v. Federbush Co., (C.C.A. 2d, 1941) 121 F. (2d) 954 at 957: “Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. 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.”


72 See NLRB v. Federbush Co., (C.C.A. 2d, 1941) 121 F. (2d) 954. Both arguments were developed with additional citations in the Petition for Certiorari in NLRB v. American Tube Bending Co., No. 334, October Term, 1943, cert. den. 320 U.S. 768, 64 S.Ct. 84 (1943).

73 See pp. 769-770, supra.

74 E.g., NLRB v. American Tube Bending Co., (C.C.A. 2d, 1943) 134 F. (2d) 993 cert. den. 320 U.S. 768, 64 S.Ct. 84 (1943). In this case the National Labor Relations Board filed a petition for certiorari contending that the Virginia Electric case did not extend the privilege of free speech to employer arguments concerning unionization.
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. But however innocent on their face, an employer's arguments would violate the NLRA if they were part of a course of conduct designed to pit his economic power against employee self-organization. . . . Certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. . . . And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. To put the point another way, words which are in fact inescapably coercive do not offend against the legal concept of coercion embodied in section 8(1) unless the employer, either by his words alone or by the totality of his conduct, adds some further threat or promise to his appeal to reason.

Both branches of the Virginia Electric decision strongly influenced the development of labor law. The first led to a series of circuit court of appeals decisions reversing unfair labor practice findings based solely upon arguments and expressions of opinion. Later its substance was written into section 8(c) by the Taft-Hartley amendments. The second branch of the decision had a more checkered history. Administrative agencies tend to acquire a momentum which makes them resistant to change, and the momentum of the NLRB's development was enhanced by the staff's enthusiasm for labor unions and collective bargaining. The agency was slow to lose its distaste for employers who argued with their employees against embracing unionism, and the total-

76 Ibid.
78 Senator Taft in opening the debate in the Senate declared that the provision guaranteeing free speech to employers "carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into law itself, rather than to leave employers dependent on future decisions." 93 Cong. Rec. 3953 (1947).
ity of conduct doctrine furnished a convenient ground on which to rest its conclusions. Changes in the personnel of the board, however, together with the influence of the new trend of judicial decisions, led to confining the doctrine to situations in which related unfair practices strongly colored the speech. Its status under the Taft-Hartley amendments is still unsettled.

The influence of the Virginia Electric case, however, reaches far beyond the administration of the NLRA. Its roots are deep in the philosophy of the First Amendment. Freedom of speech is an ideal born during the enlightenment out of the faith that men can progress by the use of reason if ideas are freely interchanged to be tested by debate and experience. Nor can we seek to judge between appeals to reason and bare slogans arousing prejudice or emotion. Discussion may be curtailed only if a "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." But if the speaker goes beyond discussion and invokes sanctions to support his words, he cannot claim the same constitutional protection. For this reason an employer may speak freely on labor questions but if he does not leave his ideas to seek approval on their merits and instead of this invokes fear of his economic power to induce obedience, the constitutional privilege is exceeded and the state may intervene. The same philosophy is applicable to labor unions.

"No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."

In the field of peaceful picketing the philosophy thus drawn out of the Virginia Electric case by Mr. Justice Douglas concurring in Thomas v. Collins, has already found concrete application.

70 The evolution of NLRB policy was summarized by Mr. Reilly in Matter of Clark Bros. Co., 70 NLRB 802 at 807 (1946).
80 Matter of Fisher Governor Co., 71 NLRB 1291 (1946); Matter of LaSalle Steel Co., 72 NLRB 411 (1947).
C. Peaceful Picketing: Freedom of Speech and Economic Sanctions

When negotiation fails a labor union must resort to economic power to gain its objectives, either by withdrawing from the employer the services of employees or by withholding, and inducing others to withhold, their patronage. Success depends upon convincing the employer that it will be cheaper to capitulate, or to compromise the union's demands, than to face continuing losses. Furthermore, since there are relatively few occasions on which picket lines are set for the sole purpose of influencing public opinion, the role of the picket nearly always is to give notice of, and secure adherents to, the combination.

The economic purpose of picketing led some commentators to argue that the *Thornhill* doctrine distorted the ideals of the First Amendment. In terms of a purely political conception of freedom of speech the argument has considerable force. There is a clear distinction between discussion looking forward, however remotely, to political action and requests for immediate economic assistance in driving a private bargain. On this view the *Thornhill* and *Virginia Electric* decisions should be criticized alike. The former case holds expressly, and the latter holds by necessary implication, that the privilege of free speech may be invoked to protect utterances whose purpose is to advance private economic objectives. The argument loses much of its force, however, if the broader ground is taken that the First Amendment embodies a concern for human liberty as well as political rights because men know not only a need, but often a duty of expression. From this standpoint it is of small moment that an employer arguing with his employees is thinking of retaining the prerogatives which management loses under collective bargaining, or that a worker bespeaking the aid of his fellows is seeking immediate improvement of his standard of living. It is equally immaterial that the arguments and entreaties may in the one case lead men to refrain from joining the labor organization, thus lessening its economic power, and in the other may induce workers and customers to break off economic relations with the employer, thus injuring a lawful business. The latter point was categorically affirmed in the *Thornhill* decision.

Although the First Amendment covers both, it would be rash to assert that no distinctions will be drawn between political speeches and

---

84 See pp. 773 and 777, supra.
the use of words to achieve private, economic objectives. An economic concomitant of picketing which seems likely to be more important, however, is the sanctions which it threatens to invoke against workers who disregard the picket line. The International Brotherhood of Teamsters has made wide use of its ability to shut off the flow of supplies into an establishment, or to stop the movement of its products, merely by posting a single picket at each driveway normally used by incoming or outgoing trucks. Other unions exercise similar power not by appealing to the public but because of the discipline of their members. The truck driver who crosses a teamsters' picket line is subject not only to union fines but also to expulsion, and in the trucking industry suspension or expulsion from the union carries with it loss of employment—the capital punishment of the industrial world. The constitutions and by-laws of other unions provide similar sanctions and while reliable statistics are not available, it seems plain that whenever the union is strong enough to exercise its power, the power will be invoked if necessary. In such cases the picket line is not a method of securing publicity nor are the pickets seeking to secure adherents by persuading others of the truth of what they have to say. The pickets' reliance in such a case is on the sanctions inherent in the discipline and organized economic power of their union.

