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MR. JUSTICE MURPHY, CIVIL LIBERTIES AND THE HOLMES TRADITION

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Supreme Court decisions relative to constitutional law since the so-called "Roosevelt Revolution" in the Court in the spring of 1937 reveal two major characteristics. One is the notable increase in judicial tolerance with respect to the acts of legislative and administrative agencies, both federal and state, based on a real presumption of validity of the acts of these agencies and a reluctance to strike them down unless clearly and unmistakably contrary to specific prohibitions in the Constitution. The other is a significant broadening of the scope of civil liberties as contained in the Bill of Rights and read into the Fourteenth Amendment, involving a severe modification or abandonment of the presumption of validity of legislation when it involves these areas.[1] On the first point, there has been a considerable degree of unanimity in the new Court; a perusal of its decisions reveals that no federal act has been declared unconstitutional since the shift in 1937 and an exceedingly small number of state laws have been overruled in any except civil liberties cases. Similarly, broad scope has been allowed to federal and state administrative agencies. On the second point, however, not only has the number of state actions held to be contrary to the Fourteenth Amendment increased sharply, but the new membership of the Court has found itself frequently and sometimes bitterly divided on civil liberties issues in general.

When, in the spring of 1946, the Supreme Court majority rejected the last-minute appeals from Japanese Generals Yamashita and Homma for writs of *habeas corpus* contesting the legality of their trials by military tribunals, Mr. Justice Murphy dissented in the most vigorous terms. In his opinion, the unavoidable question was whether military commissions may disregard the procedural rights of an accused person as guaranteed by the Constitution, particularly the due process clause of the Fifth Amendment. He held that the answer is plain, that the clause applies to "any person" accused of a crime by the United States—even to "a fallen military commander of a conquered nation."[2] In the course of his opinion, he referred to these guarantees in the broadest terms. "The immutable rights of the individual," he said,

"including those secured by the due process clause of the Fifth Amend-

[1]To these should perhaps be added a third, a willingness to review constitutional doctrines anew without a rigorous adherence to the principle of *stare decisis*.

[2]*In Re* Yamashita, — U. S. —, 66 Sup. Ct. 340, 353 (1946).

ment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic idealogy. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment."[3]

He thought the record clear that the defendants in these cases were rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of the most elementary rules of evidence, and summarily sentenced to be executed without any serious attempt to charge or prove a recognized violation of the laws of war. In these cases, he said, "this nation's very honor" was at stake.[4]

"Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution, or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course. But I, for one, shall have no part in it, not even through silent acquiescence."[5]

He pointed out that official revenge and retribution, "masked in formal legal procedure," could do more harm of a lasting nature than all the atrocities thus avenged. The people's faith in the fairness and objectivity of the law can be seriously undercut by such a "flexible method" of executing a vanquished foe limited only by "the prevailing degree of vengeance and the absence of any objective judicial review."[6]

"Hasty, revengeful action is not the American way. All those who act by virtue of the authority of the United States are bound to respect the principles of justice codified in our Constitution. Those principles, which were established after so many centuries of struggle, can scarcely be dismissed as narrow artificialities or arbitrary technicalities. They are the very life blood of our civilization."[7]

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[3] *Ibid.*

[4] *In Re* Homma, — U. S. —, 66 Sup. Ct. 515 (1946).

[5] *Ibid.*

[6] *In Re* Yamashita, — U. S. —, 66 Sup. Ct. 340, 359 (1946).

[7] *In Re* Homma, — U. S. —, 66 Sup. Ct. 515, 516 (1946). "Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. No one can foresee the end of this failure of objective thinking and of adherence to our high hopes of a new world." Mr. Justice Rutledge joined Murphy in dissenting in both cases. Mr. Chief Justice Stone wrote the majority opinion in the *Yamashita* case holding that the commission had been legally established, that it had the power to try the defendants, and that the Supreme Court had no power to review the rulings on evidence or to consider the guilt or innocence of the parties. The *Homma* case was then disposed of by the majority on the authority of the *Yamashita* case.

These cases serve to highlight, in a dramatic way, the depth of feeling and breadth of approach with which Murphy views the general problem of civil liberties and the role of the Supreme Court in protecting them. He has established himself as the leading proponent of the broadest kind of protection of these liberties against inimical governmental action, although in all other respects he follows generally the principle of judicial self-restraint with regard to the acts of legislative and administrative bodies. In a Court often split on civil liberties issues,[8] Murphy has been consistently the advocate of the right alleged to have been infringed.

The Paradox of the Holmes Tradition

One of the most interesting aspects of the present situation is that the proponents of both sides of the civil liberties cases which have split the Court rely heavily on the constitutional philosophy of Justice Holmes to support their respective views. It is quite clear that in the cases involving general social and economic legislation, which the Court now consistently upholds in accordance with a revitalized doctrine of presumptive validity, the tribunal is following the broad approach which Holmes took with respect to such enactments. His opinions stressing the duty of the Court to resolve all reasonable doubts in favor of such legislation, in order to avoid reading a particular economic theory or the particular social views of individual Justices into the Constitution, are too familiar to require quotation here.[9] And I think it is fair to say that this general attitude has characterized the work of the Court in its review of social and economic legislation since 1937. When it comes to the review of legislation involving civil liberties, however, the indulgence of this presumption of validity runs into an apparent paradox in the Holmes tradition itself. For, although stating many times that all reasonable doubts are to be resolved in favor of legislatures—and that they, as well as courts, must be regarded as the protectors of the rights of the people—Holmes is also author of the "clear and present danger" doctrine. That doctrine, first stated by Holmes in the *Schenck* case[10] for the majority and repeated by him in his classic dissent in *Gitlow* v. *New York*,[11] calls for the invalidation of legislative interference with civil liberties unless their exercise is such as to create a "clear and present danger" of "substantive

[8]In some 77 cases involving issues of civil liberties during the period from the arrival of Murphy on the Court in February of 1940 through the spring of 1946, 45 decisions were rendered by a split Court.

[9]*See* FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938).

[10]Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919).

[11]268 U. S. 652, 45 Sup. Ct. 625 (1925).

evils" within the power of the government to deal with. Although largely ignored by the majority of the Court after the *Schenck* case, this concept was reiterated by Holmes in subsequent dissents and has been revived and widely applied by the present Court in a series of cases discussed below. It obviously collides to some degree with the broad doctrine of a presumption in favor of legislative action. The present Court has split in its attempts to reconcile these two elements of the Holmes tradition so far as civil liberties cases are concerned. One group has taken the view that the "clear and present danger" doctrine, and the general attitude toward civil liberties implicit in it, requires that the ordinary presumption of validity be reversed when statutes affecting these liberties are before the Court. The other view is that judicial tolerance of legislative action is a basic principle which admits of no such subdivision by categories, and that the ultimate protection of civil liberties in the long run must be the people themselves as represented in their legislatures. The outstanding proponent for the broadest scope of judicial protection for civil liberties has been Mr. Justice Murphy, while the most eloquent advocate of judicial tolerance for legislative acts, whether involving civil liberties or not, has been Mr. Justice Frankfurter. Both rely heavily, either directly or indirectly, on different facets of the Holmes philosophy and frequently quote his views on opposing sides of this issue.

So far as can be discovered, Holmes himself never addressed any remarks specifically to this potential dilemma in his general attitude on the scope of judicial review. The paradox, if it is one, is inherent in his own opinions as well as in the divisions in the present Court. In order to trace its development in the recent decisions of the high tribunal, it is proposed to examine the civil liberties opinions of the new Court from the point of view of the broadening of the judicial protection of those liberties, with particular attention to the role of Mr. Justice Murphy. Before doing that, however, some comments on the broad outlines of preceding developments in this connection are in order.