Quite different is the peaceful picketing which is directed primarily to the general public. Familiar illustrations may be found outside motion picture theatres, restaurants, and beauty parlors where none of the employees are on strike. Theoretically such a picket line may be entitled to the same respect from union members as any other, but as a practical matter economic sanctions play little part. Prospective patrons who are not union members are left free to determine their own course of conduct influenced but not coerced by the notice that a labor dispute is in progress. In such cases, therefore, the success or failure of pickets' appeal depends upon class or group loyalty, convention, embarrassment, fear of social ostracism and a host of similar prejudices and emotions. Nevertheless, it is the message which influences; obedience is not compelled by fear of economic or physical reprisals. 85

This distinction between picketing backed by the threat of economic punishment and picketing which appeals only to reason or emotion is paralleled by a difference in the audience which the pickets seek

to reach. The Teamsters' picket line is rarely addressed to individual members of the public. Its primary, and often its exclusive purpose is to notify union members and members of affiliated unions that they must not work in the picketed establishment, or pick up or deliver goods, because their unions are engaged in bringing economic weapons to bear on the employer. Despite its elements of publicity and propaganda, therefore, such picketing may be fairly described as the signal by which the union invokes its economic power.\(^8\) The pickets patrolling in front of a retail establishment are also bringing economic pressure against the business—and in this respect the case is the same—but their appeal is addressed to the public and the members of the public decide, chiefly as individuals, whether to patronize the establishment or to support the pickets' cause. Thus the publicizing is the primary element and the disciplined economic power of the union plays an insignificant part.

In caricature the lines are always sharper than in life. The multitude of picketing cases falls between the two extremes I have described in the range of activities covered by "peaceful picketing." The same picket line usually appeals both to public opinion and to group discipline backed by economic sanctions. The relative importance of the two appeals varies from case to case, presenting such nice questions of classification that from time to time the differences may be obscured. It is submitted, however, that the distinction is practicable and that the constitutional status of the picketing depends, largely but not exclusively, on whether the "publicity" or "signal" aspect predominates.

Indeed, the distinction is the line drawn by Mr. Justice Murphy in the Virginia Electric case between arguments alone and arguments raised to the stature of coercion by actual or threatened reliance on the use of economic power. The parallel between unfair labor practice and picketing cases was noted in three opinions in Thomas v. Collins,\(^8\) and the point is made plain by the recent decision in Giboney v. Empire Storage & Ice Co.\(^8\) Teamsters Local No. 953 organized 160 of 200 retail ice peddlers in Kansas City, Missouri. After the union failed to

---

\(8\) Compare Gompers v. Bucks Stove & Range Co., 221 U.S. 418 at 439, 31 S.Ct. 492 (1910): "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force not inherent in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."


persuade the remaining peddlers to join, it requested the wholesale ice distributors to agree not to sell ice to non-union peddlers. Empire refused. Had it signed the agreement, it would have been subject to criminal prosecution and civil liability under the Missouri anti-trust laws. Local No. 953 thereupon commenced to picket Empire's place of business. Most of the truck drivers employed by Empire's retail customers belonged to a local affiliated with the organized peddlers. They refused to cross the picket line; if they had, they would have been disciplined by their union. Empire's business was seriously injured and it sought protection in the Missouri courts. An injunction was issued restraining the picketing and the decree was affirmed on appeal.\textsuperscript{89}

The Supreme Court of the United States, in an opinion by Mr. Justice Black, affirmed the judgment of the Missouri courts. State power to prevent combinations in restraint of trade, the Court declared, is beyond question. Such legislation may be applied to combinations of workers no less than to other groups. Nor was the injunction against picketing an unconstitutional abridgment of free speech because the picketers were peacefully publicizing the facts of a labor dispute.

"... all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. ... [Therefore] it is clear that appellants were doing more than exercising a right of free speech or press. \textit{Bakery Drivers Local v. Wohl}, 315 U.S. 769, 776-777. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade."\textsuperscript{90}

That this course of conduct resulted from speech and writing was immaterial because "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."\textsuperscript{91} Where the elements of speech became thus entwined with the use of the unions' economic power, the speech loses its immunity from regulation and the union's whole course of conduct becomes subject to the power of the State

\textsuperscript{89} 357 Mo. 671, 210 S.W. (2d) 55 (1948).
\textsuperscript{90} 336 U.S. 490 at 498-503, 69 S.Ct. 684 (1949).
\textsuperscript{91} Id. at 502.
...to set the limits of permissible contest open to industrial combatants."

Mr. Justice Black relied heavily on the authority of NLRB v. Virginia Electric & P. Co. Taking as a whole the line of cases stemming from Thornhill v. Alabama, three conclusions seem warranted: First, a distinction is emerging between (a) picketing whose predominant characteristic is an appeal to public sentiment and (b) picketing which signalizes a union's decision to take concerted economic action by requiring its members, under penalty of economic reprisal, to cease work or to withhold goods and services. Second, "publicity picketing" is protected by the guarantees of the First Amendment despite its economic purposes and the injury to the employer. Nothing in the later cases detracts

92 Id. at 499.
93 Most commentators read the opinion as resting on the ground that the union's objective was to bring about a violation of a criminal statute. E.g., Frank, "The United States Supreme Court: 1948-1949," 17 Univ. Cal. L. Rev. 1 at 4-6 (1949). This reasoning would furnish a logical basis for the decision and it is suggested by several sentences in the opinion as well as the citation of Fox v. Washington, 236 U.S. 273 at 276, 35 S.Ct. 383 (1915). In my judgment their interpretation gives too little weight to the Court's reliance on Thomas v. Collins and NLRB v. Virginia Electric & Power Co. Nor does it sufficiently take account of the logical distinctions which, in decision if not always in reasoning, the Court has constantly observed.

The "signal" character of the Giboney picketing distinguished it from earlier cases in which restrictions on picketing had been invalidated. Thornhill v. Alabama decided only that there is a constitutional immunity to engage in peaceful picketing (1) when it is an appeal to individual members of the public; (2) when prolongation of the controversy carries no serious threat to the public welfare. The later cases extended the doctrine slightly but they did not impair these limitations. In American Federation of Labor v. Swing, 312 U.S. 321 at 325, 61 S.Ct. 568 (1941), the question before the Court was the validity of "a decree which for the purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him." The Illinois rule covered all kinds of picketing and apparently only publicity picketing was involved in the litigation. The Court held that "the right of free communication cannot . . . be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." Thus the constitutional right to engage in publicity picketing was extended to those who are not employees, but nothing more was decided than in Thornhill's case concerning the power of the state to limit signal picketing.

In Bakery & Pastry Drivers v. Wohl, 315 U.S. 769, 62 S.Ct. 816 (1942), the same right was extended to persons who, according to state law, were not engaged in a "labor dispute" even though they were seriously affected by the employment conditions of which they complained.

In Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 64 S.Ct. 126 (1943), non-employees were held privileged to picket a restaurant even though there was no labor dispute within the meaning of the state statute, thus combining the rules established by the Wohl and Swing cases. In Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807 (1942), the Court continued to speak of freedom of speech even though the picketing was backed by union discipline but if we may look to the results of that case without emphasizing the language of the opinions, there is significance in the fact that it was one in which the injunction was sustained.
from this aspect of the *Thornhill* ruling or weakens its force as a prece­
dent denying the states power to condemn picketing as an inherently
unlawful means of pursuing a labor objective. Third, the states have
the same power to regulate "signal picketing" as they have to regulate
the organized and disciplined economic action of which it is a part.
The criteria by which the constitutionality of a restriction on "signal
picketing" is to be judged are the criteria applicable to regulation of
strikes and other concerted economic action. And most important, these
criteria, whatever they may be, plainly allow greater freedom for state
action than the principles embodied in the First Amendment. 94

In drawing these conclusions I do not mean to imply that the
states may not be required to make a stronger showing in justification
of restrictions on the right to strike than is required to authorize busi­
ess regulations. Mr. Justice Murphy's opinions intimate that he, at
least, would have required it. Curtailment of the right to strike inter­
feres with personal liberty in a way not found in restrictions upon the
use of property. Useful as the "clear and present danger" and "rational
basis" tests may be, too great reliance upon them leads to excessive
categorization by suggesting that the constitutionality of every statute
must be judged by either one or the other standard. No logical neces­
sity requires putting every restriction upon liberty or property in one
of these two pigeon holes. In the end such questions depend not on
formulas but on balancing the interests which the state has sacrificed
against the interests which it has sought to secure. If we assign a greater
value to the right to grant or withhold one's labor in concert with others
than we do to the use of property, by so much must the showing in
justification of a restriction be increased, even though we do not place

94 In opposition to these conclusions it has been said that they would lead to the rule­
condemned by Mr. Justice Douglas in the Wohl case [315 U.S. 769 at 775, 62 S.Ct. 816
(1942)] "that a State may prohibit picketing when it is effective but may not prohibit it
when it is ineffective." There are two answers to this contention. In the first place, the dis­
tinction between "publicity picketing" and "signal picketing" does not destroy the efficacy of
the *Thornhill* doctrine. The doctrine would continue to prevent a state from treating picket­
ing as inherently unlawful means of concerted activity apart from the economic combination
behind it, thereby forcing the legislatures to deal with the substance of the employees' activi­
ties. Furthermore, the frequent use of publicity picketing in front of retail establishments is
evidence that it is not wholly ineffective. The second answer, however, is that one need not
shrink from the conclusion that the suggested distinctions would permit the states to restrict
the only picketing which is effective in some situations. When only the signal variety of
picketing is effective, it must be because the picker's appeal to reason does not suffice, and
the union therefore needs to support the appeal with threats of economic sanctions in order
to attain its objective. But this is not a reason to extend the protection of the First Amend­
ment to "signal picketing." No one would seriously assert that the employer who cannot persuade
employees to resign from their union has a constitutional privilege to resort to threats of
economic reprisals because there is no other way to make his words effective. The parallel
argument on the part of labor should receive no more favorable consideration.
the same value on freedom to strike as on freedom of expression. This consideration appears to have dominated the thinking of Mr. Justice Murphy and Mr. Justice Rutledge in the closed shop cases, for they declared in a concurring opinion that the decision permitting the states to outlaw union security contracts should not be construed either to permit a state to make illegal the concerted refusal of union members to work with non-union members or to imply that such a strike might be enjoined without violation of the Fourteenth Amendment:

"But the right to prohibit contracts for union security is one thing. The right to force union members to work with nonunion workers is entirely another. Because of this difference, I expressly reserve judgment upon the latter question until it is squarely and inescapably presented. Although this reservation is not made expressly by the Court, I do not understand its opinion to foreclose this question."  

III

Fair Labor Standards

In enacting the Fair Labor Standards Act of 1938, Congress invoked its power under the commerce clause with three objectives: (1) to establish the minimum wage "necessary for health, efficiency and general well-being of workers," (2) to discourage employment for long hours by requiring premium payments for overtime, and (3) to eliminate oppressive child labor. The Wagner Act cases and the Washington minimum wage case foreshadowed the favorable decision on the issue of constitutionality in 1941, in which Mr. Justice Murphy joined. The unprecedented exercise of national authority,

98 Id., §2(a).
100 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578 (1937).
however, created a multitude of complex questions that could ultimately be settled only by the Court. Measured by their practical importance two problems overshadowed the rest. The first was to define the reach of the FLSA into businesses previously governed by local regulations or left unregulated. The second involved application of the overtime provisions to the heterogeneous and often complex methods of wage payment prevailing in American industry.

One may surmise that it was Mr. Justice Murphy’s interest in labor, and especially in the individual worker, that attracted him to wage and hour cases. During his tenure he wrote more FLSA opinions for the Court than any other justice.\textsuperscript{102} When in disagreement with the majority, it was usually he who spoke for the dissenters.\textsuperscript{103} The statute has been modified in such a way as to reverse some of the Court’s decisions, but it is fair to say that Mr. Justice Murphy’s opinions not only shaped this branch of labor law prior to the amendments but will also influence a good part of its development under the new provisions. More important perhaps, his opinions permanently improved the compensation of thousands of workers.