The story of civil liberties in the Supreme Court in the years immediately preceding the reconstitution of that tribunal is largely the story of the growth of the Holmes approach from a minority position to one which was becoming more acceptable to the majority. Despite his general philosophy of democracy which dictated great freedom for legislatures from the inhibitions of judicial review, Holmes regarded certain individual rights as farther beyond the reach of legislatures than others. He himself did not attempt to distinguish clearly between rights of property and so-called human rights, and perhaps would have considered such a sharp division

as unreal. Nevertheless, there was clearly a "hierarchy of values" in terms of which "some manifestations of the human spirit seemed . . . so precious that in specific instances he found no justification for legislative restrictions, tolerant though he was of legislative judgment."[12] The liberties of the individual which he regarded as the indispensable conditions of a free society took on a special significance.[13] Moreover, these particular liberties were specifically enumerated in the First Amendment and were included, by interpretation, in the Fourteenth; whereas the liberties generally urged in litigation involving economic legislation, such as "liberty of contract," were nowhere explicitly stated in the Constitution. Hence, Holmes was ready, in the interest of the liberties specifically set forth in the First Amendment, not only to qualify his usual tolerance of legislative judgment but even to put the burden of proof, in effect, on the legislature by requiring that the evil be "substantive" and that the danger of its eventuation be "clear and present." This general doctrine he announced in the *Schenck* case, in which he wrote a majority opinion upholding legislation which inhibited freedom of expression during the first World War. Although he sustained the statute, he made it clear that there was no general authority in legislatures to abridge these rights. "The question in every case," he said, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[14]

Although Holmes had spoken for the majority in the *Schenck* case, the Court in subsequent cases abandoned the "clear and present danger" test which he had there enunciated, and it became a minority view until it began to win acceptance some eighteen years later. Holmes himself dissented shortly after the decision in the *Schenck* case when the majority, in *Abrams* v. *United States*,[15] upheld a conviction under the Espionage Act. Said he,

[12]FRANKFURTER, *op. cit. supra* note 9, at 49.

[13]"The Justice deferred so abundantly to legislative judgment on economic policy because he was profoundly aware of the extent to which social arrangements are conditioned by time and circumstances, and of how fragile, in scientific proof, is the ultimate validity of a particular economic adjustment. He knew that there was no authoritative fund of social wisdom to be drawn upon for answers to the perplexities which vast new material resources had brought. And so he was hesitant to oppose his own opinion to the economic views of the legislature. But history had also taught him that, since social development is a process of trial and error, the fullest opportunity for the free play of the human mind was an indispensable prerequisite. . . . Naturally, therefore, Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements." FRANKFURTER, *op. cit. supra* at 50-51.

[14]249 U. S. 47, 52, 39 Sup. Ct. 247, 249 (1919).

[15]250 U. S. 616, 40 Sup. Ct. 17 (1919).

"I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and immediate danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[16]

When, in 1925, the Court upheld the conviction of Benjamin Gitlow under the New York Criminal Syndicalism Law, Holmes reiterated his belief in the "clear and present danger" test. The majority accepted the contention that freedom of speech was included in the term "liberty" in the Fourteenth Amendment, but ruled that state legislatures could make criminal certain defined utterances with a "bad tendency" and need not wait, as they said, until the spark had kindled the flame. They did so on the grounds that state legislation is to be presumed valid unless clearly otherwise; that the legislature had in this instance defined certain kinds of expression as inimical to interests the state had the right to protect; and that therefore if the words in question fell within the legislative definition, the conviction should be sustained. Holmes, in a dissent in which Mr. Justice Brandeis joined, referred again to his formulation of the "clear and present danger" test in the *Schenck* case and urged that it should apply here. "If what I think the correct test is applied," he said, "it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."[17]

[16] *Id.* at 627-628, 40 Sup. Ct. at 21. Again, in dissenting from a majority opinion confirming denial of citizenship to a woman who refused to promise to bear arms in the defense of the United States, Holmes emphasized that, while her views might excite popular prejudice, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free for those who agree with us but freedom for the thought that we hate." United States v. Schwimmer, 279 U. S. 644, 654, 49 Sup. Ct. 448, 451 (1929). *See also* United States v. McIntosh, 283 U. S. 605, 51 Sup. Ct. 570 (1931), in which Holmes joined in Chief Justice Hughes' dissent in a 5 to 4 decision involving a similar issue. These cases were ultimately overruled by the Court in Girouard v. United States, — U. S. —, 66 Sup. Ct. 826 (1946) with much emphasis being placed by the Court on the views of the dissenters.

[17] Gitlow v. New York, 268 U. S. 652, 673, 45 Sup. Ct. 625, 632 (1925). "It is said," Holmes continued in a classic passage, "that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted upon unless some other belief outweighs it or some failure of

Again in 1927 the minority, speaking this time through Brandeis in a separate concurring opinion, phrased the "clear and present danger" test in the strongest terms. "To courageous, self-reliant men," said Brandeis,

> "with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution."[18]

Holmes indicated his concurrence in this opinion.

Beginning in 1937, the majority of the Court embarked on a series of decisions adopting a somewhat broader view of the protection afforded by the Fourteenth Amendment to civil liberties, although without specifically adopting the "clear and present danger" test. In *De Jonge* v. *Oregon*,[19] the Court held that mere membership in the Communist Party and attendance at a meeting called by that party, however innocuous, could not be punished as criminal syndicalism. In the same year, 1937, the Court overruled the conviction of a Negro Communist under the Georgia sedition law.[20] The majority now flatly rejected the "dangerous tendency" test which had characterized the *Gitlow* decision, and the language of Justice Roberts indicated that the Holmes view was now acceptable to the Court.

> "The power of the state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation

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energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." *Ibid.*

[18]Whitney v. California, 274 U. S. 357, 378, 47 Sup. Ct. 641, 649 (1927). "Whenever the fundamental rights of free speech and assembly are alleged to have been infringed, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." *Ibid.*

[19]299 U. S. 353, 57 Sup. Ct. 255 (1937).

[20]Herndon v. Lowry, 301 U. S. 242, 57 Sup. Ct. 732 (1937). This was a 5 to 4 decision.

which goes beyond this need violates the principle of the Constitution."[21]

This, while it does not in so many words reverse the ordinary presumption of validity with respect to the acts of state legislatures, requires a much closer scrutiny of the "appropriate relation to the safety of the state" than did the narrower base of the *Gitlow* decision. And in the following year, Mr. Justice Stone specifically raised the question of the presumption of validity with respect to legislation involving civil liberties. While affirming the presumption in connection with economic regulation, he said, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[22]

Mr. Justice Murphy and the Court

It remained for Mr. Justice Murphy to become the leading exponent on the new Court for expanding the scope of civil liberties as against the exercise of governmental authority seeking to limit or circumscribe them. The most notable directions of this effort have been in relation to the reading of a very broad conception of religious freedom into the Fourteenth Amendment and in interpreting freedom of speech and press to include the right of peaceful picketing, as well as in a jealous solicitude for the procedural rights of persons accused of crimes. In a variety of other civil liberties problems he has exhibited the same fundamental approach.

An examination of the career and the public statements of Frank Murphy before he came to the Court provides at least a partial key to the position he has taken on that tribunal with respect to issues involving civil and political liberties. A deep concern for these individual rights has manifested itself repeatedly during a long record of public service. After graduation from the University of Michigan Law School in 1914, he pursued advanced studies at Lincoln's Inn, London, and at Trinity College, Dublin, prior to taking up public duties. In 1919 he became Assistant United States Attorney for the Eastern District of Michigan, in which capacity he served for over three years. Upon being elected to the Recorder's Court of Detroit in 1923, he acquired the only judicial experience he was to have up to the time of his appointment to the Supreme Court of the United States. As judge

[21] *Id.* at 258, 57 Sup. Ct. at 739.

[22] United States v. Carolene Products Co., 304 U. S. 144, 152, 58 Sup. Ct. 778, 783 (1938).

of this court in Detroit, on which he sat until 1930, he handled criminal cases arising in the city. He resigned to run for Mayor of Detroit, and was successful both in 1930 and in his campaign for re-election in 1932. In the latter year, he was active in the national campaign for Franklin D. Roosevelt and was given much of the credit for carrying the normally Republican Michigan for Mr. Roosevelt by some 132,000 votes. Upon being offered the post of Governor-General of the Philippines in 1933, he accepted and resigned as Mayor of Detroit. He stayed in the Philippines (as High Commissioner after 1935) until, at President Roosevelt's request, he ran successfully for Governor of Michigan in 1936. While serving as Governor, he attracted the attention of the nation by his actions and attitude in the Detroit automobile sitdown strikes in January and February of 1937. During seven months of bitter labor strife, Governor Murphy consistently refused to use force to compel a settlement of the controversy. The issues were ultimately resolved without bloodshed, but Murphy was widely criticized for not expelling the strikers by armed force. He told the voters of Michigan that if they wanted a Governor to "shoot the workers out of the factories and thus end sitdown strikes once and for all," they would have to get another Governor. In November of 1938 he was defeated for re-election, whereupon, in January of 1939, President Roosevelt appointed him Attorney-General of the United States.

In his speeches and actions as Attorney-General he revealed the solicitude for civil liberties which had been foreshadowed by his attitude toward the Detroit automobile workers' rights. In a speech over N.B.C. on March 27, 1939, he described the new civil liberties unit which had been established in the Department of Justice in an effort to preserve civil liberties during those troubled times. "It is anything but an easy job," he said,

> "this task of protecting civil liberties, and it is made twice burdensome by the fact that there is little pleasure in enforcing liberty for those who would deny liberty to others if they were in power. It is not easy to detest an extremist philosophy and yet insist on the right of a man to advocate it freely. Yet, apparently we must do just this if we are to practice our faith in democracy. . . . We must never forget that the democratic way is not to crush the alien view but to let it be heard and to defeat it by demonstrating that our own way of living contributes the most to human happiness."[23]

[23]Speech over N.B.C., March 27, 1939. Reprinted, *Civil Liberties,* by Frank Murphy, in REPRESENTATIVE AMERICAN SPEECHES, 1938-39, selected by A. C. BAIRD (THE REFERENCE SHELF, Vol. 13, No. 3, 1939) 180. In this same connection, he said on another occasion, "It has long been my feeling that in times of social unrest there is an increased necessity for vigilance in those charged with the protection of constitutional

This concern for civil liberties, however, did not lead him to a position which required him to view with distrust democratic efforts to solve the economic and social problems of the time. On the contrary, he felt that

> "the old conception of law as a system of purely negative rules designed primarily for the maintenance of order is giving way steadily to the broader view that the law is properly a positive instrument for human betterment. Under the pressure of unprecedented economic problems, this transition to a broader viewpoint has been greatly accelerated within the present decade. There are some among us who view this change with anxiety, if not actual foreboding. Their concern is understandable, for man is ever reluctant to leave the tranquillity and calm of old-established philosophies for the transitional confusion and uncertainty of the new. I am not disposed to share these fears. The alteration, to my mind, is but a natural evolutionary and inevitable process arising from the character of a changing social order."[24]

There is, indeed, a problem of reconciliation which must be undertaken in the true spirit of democracy. That spirit, according to Murphy, "is in brief that the whole people shall enjoy equal opportunity for economic security and the immeasurable benefits of civil and political freedom."[25] These interests are reconcilable, in the process of which the preservation of fundamental freedom "ultimately depends on whether or not the courts give it fearless protection and careful interpretation."[26] When he was appointed to the Supreme Court himself in January of 1940, after having been prominently mentioned for each vacancy which had occurred since 1937, he was in a position to put into practice his views as to the fundamental nature of civil liberties and the role of the courts as their bulwark. The *American Bar Association Journal,* commenting on the appointment, characterized him

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privileges and immunities. Emotions run higher. The clash of interests is frequent and heated. In the battle for public favor, extremists urge tolerance for their ideas, intolerance for their opponents. Meanwhile, those in government—preoccupied with grave social and economic problems—tend naturally to be less sensitive to instances of oppression and denial of constitutional rights. In this welter of confusing factors that principle which is the essence of democracy—tolerance for all sides in all questions—is usually the loser. It was particularly in view of these conditions that the civil liberties unit was created to implement the Constitution's guarantee of personal liberties." N. Y. Times, Jan. 5, 1940, p. 10, col. 3.

[24]N. Y. Times, Jan. 5, 1940, p. 10, col. 3.

[25]Speech as Att'y Gen. to the Associated Press, New York City, April 24, 1939. Reprinted, *Courts as a National Bulwark* (1939) 5 VITAL SPEECHES 435, 436.

[26]*Ibid. See also* two speeches made after his appointment to the Supreme Court: *Our Greatest Danger,* speech to the Knights of Columbus at Atlantic City, August 20, 1941, reprinted in (1941) 7 VITAL SPEECHES 717, and *The Challenge to our National Character,* speech to the Lawyers' Association of Missouri, January 23, 1942, reprinted in (1942) 8 VITAL SPEECHES 272.

as not a man of "profound scholarship in the professional sense of the term" but granted that he would probably be a "liberal and progressive" judge.[27]

A perusal of Murphy's opinions on the Court relating to problems of free speech, press, religion and assembly; guarantees of fair trial procedure; deportation proceedings; war-time Japanese curfew and relocation cases; and trials by military tribunals; all show a general inclination to take a consistently broader view than most of his colleagues. Of some 77 cases involving alleged violations of civil liberties from the time he came to the bench on February 5, 1940, through the spring of 1946, he cast his vote 61 times in behalf of the right alleged to have been infringed. The Court as a whole in this period rendered 43 decisions upholding the right as against legislative, administrative or judicial action, with 34 decisions going against the right claimed. The difference between Murphy's position and that of the Court as a whole can be seen when it is noted that he was with the majority in all 43 decisions sustaining the right claimed, and dissented 18 times when the alleged right was not upheld by the majority. Only in some 11 cases did he write or concur in a majority opinion denying the applicability of a right asserted to have been violated in civil liberties cases. He took no part in the decision in five of the 77 cases. While a mere statistical recitation such as this is far from conclusive, since it disregards differences in significance in the various cases, subtleties in the diverse factual situations, and differences in reasoning in the various categories of cases, still it offers a rough measure of his general position relative to the rest of the Court. It is clearly more than statistical coincidence that he was consistently with the Court in upholding a broad application of these guaranties, that he in no case took a narrower view than the rest of the Court in this regard, and that in some 18 cases he differed from the decision of the majority—each time in the direction of a broader interpretation of the alleged rights involved. Although Justices Black and Douglas were frequently with him (they joined him on six of the 18 occasions on which he dissented), and although he was joined from time to time by Chief Justice Stone, or Justices Reed or Rutledge, no other single member of the Court in this series of cases approaches the consistent advocacy of the very broad interpretation of these limitations found in his general position and in his written opinions.[28] Leaving the somewhat dubious ground of such statistics, how-

[27]Bates, *The New Supreme Court Judge: An Appraisal* (1940) 26 A. B. A. J. 106, 107.

[28]*See* Fraenkel, *War, Civil Liberties and the Supreme Court, 1941-1946* (1946) 55 YALE L. J. 715. Says Mr. Fraenkel, "The war has brought about the final dissolution of the Black, Douglas and Murphy trio, who for so many years had been liberal dissenters. Only Justice Murphy has remained a consistent upholder of liberty, joined frequently by Justice Rutledge." *Id.* at 733.

ever, an examination of his record in several categories of civil liberties cases before the Court in this period will serve to illumine on a sounder basis the nature of these views.

Freedom of Religion

No sooner had Mr. Justice Murphy arrived on the Court than he was in the midst of what was to prove one of the most troublesome series of cases to come before the tribunal in some time. These were the Jehovah's Witnesses cases. After taking his oath of office on February 5th, he listened to arguments commencing April 25th in the famous case of *Minersville School District* v. *Gobitis*,[29] otherwise known as the First Flag Salute case, which was decided by the Court on June 3, 1940. Mr. Justice Frankfurter, who was to prove his most outspoken opponent on the scope of the civil liberties provisions of the Constitution as a basis of judicial invalidation of legislation, rendered the majority opinion, with only Mr. Justice Stone recorded as dissenting.[30] The majority opinion reversed two lower courts and held that local school authorities could require the traditional flag salute as a gesture of loyalty from all those attending the public schools, regardless of claims of religious objections. According to Frankfurter, the real issue was whether the legislatures of the various states and the authorities in thousands of counties and school districts are prevented from adopting means to promote "that unifying sentiment without which there can ultimately be no liberties, civil or religious." In his view,

> "To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence."[31]

Striking here the keynote of deference to legislative judgment which characterized the approach of the entire Court in respect to social and economic legislation, but which was destined not to receive full acceptance

[29]310 U. S. 586, 60 Sup. Ct. 1010 (1940).