\section*{A. The Scope of the FLSA}

The FLSA wage and hour provisions apply to any employee who is “engaged in commerce or in the production of goods for commerce.”\textsuperscript{104} The use of these terms to define the scope of federal regulation was novel. In \textit{Kirschbaum Co. v. Walling}\textsuperscript{105} it was authoritatively asserted that Congress used them because it chose not to exhaust its full power under the commerce clause, but the legislative materials available contained no hint of the reasons for the Congressional re-


\textsuperscript{104} Sections 6 and 7.

\textsuperscript{105} 316 U.S. 517, 62 S.Ct. 1116 (1942).
straint. Since Congress also withheld from the Administrator any power to issue binding regulations, the Court was forced to define FLSA coverage without the aid either of precedent or of legislative or administrative guides.

The difficulty of the task was increased by the excessive particularization which the statutory language required. Coverage depended on the work of the individual employee, not the character of the employer's business. Thus the Court was required to appraise in minute detail the relationship between successive individual employees and interstate commerce. Furthermore, two kinds of relationship were involved. An employee was covered if he was engaged either "in the production of goods for commerce" or "in commerce." Interpretation of these phrases proceeded along different lines.

1. "Engaged . . . in the production of goods for commerce." By a series of artificial definitions section 3 expands the quoted phrase to cover activities outside its normal connotation. "Goods" means any subject of commerce.106 "Produced" means produced, manufactured, mined, handled or in any other manner worked on.107 And an employee should be deemed to be engaged in the production of goods "... if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State."108

If the last clause were read literally, there would be few employees not engaged in covered occupations. The FLSA is applicable to any employee who spends more than a trivial part of a workweek covered employment.109 "Necessary" means only "convenient" or "incidental."110 In our industrial economy there is little that is not ultimately "necessary" to the production of articles that move to other states. By this-is-the-house-that-Jack-built reasoning the act could be applied to the carpenter that built the barn that housed the cow that gave the milk that fed the man that mined the coal that heated the mill that made the cloth that lined the suits that moved into interstate commerce. A line had to be drawn and although the egregious could be excluded, in the end the issue could be resolved only by fiat.

106 Section 3(i).
107 Section 3(j).
108 Ibid.
It was apparent from the beginning that the FLSA applied to the multitude of clerical and maintenance workers employed by most manufacturers to support their employees engaged in the physical processes of production.\textsuperscript{111} The circle of coverage might have been drawn there or at any one of a number of concentric circles. In \textit{Kirschbaum Co. v. Walling}\textsuperscript{112} the Court extended FLSA protection to the employees of a real estate company who worked in a loft building occupied, for the most part, by manufacturers of clothing. The local flavor of the building industry and the division of ownership made the case highly controversial but the result was inescapable, once it was decided that coverage was to be determined employee by employee; the Kirschbaum elevator operators, watchmen and porters were doing the custodial and maintenance work which is part of every industrial enterprise, and the goods moved out-of-state.

In many respects, therefore, the decision at the next term in \textit{Warren-Bradshaw Co. v. Hall}\textsuperscript{113} was more important. Warren-Bradshaw Company contracted with the owners and lessees of oil lands to drill holes for oil wells to a depth short of the oil sand stratum. Later, someone else did the additional drilling necessary to reach oil or gas or to prove the well dry. The Court held in an opinion by Mr. Justice Murphy that the Warren-Bradshaw drilling crew was engaged in a process or occupation necessary to the production of oil. "The connection between respondents' activities in partially drilling wells and the capture of oil is quite substantial and those activities certainly bear as 'close and immediate tie' to production as did the services of the building maintenance workers held within the Act in \textit{Kirschbaum Co. v. Walling}."\textsuperscript{114}

Despite the Justice's reliance on precedent the ruling was a marked advance beyond the earlier decision. The employees in both the \textit{Kirschbaum} and \textit{Warren-Bradshaw} cases were all one step removed from the actual processes of production. In the former case, however, they were concurrently necessary; in the latter the employee's work was antecedent. Thus the \textit{Warren-Bradshaw} decision opened the way to extending the act back through the sequences of production to employees of local firms engaged in supplying goods or services subsequently put to use by other manufacturers who made goods for out-of-state shipment. Two possible limitations, however, distinguished the employees

\textsuperscript{111} See e.g., Holland \textit{v. Amoskeag Machine Co.}, (D.C. N.H. 1942) 44 F. Supp. 884.
\textsuperscript{112} 316 U.S. 517, 62 S.Ct. 1116 (1942).
\textsuperscript{113} 317 U.S. 88, 63 S.Ct. 125 (1942).
\textsuperscript{114} Id. at 91.
in the *Kirschbaum* and *Warren-Bradshaw* cases from the employees of ordinary suppliers of goods or services: first, they worked on the site of production; second, the enterprises in which they were engaged were not serving all kinds of local customers but were specifically directed to facilitating the production of goods for commerce.

*Borden Co. v. Borella*\(^\text{116}\) made it apparent that the first of these possible limitations was not controlling, at least as it might be taken to refer to the site of physical manufacture. The case grew out of a suit for statutory overtime pay brought by porters, elevator operators and night watchmen employed in a New York City office building owned by a large corporation engaged in transporting, manufacturing, and selling dairy products into an interstate market. Seventeen floors of the twenty-four story building were occupied by the company's executive offices, from which it controlled the scattered plants engaged in manufacturing its products. Speaking for six members of the Court, Mr. Justice Murphy said:

"In an economic sense, production includes all activity directed to increasing the number of scarce economic goods. . . . He who conceives or directs a productive activity is as essential to that activity as the one who physically performs it. From a productive standpoint, therefore, petitioner's executive officers and administrative employees in the central office building are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants. And since the respondent maintenance employees stand in the same relation to this production as did the maintenance workers in the *Kirschbaum* case, they are engaged in occupations "necessary" to such production, thereby qualifying for the benefits of the Fair Labor Standards Act."\(^\text{116}\)

A companion case to *Borden Co. v. Borella*, however, tended to confirm, over Mr. Justice Murphy's dissent, the second possible limitation inherent in the *Kirschbaum* and *Warren-Bradshaw* rulings. In *10 East 40th St. Co. v. Callus*,\(^\text{117}\) the majority concluded that the building service employees in a typical New York office building were not covered by the act. Twenty-six per cent of the rentable space was occupied by the executive offices of manufacturing and mining companies and 16 per cent by other concerns whose business was re-


\(^{116}\) Id. at 683.