[30]Murphy came to the Court in February of 1940, and for the rest of that term and all of the succeeding October 1940 term he voted almost always with the majority. In fact, the impending split in the new Court on civil liberties issues, although implicit in some of the opinions, had not yet become clearly apparent. It is suggested by subsequent events that Murphy joined silently with the majority in some cases during this period which at a later time probably would have evoked different views from him. That may be true of his recorded position in this case.

[31]Minersville School District v. Gobitis, 310 U. S. 586, 597-598, 60 Sup. Ct. 1010, 1014 (1940).

with respect to civil liberties cases, Frankfurter said that the wisdom of this type of training was not for courts to decide. Since science and psychology had not yet given the answer as to the real elements of national unity, making the courtroom the arena for debating issues of educational policy would "in effect make us the school board for the country."[32] It is not the function of the Court to "exercise censorship over the conviction of legislatures" that a particular program will best secure attachment to our national institutions on the part of school children. "When the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail."[33] Murphy was silently with the majority in this case.[34]

Another Jehovah's Witnesses case came before the Court during Murphy's first term on the bench. This one involved a Connecticut statute prohibiting any person from soliciting money for religious or charitable purposes from the general public unless approved by the Secretary of the Public Welfare Council, who was to determine whether the cause was a *bona fide* religious or charitable one and whether it met certain standards of efficiency. If he so found, he issued a certificate, revocable at any time, on the basis of which the soliciting could go forward. This statute, as applied to Jehovah's Witnesses who were distributing books and pamphlets, playing phonograph records, and collecting contributions for their cause, was held to be an unconstitutional violation of freedom of speech and freedom of religion protected by the Fourteenth Amendment.[35] Mr. Justice Roberts, for an unanimous Court, said that the power of censorship of what is a "religious" cause, placed in the hands of an administrative official, violates freedom of religion and is not saved because judicial remedies may be available for recourse from any arbitrary acts on his part. It is, in short, a previous

[32]*Id.* at 598, 60 Sup. Ct. at 1015.

[33]*Id.* at 596, 60 Sup. Ct. at 1013. "Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. . . . Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the form of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." *Id.* at 600, 60 Sup. Ct. at 1015-1016.

[34]Professor B. F. Wright, writing before the reversal of this decision three years later, commented, "Certainly it seems out of line with the opinions which went before." WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942) 231.

[35]Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900 (1940). There had been some similar cases before the Court shortly before Murphy's appointment. *See especially* Lovell v. Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938); Schneider v. Irvington, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

restraint of religious freedom and cannot be reconciled with the Fourteenth Amendment.[36]

Thus far, Mr. Justice Murphy had been with the majority in these cases, whether upholding or denying the claims under the freedom of religion guaranty. And again in the following year, 1941, he joined in the unanimous opinion written by Chief Justice Hughes in *Cox* v. *New Hampshire*[37] upholding, as applied to this same religious sect, a state law requiring a license prior to engaging in a "parade or procession" upon a public street. It was found that the licensing authorities regulated only the time, place and manner of parades and charged a fee sufficient only to cover the public expense in connection with it. Since, under the authoritative interpretation of the state law, there was no arbitrary discretion to issue or refuse licenses, this was merely an allowable police statute governing the use of streets.[38]

Similarly, in his first written opinion on religious liberty, Murphy spoke for an unanimous Court in upholding the regulation in question and denying the claim based on the Fourteenth Amendment. This was in the case of *Chaplinsky* v. *New Hampshire*.[39] Chaplinsky, a member of Jehovah's Witnesses, was convicted in municipal court in Rochester, New Hampshire, for violation of a state law providing that no person might address "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business or occupation."[40] The appellant had been convicted on the complaint that he publicly told the City Marshal, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." The highest state court had upheld the conviction against the claim that the law as applied was invalid as an unreasonable restraint on free speech, free press, freedom of religion, and as being vague and indefinite.

Murphy, for the Court, noted that the facts were substantially undisputed,

[36]Cantwell v. Connecticut, 310 U. S. 296, 310, 60 Sup. Ct. 900, 906 (1940).
[37]312 U. S. 569, 61 Sup. Ct. 762 (1941).
[38]Said Hughes, "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. . . . One would not be justified in iguoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions." *Id.* at 574, 61 Sup. Ct. at 765.
[39]315 U. S. 568, 62 Sup. Ct. 766 (1942).
[40]N. H. PUB. LAWS (1926) c. 378, § 2.

except that Chaplinsky denied using the name of the Deity. The trial court had excluded as irrelevant any evidence as to Chaplinsky's "mission to preach the true facts of the Bible," his provocation at the hands of a crowd prior to the Marshal's arrival on the scene, and the alleged neglect of duty by the police—all on the ground that none of these, even if true, would constitute a valid defense to the charge. The protest that the statute as applied infringed freedom of the press and freedom of religion Murphy dismissed brusquely. The written word was not involved in this case, said he, "And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term."[41] Even if the activities of the appellant which preceded the incident were religious in character, they "would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute."[42] He then turned to the validity of the statute as a violation of freedom of speech. His conclusion was that resort to epithets or personal abuse is not in any proper sense communication of information or opinion protected by the Constitution, and its punishment as a criminal act raises no constitutional question.[43] The highest state court had construed the statute to mean that it "does nothing more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." Noting that this construction was authoritative, Murphy held that the limited scope of the statute as thus construed was no contravention of the right of free expression. "Argument is unnecessary," he added dryly, "to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[44]

Shortly after the disposition of this case, however, Murphy dissented for the first time in litigation involving freedom of religion. This was in the first *Jones* v. *Opelika* case.[45] Involved were three local ordinances imposing

[41]315 U. S. 568, 571, 62 Sup. Ct. 766, 769 (1942).
[42]*Ibid.* "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572, 62 Sup. Ct. at 769.
[43]*Citing dictum,* Cantwell v. Connecticut, 310 U. S. 296, 309, 60 Sup. Ct. 900, 906 (1940).
[44]315 U. S. 568, 574, 62 Sup. Ct. 766, 770 (1942).
[45]316 U. S. 584, 62 Sup. Ct. 1231 (1942).

license taxes on the sale of printed matter. Jones and others, members of Jehovah's Witnesses, were convicted for refusing to take out licenses in connection with distributing religious literature. The fees involved were all relatively small, but not entirely negligible. The sole constitutional question was whether a non-discriminatory license fee not alleged to be inordinate could be imposed on the activities of this sect. The Court, in a 5 to 4 decision, upheld the ordinances as applied. Mr. Justice Reed, for the majority, held that to subject religious groups to reasonable fees for their money-making activities, such as bookselling, is not to hold that these acts are purely commercial; it is simply to say that they are money-making and are subject to a non-discriminatory tax.[46]

Chief Justice Stone and Justices Black, Douglas and Murphy dissented, with Stone and Murphy writing separate dissents. In addition, Black, Douglas and Murphy joined in a very interesting note inviting reconsideration of the principles laid down in the *Gobitis* case.[47] In his dissent, Stone was of the opinion that these ordinances were invalid on their face, under the general doctrine of *Lovell* v. *Griffin*.[48] He stressed that the cumulative effect of such ordinances in town after town would destroy freedom of communication except for those financially able to distribute their ideas without soliciting funds. "In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression. The more humble and needy the cause, the more effective is the suppression."[49] Justices Black, Douglas and Murphy agreed with this dissent.

In his separate dissent, Justice Murphy emphasized that ordinances which

[46]"When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or of the press." *Id.* at 597, 62 Sup. Ct. at 1239. Reed added that if the fees were challenged as being too high, and thus threatening to choke off this channel of communication, that might be another question. There was no contention in these cases that the fees were excessively high.

[47]After saying that the majority opinion in the present case tends to suppress the free exercise of religion and is but another step in the direction started by the *Gobitis* case, they add: "Since we joined in the opinion in the *Gobitis* case, we think it is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that." *Id.* at 623, 62 Sup. Ct. at 1251.

[48]*See* note 35.

[49]316 U. S. 584, 611, 62 Sup. Ct. 1231, 1245 (1942).

may operate to restrict the dissemination of ideas on religious or other subjects must be framed "with fastidious care and precise language" in order to avoid infringement of fundamental liberties. It is axiomatic, of course, that the protection of these liberties is extended not only to those whose views are popular but to dissident minorities who seek vigorously to spread their beliefs. He held that the activities here involved were not in any real sense commercial, but that the Witnesses were evangelizing their faith as they saw it. While the taxes were not high, they were large enough to be substantial and to hinder the distribution of this kind of literature. "With so few potential purchasers," he remarked, "it would take a gifted evangelist indeed, in view of the antagonism generally encountered by Jehovah's Witnesses, to sell enough tracts at prices ranging from five to twenty-five cents to gross enough to pay the tax."[50] Murphy notes in passing that evidence excluded by the trial court in the instant case indicated that similar fees were not exacted from more orthodox ministers. In any event, however,

> "Freedom of speech and freedom of the press cannot and must not mean freedom only for those who can distribute their broadsides without charge. There may be others with messages more vital but purses less full, who must seek some reimbursement for their outlay or else forego passing on their ideas."[51]

In concluding this, his first dissent in a civil liberties case, he sounded the note on which the Court was to continue to have difficulty in these cases—the note that the ordinary presumption of validity of legislation did not extend to statutes involving fundamental freedoms. "Liberty of conscience," he said,

> "is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of the community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights."[52]

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[50] *Id.* at 616, 62 Sup. Ct. at 1248. Moreover, as he pointed out, the tax levied bore no relation to the amount grossed or to ability to pay.

[51] *Id.* at 619, 62 Sup. Ct. at 1249. The pamphlet, he points out, is "an historic weapon against oppression" and is again today "the convenient vehicle of those with limited resources." Thomas Paine's famous pamphlets, he comments, were sold—not distributed free of charge.

[52] *Id.* at 623, 62 Sup. Ct. at 1251.

Chief Justice Stone and Justices Black and Douglas agreed with these views.

As foreshadowed in the views expressed by Justices Black, Douglas and Murphy in the case just discussed, the Court soon reversed the three-year old precedent of the *Gobitis* case. The occasion arose in *West Virginia State Board of Education* v. *Barnette*,[53] which accentuated the depth of the cleavage on issues of religious freedom first revealed by the *Opelika* case. The Supreme Court, in a 5 to 4 opinion written by Justice Jackson, held that a compulsory flag salute provision for the public schools was inconsistent with religious freedom as applied to those who objected on religious grounds, and specifically reversed the *Gobitis* decision. With respect to Frankfurter's plea in the earlier case for judicial tolerance of legislative wisdom in this area "where courts possess no marked and certainly no controlling competence," Jackson answered emphatically that "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." One's claim to these fundamental rights "may not be submitted to vote; they depend on the outcome of no elections."[54] Although the due process clause of the Fourteenth Amendment may be sufficiently vague in its application to many kinds of legislation as to require broad judicial tolerance of legislative acts, such is not the case with the liberties included under the protection of the First Amendment. "Much of the vagueness of the due process clause," said Jackson, "disappears when the specific prohibitions of the First [Amendment] become its standard."[55] In any event, he added, "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[56]

Justices Black and Douglas, who, with Justice Murphy, shifted in this case from their earlier position, indicated in a separate concurrence the reasons for their change in attitude.[57] In doing so, they specifically applied the Holmes "clear and present danger" test to this kind of problem and indi-

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[53]319 U. S. 624, 63 Sup. Ct. 1178 (1943).
[54]*Id.* at 638, 63 Sup. Ct. at 1185.
[55]*Id.* at 639, 63 Sup. Ct. at 1186.
[56]*Id.* at 640, 63 Sup. Ct. at 1186.
[57]"Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong." *Id.* at 643, 63 Sup. Ct. at 1187.

cated a willingness to use that criterion in judging a wide variety of civil liberties issues.

> "Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat words of a patriotic formula creates a grave danger to the nation."[58]

Justice Murphy, in his separate concurring opinion, admitted a reluctance to interfere with considered state action, conceded that the end sought was a desirable one, and recognized the nature of the emotion aroused by the flag for which the nation was again fighting as the opinions in this case were read. "But," he said, "there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches."[59] Moreover, in balancing the objectives of democratic government as found in America, Murphy finds that the weight must lie in favor of freedom of conscience.[60]

It is in his remarkable and often deeply moving dissent in this case that Justice Frankfurter most eloquently challenged the views of Murphy and his majority colleagnes with respect to the presumption of validity of legislation in civil liberties cases. Standing by the principles of the *Gobitis* decision, he denies the applicability of the "clear and present danger" test in cases such as these and urges persuasively that the proper scope of the judicial function is such as to leave matters of policy, on this as on other subjects, to legislative bodies. In language which restates in the strongest terms the Holmes doctrine that judges must divest themselves of their personal predilections when sitting in review of legislation, Frankfurter says,

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[58] *Id. at* 643-44, 63 Sup. Ct. at 1188.

[59] *Id.* at 645, 63 Sup. Ct. at 1188.

[60] "It is in . . . freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies."

"Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the 'severest contests in which I have ever been engaged.'" *Id.* at 646, 63 Sup. Ct. at 1189.

"One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."[61]

He then turns to the very important concept of judicial self-restraint[62] with respect to legislative enactments, reminding the Court what Stone had said in the *United States* v. *Butler* dissent, and stating clearly that no different rule should apply in civil liberties cases. "Not so long ago," he says,

"we were admonished that 'the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.' . . . The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. . . . Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending on the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked."[63]

The divergence in emphasis between the two groups on the Court in applying different phases of the Holmes constitutional tradition is nowhere better shown than in this dissent. Frankfurter re-emphasizes the general Holmes

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[61] *Ibid.* "It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review." *Id.* at 647, 63 Sup. Ct. at 1189.

[62] For a general discussion of this concept, *see* Vincent M. Barnett, Jr., *Constitutional Interpretation and Judicial Self-Restraint* (1940) 39 MICH. L. REV. 213.

[63] 319 U. S. 624, 647-48, 63 Sup. Ct. 1178, 1190 (1943). *But note* that some of the provisions of the Bill of Rights are not included in the Fourteenth Amendment in the view of the majority. As to the inclusion of the Sixth Amendment, *see* Betts v. Brady, 316 U. S. 455, 62 Sup. Ct. 1252 (1942), and Justice Black's dissent at 474, 62 Sup. Ct. at 1262, referred to *infra*.

plea for judicial tolerance, before turning to the "clear and present danger" doctrine—also a heritage from Holmes—in an effort to limit its application much more narrowly than the Court as a whole does.

> "When Mr. Justice Holmes, speaking for this Court, wrote that 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,' . . . he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered."[64]

Then, with respect to what he conceives to be the tendency of the majority to enlarge on the "clear and present danger" test laid down Justice Holmes, he says,

> "To talk about 'clear and present danger' as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase . . . in a case involving mere speech as a means by which alone to accomplish sedition in time of war. . . . He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought 'to our institutions or our government.' "[65]

Those who pass laws, he adds, are under a duty to observe the Constitution no less than judges. "And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting."[66] This, he says, is not abdication of the judicial function, but merely due observance of its limits.[67]

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[64]319 U. S. 624, 649, 63 Sup. Ct. 1178, 1190 (1943). The quotation is from Missouri, K. & T. Ry. v. May, 194 U. S. 267, 270, 24 Sup. Ct. 638, 639 (1904).

[65]319 U. S. 624, 663, 63 Sup. Ct. 1178, 1196 (1943). Frankfurter does not add that Holmes repeated this test in the *Gitlow* case, which did not involve sedition in wartime, and that he concurred with Brandeis' separate opinion in the *Whitney* case again stressing this test.

[66]*Id.* at 667, 63 Sup. Ct. at 1198.