\(^{117}\) 325 U.S. 578, 65 S.Ct. 1227 (1945).
lated in one way or another to production for commerce. “To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for regard to the regulatory power of the States which Congress saw fit to reserve to them. . . . an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts.” Mr. Justice Murphy’s vigorous dissent, in which Mr. Justice Black, Mr. Justice Reed and Mr. Justice Rutledge concurred, stressed again the economic equivalence of the physical processes and executive direction of production.

The Callus decision has been thought to cast doubt on the propriety of applying the FLSA not only to utilities supplying light and power to the public generally but even to other companies serving “all the usual miscellany” of local customers. Whether this was the point at which the Court would ultimately have drawn a line, and if not, how far back from production coverage would be pressed, are questions which will never be answered. The 1949 amendment to section 3(j) substitutes for the words engaged “in any process or occupation necessary to the production” of goods for commerce, the phrase to eliminate coverage of employees necessary to production except when engaged “in any closely related process or occupation directly essential” thereto.

2. “Engaged in commerce.” Overstreet v. North Shore Corp. and McLeod v. Threlkeld were the two cases in which Mr. Justice Murphy delivered opinions discussing the application of the FLSA to employees whose claim to its protection depended upon showing that they were engaged “in commerce.” In the first case he spoke for the majority, holding that employees of a toll road company, whose respective duties were to operate a drawbridge, to collect toll, and to do maintenance work on the road and bridge, were covered by the act because the toll road and drawbridge were used by interstate traffic.

118 Id. at 583-584.
120 Act of October 26, 1949, P.L. 393, 81st Cong., 1st sess.
121 318 U.S. 125, 63 S.Ct. 494 (1943).
122 319 U.S. 491, 63 S.Ct. 1246 (1943).
In the second he spoke in dissent. The issue was whether a cook in a dining car which served a railroad construction and maintenance gang was "engaged in commerce" within the meaning of the act; the cook was employed by an independent contractor but the dining car followed the gang over the carrier's interstate tracks as the work progressed. In holding that coverage should not be extended beyond the employees engaged in actual work upon the transportation facilities the majority invoked the Federal Employers Liability Act distinction between transportation and interstate commerce. Mr. Justice Murphy's trenchant dissent cut the ground from under the majority opinion. "Commerce," the word used in FLSA, covers a field of which transportation is only a part. "Hence, whatever basis there may have been for restricting the coverage of the FELA because of the fact that the Act applied only to employers engaged in interstate transportation by rail, can have no possible application or bearing on the interpretation of the FLSA."\(^{123}\) The majority view not only introduced "that concededly undesirable confusion"\(^{124}\) resulting from a concept which Congress had repudiated in amending the FELA. It also resulted in an "unbalanced application of the statute"\(^{125}\) by attributing to Congress the paradoxical intent to exercise its powers sweepingly in regulating employment in the production of goods for commerce, over which federal authority was doubtful in 1938, but to restrict the regulation narrowly in dealing with activities "in commerce," where federal authority was clear. The pertinent legislative materials also showed that the scope of the two bases of coverage was intended to be the same.

Rereading the cases pricking out the coverage of the FLSA leaves one with a strong sense of the emptiness of the task in which the Court was required to engage. Abstractly, the issues may be viewed as phases of the historic problem of federalism. Practically, little could be achieved by this approach. The Court's hypothesis was that Congress had not subjected to the statute activities along the line of production constitutionally subject to its control. It might be supposed, therefore, if the decision thus to limit the statute were based upon a rational judgment and not egregious circumstances, that there were practical considerations of policy which Congress had taken into

\(^{123}\) Id. at 499.

\(^{124}\) Id. at 500. The majority opinion described the decisions applying this distinction as "the overrefinement of factual situations which hampered the development of the Federal Employers' Liability Act, prior to the recent amendment." 319 U.S. 491 at 495, 63 S.Ct. 1248 (1943).

\(^{125}\) Id. at 502.
account and which gave meaning to the statutory formulas. But the Court never pointed out the considerations and I can discover none. The FLSA is not a statute which occupies the field in such a way as to leave too little room for local experimentation. Since the FLSA establishes only a floor under wages and only a ceiling over hours, there is room not only for collective bargaining but also for state legislation raising the minimum wage, shortening hours or regulating labor standards according to skill, sex, or occupation. Neither could the lines to be drawn be based upon a danger of subjecting diverse local conditions to a single national rule. Congress was as well qualified to regulate the wages of the dining car cook as the wages of the track-walker; there were no local factors affecting Callus which did not impinge equally upon Borella and the employees in the Kirschbaum building. Similarly, there was no greater unfairness in requiring the 10 East 40th Street Corporation to deal with a federal administrator in Washington than in applying the statute to a local newspaper, a few copies of which went to subscribers in other states. Under some statutes limitations of time, funds and personnel may lead to confining the exercise of federal jurisdiction to cases of national importance, but the employee test of coverage precluded the use of this criterion in interpreting the FLSA and in any event the act did not require continuous administrative regulation or adjudication.

It is a fallacy to suppose that because no single consideration will answer in every case, all of them together have limited utility. Yet I think that is the case here, largely because Congress based coverage on the character of the individual’s work rather than on the national or local character of the industry in which he was engaged. The law is full of phrases like “proximate cause,” “reasonable care,” and “unreasonable restraint” which we use to resolve questions of degree. They nevertheless state compendiously the relevant considerations of policy in the light of which a balance must be struck or a line must be drawn. In this field the applicable phrase became “close and immediate tie” but, as I have sought to show, the policies implicit in federalism which it might be thought to epitomize have no discernible application in any doubtful, concrete FLSA case. Thus the courts were forced in drawing lines to look for distinctions not for the purpose of giving effect to policies of federalism implicit in the statute but solely because admin-

127 This phrase, which is as felicitous as the problem permits, was first used by Mr. Justice Frankfurter in Kirschbaum Co. v. Walling, 316 U.S. 517 at 525, 62 S.Ct. 1116 (1942).
istration of the statute required the drawing of a line. Nor was there any lack of circumstances which might be considered significant. The difficulty lay in the question, how much weight should be attributed to each circumstance?