[67]With a warning that excessive reliance on courts in these matters stunts demo-

It is clear that most other members of the Court, and indeed most so-called "liberal" observers outside the Court, would agree vigorously with almost everything Frankfurter says in this opinion with respect to the desirable scope of judicial review in a democracy. So far as censorship over the wisdom of social and economic legislation is concerned, there has seldom been a better essay on the desirable relationship of the courts to the legislatures from this particular point of view—and it is a point of view which animates the majority of the Court in connection with legislation of that kind. It is in refusing to distinguish between such general regulatory legislation not challenged under the First Amendment and legislation directly or indirectly affecting those liberties that Frankfurter parts company with Murphy and his other colleagues.

At the same term, the high tribunal split 5 to 4 in another group of cases which reversed an earlier ruling of the Court on issues of religious liberties. The leading case of the group was *Murdock* v. *Pennsylvania,* on the authority of which the Court reversed the ruling in the first *Opelika* case and vacated the judgment there.[68] In this case Murdock had been convicted of violating a forty-year old ordinance of Jeannette, Pennsylvania, which provided that all persons soliciting orders for merchandise of any kind must secure a license, at rates ranging from $1.50 per day to $20 for three weeks. Appellants refused to secure the license on the ground, among others, that they made no "sales" but simply secured "contributions" to the cause. Reversing the major basis for upholding such a tax in the first *Opelika* case, Justice Douglas held that a state may not impose a charge for the enjoyment of a right granted by the federal Constitution, and that the non-discriminatory nature of the tax does not save it. Protection for the distribution of religious literature must be accorded even though it may be "provocative, abusive, and ill-mannered."[69] Justices Reed, Roberts, Frankfurter and Jackson joined in dissenting.[70]

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cratic faculties, he adds, "Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law." *Id.* at 670-671, 63 Sup. Ct. at 1200.

[68]319 U. S. 103, 63 Sup. Ct. 890 (1943), reversing and vacating the judgment in Jones v. Opelika, 316 U. S. 584, 62 Sup. Ct. 1231 (1942), discussed *supra.*

[69]319 U. S. 105, 117, 63 Sup. Ct. 870, 877 (1943).

[70]Frankfurter, dissenting separately (although concurring also in Reed's dissent), adds a Holmesian comment. "The power to tax, like all powers of government, legis-

In the case just discussed, Justice Murphy was silently with the majority, but he added a note on his own views in a similar case decided at the same time. This was another Witnesses case, *Martin* v. *Struthers*.[71] Here an ordinance of Struthers, Ohio, making it unlawful for anyone distributing literature to ring a doorbell or knock on the door was held unconstitutional. The decision itself was apparently on the rather narrow ground that the ordinance did not distinguish between those householders willing to receive the literature and those who were not.[72] As an outright prohibition of canvassing if attended by the distribution of literature, it was invalid. In concurring separately with Justice Black's opinion for the majority, Justice Murphy emphasized particularly the preferred place given to freedom of religion, in his opinion, by the Constitution. Said he,

> "I believe that nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions. . . . The right extends to the aggressive and disputatious as well as to the meek and acquiescent. The lesson of experience is that—with the passage of time and the interchange of ideas—organizations, once turbulent, perfervid and intolerant in their origin, mellow into tolerance and acceptance by the community, or else sink into oblivion."[73]

Justice Frankfurter, noting the narrow ground of the specific ruling, indicated he would not disagree.[74] Justices Reed, Roberts and Jackson, however, (Frankfurter's associates in previous 5 to 4 decisions on similar issues), again dissented. Jackson, in a dissent pertaining to several of these cases at once, [75] called into question the whole problem of the methods of operation of the Witnesses and indicated doubt that such activities can legitimately claim the protection of the Bill of Rights.[76] If all religious

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lative, executive and judicial alike, can be abused or perverted. The power to tax is the power to destroy only in the sense that those who have power can misuse it. Mr. Justice Holmes disposed of this smooth phrase as a constitutional basis for invalidating taxes when he wrote 'The power to tax is not the power to destroy while this Court sits.'" *Id.* at 137, 63 Sup. Ct. at 900.

[71]319 U. S. 141, 63 Sup. Ct. 862 (1943).

[72]The suggestion was made that ordinances making doorbell-ringing illegal where the householder had indicated by sign or otherwise that he did not wish to be disturbed for such purposes might be upheld. See two cases decided the previous year, Jamison v. Texas, 318 U. S. 413, 63 Sup. Ct. 669 (1943) and Largent v. Texas, 318 U. S. 418, 63 Sup. Ct. 667 (1943), in both of which local ordinances were invalidated as applied to distribution of literature by Jehovah's Witnesses. *Cf.* Valentine v. Chrestensen, 316 U. S. 52, 62 Sup. Ct. 920 (1942).

[73]319 U. S. 141, 149, 63 Sup. Ct. 862, 866 (1943).

[74]His concurrence concedes nothing on the broader points of disagreement between the two groups on the Court.

[75]Douglas v. Jeannette, 319 U. S. 157, 166, 63 Sup. Ct. 877, 882 (1943).

[76]*Id.* at 179, 63 Sup. Ct. at 888. "When limits are reached which such communica-

sects used the aggressive and pugnacious, not to say abusive and obscene, methods frequently employed by the Witnesses, said Jackson, the results would be intolerable. Such methods, he thought, can hardly be considered an essential part of religious freedom.[77]

Cases involving this same sect continued to come up the following year, and continued to split the Court. In *Prince* v. *Massachusetts*,[78] there was involved a state law prohibiting children from selling or exercising any trade in a public place, and penalizing anyone furnishing them with merchandise for such purposes. The majority, speaking through Justice Rutledge, affirmed the conviction of an adult for permitting a child to sell Witnesses literature and upheld the statute as an appropriate exercise of the police power. The statute was sustained on the ground that, as a child labor law based on a reasonable age standard, it could prohibit such activity on the part of children even though connected with religious purposes. Rutledge was very careful to limit the decision to the facts of the case, and to emphasize the age factor. Justices Jackson, Roberts and Frankfurter concurred in the affirmance of the conviction, but differed with the majority as to the grounds. They would have upheld the statute as regulating "commercial" activities, whether on the part of children or adults, consistent with their views earlier expressed. Money-raising activities, they said, even when conducted by religious groups, are affairs of Caesar rather than of God and are subject to such restraint.

Murphy's willingness to go further than any of his brethren in religious liberty cases is here demonstrated. In a lone dissent, he condemns the statute on either ground. The nine year old girl, to whom the defendant furnished magazines to sell in this case, was, he held, engaged in a genuine religious activity, voluntarily and in pursuance of her religious beliefs. As such, the activity was beyond the reach of the state police power.[79] In dis-

tions must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups." *Ibid.*

[77] *Id.* at 181, 63 Sup. Ct. at 889. Jackson adds a warning that excesses in interpretation of these liberties may in the long run work to the detriment of the very freedoms here sought to be protected. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty. In so doing it needlessly creates a risk of discrediting a wise provision of our Constitution. . . ." *Ibid.*

[78] 321 U. S. 158, 64 Sup. Ct. 438 (1944).

[79] *Id.* at 172, 64 Sup. Ct. at 446. The question, according to Murphy, was whether

cussing the general issues involved, he met frontally the position taken by Frankfurter in these cases with respect to the constitutional obligation of deference to legislative judgment.

> "In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the rights of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. . . . On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth are to be presumed to be invulnerable and any attempt to sweep away those freedoms is *prima facie* invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case."[80]

A sharper conflict with the general views so forcefully expressed by Frankfurter in his dissent in the second flag salute case can hardly be imagined. In the instant case, said Murphy, the burden of proof on the state is not met by "vague references to the reasonableness underlying child labor legislation in general."

Commenting on the nature of the methods used by the Witnesses, almost, it seems, in direct reply to Jackson's remarks noted above in this connection,[81] Murphy said that the story of this sect

> "is living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. . . . To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger."[82]

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the state, "under the guise of enforcing its child labor laws," could prohibit children from practicing their religious faith by distributing religious tracts. He notes that no truancy or curfew laws were involved.

[80] *Id.* at 173, 64 Sup. Ct. at 446.