Mr. Justice Murphy's judgments in these cases were influenced chiefly by three qualities. He brought to the bench a strong belief in the new found powers of the national government. His previous experience taught him the interdependence of all phases of our economy. While he was mayor, Detroit suffered because buyers in scattered, local communities could not afford to buy cars. At the same time he apparently did not feel the restraining influence resulting from long study of the traditions of federalism. Thus, while he rarely voted to restrict state action until Congress had acted, he was quick to find that federal power was available and had been exercised to meet problems with which the states could not adequately deal.

The second quality which affected Mr. Justice Murphy's judgment in these cases was an essential simplicity of analysis. Nice distinctions of fact or legal conception yielded to what he called—not always with precise accuracy—a practical approach. It is not hard to imagine him asking of the McLeod v. Threlkeld distinction between the maintenance gang engaged in "transportation" and the cook who was not: "What difference does it make? Don't they work together? Isn't the effect of their labor conditions on the national economy the same?" The questions are not easily answered. The same quality appears in the Borden Co. and Callus opinions.

The Justice's lone dissent in Mabee v. White Plains Pub. Co. attests the genuineness of this approach. The respondent published a daily newspaper in White Plains, New York. Its circulation ranged from 9,000 to 11,000 copies. About 45 copies were sent out-of-state. Under the precedents even this small flow of goods was enough to make the FLSA applicable to the paper's employees; and the Court so held. But to Mr. Justice Murphy the result seemed as foolish as some of the distinctions drawn in restricting coverage.

"In my opinion, a company that produces 993/4% of its products for local commerce is essentially a local business. True, ½ of 1% of its production is for interstate commerce, thus subjecting it to the constitutional power of Congress when and if exercised. But

---

128 See the discussion of the portal-to-portal cases, p. 802 et seq., infra.
that fact does not make it any less a local business, which we have said Congress plainly excluded from this Act." 130

Third, Mr. Justice Murphy's humanitarianism moved him as deeply in this field as elsewhere. His references to the humanitarian purposes of the FLSA were not abstract phrases. When he invoked the maxim that remedial statutes should be liberally construed and exceptions narrowly construed he expressed a genuine sentiment. This quality, coupled with the others, led the Justice to expand coverage in doubtful cases.

In the 1949 amendments Congress determined that the courts, guided largely by Mr. Justice Murphy's opinions, had extended coverage too far back into supporting activities along the processes of production for commerce. But although the simplicity and humanitarianism of the Justice's technique led to difficulties in other areas, here he struck a wise and beneficent balance between extension of fair labor standards and restriction of coverage merely for the sake of drawing a line. The chief result of the amendment will be to encourage the relitigation of questions once decided, thus not only denying those who need it the protection of the act but also recreating the uncertainty of which businessmen not unjustly complained.

B. Hours Worked

Prior to the recent amendments section 7 of the FLSA provided that no employer should employ any of his covered employees "... for a workweek longer than forty hours ... unless such employee receives compensation for his employment in excess of the hours above specified at not less than one and one-half times the regular rate at which he is employed."

Since the act did not define "workweek" and the definition of "employ" was too vague to be useful in this connection, 131 it fell to

130 Id. at 186.
131 Section 3(g). Serious problems also arose in defining the "regular rate" at which an employee is employed. Many of them resulted from Walling v. Belo Corp., 316 U.S. 624, 62 S.Ct. 1223 (1942), which seemed to invite employers to circumvent section 7 by artificial, contractual definitions of the regular rate. Mr. Justice Murphy's opinions in later cases closed the resulting gap. Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 65 S.Ct. 11 (1944); Walling v. Hardwood Co., 325 U.S. 419, 65 S.Ct. 1242 (1945); Walling v. Harnischfeger Corp., 325 U.S. 427, 65 S.Ct. 1246 (1945). In Walling v. Haliburton Oil Well Cementing Co., 331 U.S. 17, 67 S.Ct. 1056 (1947), however, the Court refused to overrule the Belo case. Mr. Justice Murphy dissented.

A related problem involved the items of compensation to be included in computing the regular rate, for example premiums for late or dirty work. See Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 68 S.Ct. 1186 (1948). The history of this "overtime on overtime"
the courts to determine what constituted "employment" or "work" for which an employee should receive premium compensation. The problem was first raised in a case involving miners in the Alabama iron mines,\footnote{132 Tennessee Coal, Iron \& R. Co. v. Muscoda Local, 321 U.S. 590, 64 S.Ct. 698 (1944).} who worked eight hour shifts at the working faces underground and also spent substantial periods, before and after each shift, traveling between the portal and the face. The employers did not count travel time in measuring the workweek. If this was correct, the miners had been paid in accordance with the act. If not, the employers had violated section 7 and large sums were due for unpaid overtime and liquidated damages.

The district court found as a fact that the travel time "bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit, and conditions peculiar to the occupation of mining."\footnote{133} Accordingly the judge ruled that the travel time was worktime. The ruling was affirmed by a divided circuit court of appeals\footnote{184 (C.C.A. 5th, 1943) 135 F. (2d) 320.} and by a seven-to-two majority of the Supreme Court.

Speaking for the Court, Mr. Justice Murphy stressed the dangers, arduousness and unpleasantness of the trip. The men are forced to "ride in a close 'spoon-fashion', 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 ride is taken "in the dark, moist, malodorous shafts." Then the miners walk up to two miles to the working face. "These subterranean walks are filled with discomforts and hidden perils. The surroundings are dark and dank. The air is increasingly warm and humid, the ventilation poor. Odors of human sewage, resulting from a complete absence of sanitary facilities, permeate the atmosphere. . . . Water, muck and stray pieces of ore often make the footing uncertain. . . . Overhead, a maze of water and air pipe line, telephone wires, and exposed high voltage electric cables and wires present everdangerous obstacles, especially to those transporting tools."\footnote{135 321 U.S. 590 at 596, 64 S.Ct. 698 (1944).} Turning to the critical words in the statute, the opinion declared:

"But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We
are not dealing here with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others. . . . in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental 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.\textsuperscript{136}

Travel time in the iron ore mines satisfied this definition of work.

In a dissenting opinion the Chief Justice and Mr. Justice Roberts argued that the FLSA minimum wage and overtime provisions should be fitted into the prevailing practices and understandings as to what constituted work in various industries, here the face-to-face measure of working time established by custom and collective bargaining agreement. As applied to the T.C.I. & R. case, the argument was vulnerable at several points. Whatever the practice, it was plainly one dictated by the steel companies to unorganized employees or company unions. Moreover there was no \textit{industry} practice in iron mines. The dissenting opinion relied chiefly on the history of travel time in the coal mines. In metal mining, including iron ore, many employers computed work-time from portal-to-portal, and in some states this method of computation was required by statute. It was unlikely that Congress intended to leave so large an item in computing overtime under a uniform national policy to the fluctuating, heterogeneous practices of different mines. Furthermore, Mr. Justice Roberts' definition of work—"the actual service rendered to the employer for which he pays wages in conformity to custom or agreement"\textsuperscript{137}—proved too much. The inspectors of the Wage and Hour and Public Contracts Divisions repeatedly turn up situations in which an unscrupulous employer has required his employees to perform, before or after the shift, without compensation, various activities such as servicing and repairing their machines, counting pieces, filling in reports and sweeping up. To give controlling effect to custom or agreement in these situations would license the kind of "sweating" the FLSA was intended to halt.

Nevertheless, the majority opinion leaves a good deal to be desired in its handling of this branch of the steel companies' argument. The district court had found that there were no immemorial customs or

\textsuperscript{136} Id. at 597.
\textsuperscript{137} Id. at 608.
collective bargaining agreements treating travel time as time not worked, and the Supreme Court concluded that the finding was not plainly erroneous. It would have been better judicial technique to have stopped the opinion at this point, for the explosive issue of travel time in the coal mines was already a matter of national controversy. But the Justice was outraged by the contention that men should travel underground without compensation under the difficult, hazardous conditions that he so vividly described. He swept aside the companies' contention that, according to custom, this was not work.

"... it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. ... Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."  

The force of this sweeping declaration was scarcely tempered by a later sentence in which the Justice observed, "Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment."  

When overtime compensation was demanded for travel time in the coal mines, the producers selected the case for litigation more carefully. The shafts in the Jewell Ridge mine were large enough to permit the journey from the portal to the working face to be made under conditions which, while "definitely not luxurious," were "neither painful nor unduly uncomfortable," and "less hazardous than other phases of mining operations." Nevertheless the Court concluded, in another opinion by Mr. Justice Murphy, that each of the three indicia of work was present: (1) physical or mental exertion (whether burdensome or not); (2) exertion controlled or required by the employer; (3) exertion pursued necessarily and primarily for the benefit of the employer and business. As a practical matter the Court was probably right in  

138 Id. at 602-603.  
139 Ibid.  
141 Id. at 164-165.
refusing to distinguish the T.C.I., & R. case on these grounds. Since the
difficulties of travel in iron mines, taken by and large, are not much
different from those in coal mines, any other holding would have
made the compensability of travel time depend on the individual judge's
appraisal of the physical conditions prevailing in a particular mine.

The real difference between the cases lay in the proof of the 50
year old industry-wide custom, confirmed by bona fide collective
bargaining agreements, under which coal miners were compensated
for seven hours’ work at the face without otherwise taking into account
the time which they were forced to spend traveling between the face
and the portal. In 1940 the Administrator, Wage and Hour Division,
had approved the practice. It was in 1943 that the United Mine
Workers, for the first time, sought to change the basis of payment
for the purpose of securing an increase in the miners' take-home pay
which would plainly violate wartime wage stabilization policies unless
the payments were required by the FLSA. In holding the settled
practice to be legally irrelevant the Court relied, without additional
discussion, on the passage in the T.C.I. & R. opinion quoted above.
This was scarcely a satisfactory way of disposing of the issue for in
the iron case the Court had relied on the absence of bona fide collective
bargaining or uniform industry practice and had reserved room for
their operation in close cases. Mr. Justice Jackson delivered a biting
dissent in which three of his brethren concurred.

Before attempting to appraise the T.C.I. & R. and Jewell Ridge
opinions it is appropriate to note the decision to which they led in
Anderson v. Mt. Clemens Pottery Co. The defendant employer
treated the worktime of piecework employees as limited to time spent
in productive activities and excluded from its computation the intervals
between punching the time clock and beginning and ending work.
These periods might total 56 minutes a day for a single employee but
actually the time was a great deal shorter. It was spent in two kinds
of activity: (1) in walking from the time-clock to the work bench and
(2) in preliminary operations such as donning work clothes, greasing
and taping arms, preparing equipment and sharpening tools. The
Court held both to be worktime. Both involved exertion of a physical
nature, controlled or required by the employer and pursued necessarily
and primarily for the employer's benefit. "The employees' convenience
and necessity, moreover, bore no relation whatever to this walking

time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business. In that respect the walking time differed vitally from the time spent traveling from workers' homes to the factory. Work of this character must be included in the statutory workweek "regardless of contrary custom or contract."

The decision that the travel time was part of the workweek meant extending the portal-to-portal rulings to industry generally. The trip from the time clock to the work benches does not appear to have been long. Unlike the underground journey of a miner, or a logger's trip in the woods, walking from the time clock to the work bench is not a peculiar incident of work in the manufacture of pottery. Apparently the pottery workers were subject to few restraints on their conduct during these periods so long as they got to their places before production began; they could go as they pleased, chat with their fellows, or devote their attention to personal affairs. The plaintiffs claimed compensation only for the time spent after they punched the clock but it seems unlikely that the Court intended to make the location of the time clocks decisive. Certainly its reasoning was applicable to all the time which employees are required to spend on their employer's premises either on their way to work or on their way home. It was also significant that the opinion, unlike the T.C.I. & R. and Jewell Ridge opinions, saved no room for the operation of custom or contract in borderline cases—no room remained.

The Mt. Clemens Pottery decision would have caused radical changes in the payroll practices of American industry. Since it applied retrospectively, it also loosed a flood of litigation. The resulting outcry made it plain that the majority had gone too far, and Congress reversed the ruling in Portal-to-Portal Act of 1947. Unfortunately, the need for remedial legislation also furnished an occasion for legitimatizing doubtful practices and outlawing a number of justified claims.