[81] See note 76 *supra.*

[82] 321 U. S. 158, 175, 64 Sup. Ct. 438, 447 (1944). It is worth commenting upon, in connection with this passage, that some of the most abusive tracts in the Witnesses' repertoire are leveled at the Catholic Church, of which Murphy is a member.

Shortly afterward, the Court again invalidated a local ordinance in a Jehovah's Witnesses case over the dissent of Justices Frankfurter, Roberts and Jackson.[83] This was in *Follett* v. *McCormick*,[84] in which Follett had been convicted of violating an ordinance which exacted a book agent's license fee for distributing literature. The facts took this case beyond the precedent of the *Murdock* case, since Follett was a resident of the town, confined his activities to that community, and earned his livelihood entirely from the "contributions" requested in return for the literature. The *Murdock* case had specifically covered only "itinerant" evangelists. Justice Douglas, for the Court, took the same general ground as in the earlier case, however, commenting that "Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living."[85] The dissenters again stressed the non-discriminatory nature of the levy, which was applied to all persons who earned their livings by the sale of publications, whatever their nature. Such a revenue measure, they said, is reasonably related to the cost of maintaining society by governmental protection, without which no civil liberty is possible. There is no reason, in their view, why a resident of the community earning his living there in this fashion should not share in the community expenses. The principle of the majority opinion, they fear, might lead to tax exemption for great and wealthy churches, such as Trinity Church in New York which holds extensive commercial and financial interests. Indeed, the principle in logic would lead to tax exemption for all those who were engaged in spreading opinion, religious or secular. As to religion itself, it does not entitle the believers to be free of contribution to the cost of government "which itself guarantees them the privilege of pursuing their callings without governmental prohibition or interference."[86]

Justice Murphy, in a separate concurrence, undertook to answer the minority view and to deny that the decision opens the way for vast tax exemptions for the spreaders of religious or other opinion.

> "It is suggested that we have opened the door to exemption of wealthy religious institutions, like Trinity Church in New York City, from

[83]Justice Reed would have concurred with the dissenters again on the same basis as in the second Opelika case, but he says, in a separate concurrence with the majority, that although he thinks the ruling wrong he now considers it the law of the land. This adherence to the doctrine of *stare decisis* serves to accentuate the degree to which it has not been followed by some of the Justices in these cases.

[84]321 U. S. 573, 64 Sup. Ct. 717 (1944).

[85]*Id.* at 576, 64 Sup. Ct at 719.

[86]*Id.* at 583, 64 Sup. Ct. at 722.

the payment of taxes on property investments from which support is derived for religious activities. It is also charged that the decision contains startling implications with respect to freedom of speech and the press. I am neither disturbed nor impressed by these allegations. We are not called upon in this case to deal with the taxability of income arising out of extensive holdings of commercial property and business activities related thereto. There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication. It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to destroy religion unless it is kept within appropriate bounds."[87]

It is in these religious liberty decisions striking down non-discriminatory taxes that the position of the majority, and some of the language of Justice Murphy, have come in for the most vigorous criticism from students of constitutional law otherwise in sympathy with the broadened scope of civil liberties protection. The implications of tax exemption for commercial activities connected with religious undertakings seem to some observers not only to overextend the liberties protected by the First Amendment, but to establish a hierarchy of special privileges within those liberties. Such a hierarchy puts at its most preferred level all religious activity (exempted even from non-discriminatory nominal taxes on money-raising undertakings), followed by other freedoms now read into the Fourteenth Amendment, with those provisions of the Bill of Rights not yet imported into that amendment occupying the lowest rung on the ladder. This preferred position for religious liberty, so far as taxes are concerned (and it has thus far been applied only in tax cases), is considered by some not only to be unjustified by the wording of the First Amendment but to be clearly prohibited by it. Pointing out that tax exemption amounts to a subsidy, Mr. Louis B. Boudin, for example, feels that such subsidizing of religion violates the im-

[87] *Id.* at 579, 64 Sup. Ct. at 720. Jehovah's Witnesses cases continue to come to the Court. *See* Marsh v. Alabama, 326 U. S. 501, 66 Sup. Ct. 276 (1946), protecting distribution of religious literature in company-owned towns by a 5 to 3 decision; and Tucker v. Texas, 326 U. S. 517, 66 Sup. Ct. 274 (1946), protecting such activity on United States-owned land even where forbidden by the village manager, also in a 5-3 split. Chief Justice Hughes and Justices Reed and Burton thought the claim of religious liberty overextended in these cases. In the case of Matter of Summers, 325 U. S. 561, 65 Sup. Ct. 1307 (1945), Murphy dissented in a 5-4 opinion upholding the right of Illinois courts to deny admission to the bar to a man who, for religious reasons was opposed to armed force and violence and who, therefore, was barred from taking the oath required of all admitted to the bar. Justices Black, Douglas and Rutledge joined Murphy in dissenting.

plied injunction against state favoritism on behalf of religion as against non-religious groups. The Constitution, in this view, in effect has a provision against subsidizing any particular religion or even religion in general. Freedom from religion is part of the guarantee—the right not to have any religion and not to be burdened in any way because others do have religion. Exemption from taxation, according to Boudin, violates this concept.[88]

It may well be that the Court has gone too far in its zeal to protect religious liberties in these cases. The application case by case of the distinction between "essential commercial" or "essentially secular" activities as opposed to "essentially religious" activities could have formed the basis of the cases discussed above, and may well prove to be the most practicable approach in the future. Indeed, Justice Murphy's comment about the putative tax exemption for Trinity Church with respect to "extensive holdings of commercial property and business activities related thereto" indicates that such a distinction may come to be the basis for future decisions in this field.

Right of Peaceful Picketing

In one of his first important opinions on the bench, Justice Murphy spoke for the majority in the far-reaching decision which extended the protection of the Bill of Rights, under the *aegis* of the Fourteenth Amendment, to peaceful picketing in labor controversies. This was the case of *Thornhill* v. *Alabama*,[89] which became another in the series of landmark decisions in the direction of broadening the categories of civil rights deemed to be protected by the Fourteenth Amendment. Thornhill was convicted of violation of the Alabama State Code, section 3448, which made "loitering" or "picketing," as defined, a misdemeanor.[90] Thornhill had "loitered" at and "picketed" a certain factory. He demurred to the charges on the ground that his right of free speech and peaceable assemblage was denied. The demurrer was apparently not ruled on, and after the case was argued he moved to exclude all testimony on the ground that the section was unconstitutional. This motion was overruled, judgment was affirmed on appeal by the Alabama Court of Appeals, and the Alabama Supreme Court refused

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[88]Boudin, *Freedom of Thought and Religious Liberty under the Constitution* (1944) 4 LAWYERS GUILD REV. 9.

[89]310 U. S. 88, 60 Sup. Ct. 736 (1940).

[90]Any person who without just cause or legal excuse loiters about the premises of a lawful business "for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons . . . or who pickets the works or place of business . . ." for purposes of "hindering, delaying, or interfering with or injuring" such lawful business "shall be guilty of a misdemeanor."

certiorari. The case was then heard by the Supreme Court of the United States "because of the importance of the questions presented."[91]

Justice Murphy, for the Court, first reviewed the specific facts of the case. Thornhill, on the morning of his arrest, was seen with six or eight others on the picket line at the plant, in a strike called by an A. F. of L. affiliate which had all but four of the 100 employees of the plant as members. A picket line with two picket posts was being maintained 24 hours a day. Most employees lived on company property and received mail from the post office located on such property. On the day in question, the company announced that it would resume operations. One non-member of the union reported for work and, on approaching the plant, was stopped by Thornhill and persuaded not to enter. According to the man's own testimony, he was not threatened, nor were any harsh or angry words exchanged. The man, as a consequence of the conversation, returned home. It was for this activity that Thornhill was arrested and convicted.

In considering the validity of the questioned legislation, Murphy again indicated why, in his view, the ordinary presumption of validity cannot apply in civil liberties cases.

> "Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."[92]

Thus the chosen method now becomes a "mere legislative preference" when civil liberties are involved, and the burden is on those imposing such restrictions to support the substantiality of the reasons advanced. This is the same line of reasoning followed by the majority of the Court in the religious liberty cases, and against which Justice Frankfurter (subsequent to the date of decision in this case) protested so vigorously. The split had not yet become pronounced, and it is interesting to note that Frankfurter was

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[91] 310 U. S. 88, 93, 60 Sup. Ct. 736, 740 (1940).