The division between the majority and minority justices in the travel time cases arose from fundamental differences in their philosophies of the nature of the judicial process. The statute was blind. Certain activities are plainly "work"; a contract or practice to treat them otherwise could not alter the employer's statutory obligations. Other activities fall in the hazy penumbra; neither common understanding

143 Id. at 691.
144 Id. at 692.
nor a priori reasoning will tell us whether they are work or not. In my judgment underground travel in iron mines fell into the former category and, with somewhat more doubt I would place travel in the coal mines in the same classification. But walking to one's work place through a yard and factory cannot be said to be so plainly "work" that there is no room for a contrary understanding. Nor did the policy of the statute show how it should be treated. Congress intended to change industrial practice by establishing a minimum wage, discouraging excessively long hours and eliminating oppressive child labor. But there was no purpose to reform all industrial evils and apparently no one thought of the relationship between the treatment of travel time and the application of the overtime premiums; in any event no one raised the question. Consequently, when the problem arose the Court was confronted with the necessity of choosing between (1) formulating a judicial definition of work which would require employers to compensate employees for activities which the judges believed ought to be compensable and (2) filling in the statute by reference to existing practices, save in egregious instances of overreaching.

The choice made must depend, consciously or not, on the judge's conception of his proper role in our society. Few would deny the injustice in withholding compensation for underground travel in the iron and coal mines. It will also be generally conceded, I suspect, that if a fresh start was to be made it would be fairer to count the travel time as worktime for which pay is due, instead of making (or not making) an allowance for the travel in the compensation paid for the work at the face. Perhaps this is true of all industrial enterprises despite the confusing practical problems. Yet the issue remains, should the Court seek to accomplish these reforms? Whatever may be said of mining for iron ore, the Jewell Ridge decision invalidated the established practice of an industry and the Mt. Clemens Pottery case, if followed, would have remade the payroll practices of most large manufacturing establishments. Is it the proper function of a judge, engaged in what we choose to call "statutory interpretation," to make such major changes when they are desirable, provided only that he does not disregard any legislative intention which is reasonably apparent? Or should the judge accept a humbler role, move within a smaller orbit and leave major reforms to elected representatives?

In statutory interpretation, as in other aspects of his judicial work, Mr. Justice Murphy sought actively to realize the social and political ideals he held important. This was not merely a matter of disregard for precedents—and surely not of incompetence to deal with them—
although the Justice was ready enough to brush precedent aside.\footnote{E.g., United States v. Beach, 324 U.S. 193 at 196, 65 S.Ct. 602 (1945); Cleveland v. United States, 329 U.S. 14 at 24, 67 S.Ct. 13 (1946).} Nor was it only his distaste for the conventions by which judges decline to hear abstract issues, avoid deciding constitutional questions, and place their decisions on the narrowest possible ground. These characteristics of Mr. Justice Murphy’s opinions, like his activist role in interpreting legislation, flowed from the same two sources. He thought in terms of fair play, decent standards of living, oppression, justice and injustice. The terms may be too simple and unsophisticated but they are those of the common American tradition. He believed also, I think, that the authority of a Supreme Court Justice carried with it a duty to exert his influence. A justice’s opinions carried weight beyond the litigants; therefore he should speak out against persecution or oppression even though affirmance or reversal of the judgment did not so require. It was for this reason that in the Steele case he wrote his strong concurring opinion. In the portal-to-portal cases, a justice’s vote might help to secure for the worker a higher standard of living through an improved wage. If so, the judge should accomplish the goal, whenever possible, in applying broad humanitarian legislation.

The travel time cases illustrate the difficulties in this judicial philosophy. The adversary system and the case-by-case method of decision give the judge a partial view made up of a narrow record and his own experiences or preconceptions. The process is not only an inadequate basis for reform but it contains a self-perpetuating weakness. Even in the hands of the most pragmatic of judges the phrases used to explain one decision are apt to be applied as formulas in later cases, divorced from their practical background. Witness how easily Mr. Justice Murphy took as the basis for decision in the Mt. Clemens Pottery case, a definition of worktime which had been formulated to describe a long, arduous and dangerous journey underground. Despite his constant emphasis on a pragmatic approach to adjudication, one cannot help wondering how far he appreciated the practical implications of the Mt. Clemens ruling. A second difficulty is that the courts are unable to give the law they make only a prospective application. The meaning which the courts write into a statute measures all obligations arising since its enactment. Although the published estimates of the retrospective liabilities that would result from the Mt. Clemens Pottery decision were grossly inflated, the ruling would have imposed crushing liabilities on American industry.
From a broader view, it may also be wise to recall that the judge who essays major reforms may misjudge public sentiment to such a degree as to impose his views of policy on a community that does not share them. The portal-to-portal rulings were repudiated by Congress. Nor is it altogether clear that even the Supreme Court's judgments upon questions of economic policy can command that measure of acquiescence which the out-voted minority gives to legislation enacted by elected representatives, acquiescence which alone gives meaning to government by consent of the governed. Self-restraint upon such issues may in the long run be indispensable to the preservation of the Court's authority—perhaps even to the preservation of the ideal of law.

Despite these faults (if faults they be) history will mark Mr. Justice Murphy's influence on the worker and labor relations. In the development of labor law few cases in the past decade have had the influence of Thornhill v. Alabama. That decision, read with the counterpoises developed out of NLRB v. Virginia Electric & Power Co., will long be a starting point in the law of strikes and picketing. His opinions in NLRB cases contributed much toward making collective bargaining an effective institution. The cases dealing with FLSA coverage not only broadened the protection accorded individual workers but are important parts of the body of law establishing the power of the federal government to deal with local matters affecting the national economy. Looking only to law in the books, these are no mean accomplishments.

But lawyers must be concerned with more than legal doctrine. Even those who share the doubts I have expressed concerning the Jewell Ridge and Mt. Clemens Pottery decisions must concede their practical impact. Despite the Portal-to-Portal Act miners are now compensated for travel time, as they should be. In the packinghouses and elsewhere where unusual clothes or equipment or special preparations are needed for the work, workers secured important concessions making compensable all or part of the time they contribute to production in making ready for work or cleaning up afterwards. The Portal-to-Portal Act will not unmake the fairer practices. Thornhill's case affected the lives of workers in countless industrial communities. Would it have accomplished so much had it been a less ringing declaration? Similarly, there is reason to believe that Mr. Justice Murphy's opinions in civil liberties cases, exemplified in the labor field by Steele v. Louisville & Nashville R. Co., influenced our national thought more deeply than if he had observed conventional canons of judicial restraint. He labored and spoke passionately for ideals which he cherished. Thus his judicial work entered into the stream of American life.