[92] *Id.* at 95, 60 Sup. Ct. at 741, *quoting* Schneider v. Irvington, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

with the majority in this case in an 8 to 1 opinion, with only Justice McReynolds dissenting.

As construed by the state courts, said Murphy, this statute makes it a crime for a single individual to walk peacefully in front of a place of business, doing nothing but carrying a placard saying that the firm does not employ union labor. Thus, it "comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer."[93] Any legislative attempt as broad as this is invalid on its face. Freedom of peaceful picketing must be regarded as within the protected rights of free communication. "Freedom of discussion," said Murphy,

> "if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[94]

Such rights are admittedly subject to modification or qualification; and the question in each case is likely to be the scope of the state's power to set limits of permissible contest open to industrial combatants. But it does not follow that the state, in attempting to deal with the real evils which sometimes accompany industrial disputes, may impair the broad right of effective exercise of free discussion about industrial situations that are matters of public concern. Referring specifically to the Holmes civil liberties philosophy, and citing the opinion in the *Schenck* case, Murphy applied the "clear and present danger" doctrine to this type of problem. "Abridgement of the liberty of such discussion," he said,

> "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. 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 section 3448."[95]

The state has an unquestioned right to prevent violence and breaches of the peace, and a case involving mass picketing attended by violence might yield a different result, said Murphy. "But no clear and present danger of

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[93] *Id.* at 100, 60 Sup. Ct. at 743.
[94] *Id.* at 102, 60 Sup. Ct. at 744.
[95] *Id.* at 104, 60 Sup. Ct. at 745.

destruction of life and property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter."[96]

In the following year, Murphy joined with the majority in a decision limiting the right even of peaceful picketing when it was set in a background of violence and bloodshed. He was unwilling to go so far as to invalidate an injunction against picketing in these circumstances, although Justices Black, Reed and Douglas dissented from the majority opinion written by Frankfurter. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*[97] involved an Illinois court injunction issued against the drivers' union restraining violence and picketing. The Supreme Court upheld the injunction as applied to both the violence and the picketing, although there was no evidence that the latter by itself had been anything but peaceful. The facts, however, indicated a wide resort to violence in the dispute as a whole.[98]

The following year revealed the familiar split again in a 5 to 4 decision on a picketing case, with Justices Black, Reed, Douglas and Murphy dissenting from a ruling sustaining a Texas injunction. This was in *Carpenters and Joiners Union* v. *Ritter's Cafe*.[99] Ritter, owner of a cafe, made an agreement with a contractor for the construction of a building in another part of the town which, so far as the record showed, had no connection with the cafe itself. The contractor employed non-union carpenters and painters. Although there was no labor trouble at the cafe and no construction was done there, the union began to picket the premises. As a result, the restaurant union called Ritter's cafe employees out on strike; union truck drivers

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[96] *Id.* at 105, 60 Sup. Ct. at 745. Similar issues were presented in another case decided the same day, in which Murphy again spoke for the Court. Carlson v. California, 310 U. S. 106, 60 Sup. Ct. 746 (1940). An anti-picketing ordinance was here characterized as "sweeping and inexact," and affirmation was given the holding that "publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, 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 abridgement by a state." *Id.* at 112-113, 60 Sup. Ct. at 748-749. McReynolds dissented here also, without opinion.

[97] 312 U. S. 287, 61 Sup. Ct. 552 (1941).

[98] Frankfurter's recital lists some 50 windows smashed, the use of stench bombs in five of the company's stores, the setting afire of one store, and the beating of workers at gunpoint for not joining the union. The picketing, therefore, was part of a "coercive thrust," even though peaceful in itself. It was set in "a background of violence" from which it could not be disentangled. *Id.* at 294, 61 Sup. Ct. at 555. *See also* A. F. of L. v. Swing, 312 U. S. 321, 61 Sup. Ct. 568 (1941), invalidating an injunction against peaceful picketing which had been issued because the picketers were not in the employ of the man whose business was being picketed.

[99] 315 U. S. 722, 62 Sup. Ct. 807 (1942).

would not deliver food; no union men patronized the cafe; and Ritter suffered the loss of approximately 60 per cent of his business. The Texas court enjoined picketing under the Texas penal code, and the union claimed violation of the Fourteenth Amendment under previous decisions of the United States Supreme Court. Justice Frankfurter, for the majority, held that Texas could restrict picketing to the area involved in the immediate labor controversy. The cafe in this case, according to the Court, had no "nexus" with the building dispute. Murphy, along with Justice Douglas, joined Justice Black in denying that this was just a private dispute. Union *versus* non-union systems of employment, he said, are part of a nation-wide controversy. "I can see no reason why members of the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales in favor of the side they think is right."[100] And in other decisions, the Court continued in general to uphold peaceful picketing as coming within freedom of communication protected by the federal Constitution.[101]

Trial Procedure Consistent with "Common and Fundamental Ideas of Fairness and Right"

During this period there were many interesting cases involving the interpretation of the Constitution as it relates to trial procedures. These cases included questions of the scope of protection afforded in the event of allegedly coerced confessions, denial of counsel, illegally induced pleas of guilty, exclusion of Negroes from juries, and other charges going to the heart of the concept of a fair trial. It is not possible here to do more than touch briefly upon some of them, and to indicate in general Justice Murphy's position relative to the rest of the Court. There were some 32 such cases in the period in question, in 15 of which the right alleged to be protected by the amendment was upheld in whole or in part by the Court. In these 15 cases, Murphy was in each instance with the majority. In 10 other cases, in which the majority held against the right alleged to have been violated, Murphy dissented. He joined an unanimous Court in denying such a claim in three cases; but in only one case did he vote with the majority in a split decision denying an alleged right of this kind. He took no part in three of the 32 cases in this category. While these data are subject

[100] *Id.* at 730, 62 Sup. Ct. at 811.

[101] See Hotel and Rest. Emp. v. Wisconsin Employment Relations Board, 315 U. S. 437, 62 Sup. Ct. 706 (1942); Bakery and Pastry Drivers v. Wohl, 315 U. S. 769, 62 Sup. Ct. 816 (1942); and Cafeteria Employees Union v. Angelos, 320 U. S. 293, 64 Sup. Ct. 126 (1943).

to the same qualifications mentioned above with respect to quantitative treatment of complex constitutional issues, they are at least suggestive of the fact revealed in the opinions themselves on closer analysis, namely, that here too Justice Murphy went beyond most of his colleagues in generally resolving any doubts in favor of the civil right claimed to have been violated.

One of the most significant of these issues involved the question of the extent to which the specific trial guarantees in the Bill of Rights are carried over into the Fourteenth Amendment as a protection against challenged trial procedures in the state courts. Murphy's concurrence in the dissenting opinion in *Betts* v. *Brady*[102] indicated his position on this point. Betts had been indicted for robbery, and, being too poor to hire counsel, had asked the court to appoint one. The court refused, saying it was not the practice in that county of Maryland to appoint counsel for indigent defendants except in rape and murder cases. He was convicted and sentenced to eight years in prison. In *habeas corpus* proceedings ultimately reaching the Supreme Court, the majority held that this was no infringement of due process. Justice Roberts, for the Court, said that refusal of counsel in an uncomplicated case tried to a judge, where the defendant was a man of ordinary intelligence and ability who had been in court before and was familiar with the procedure, did not violate the Fourteenth Amendment. That amendment does not incorporate as such the specific trial guarantees found in the Sixth Amendment, he said, although denial of any of these privileges in a given case may be held to violate due process. The concept of due process he described as "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. . . . Asserted denial is to be tested by an appraisal of the totality of facts in a given case."[103] It is recognized, said the Court, that due process is broad enough to prohibit the conviction or imprisonment of one whose trial was "offensive to the common and fundamental ideas of fairness and right."[104] In this case, however, there was no lack of such fundamental fairness.

Justice Black, in a dissent joined by Justices Douglas and Murphy, disagreed both on the narrow and on a broader ground. "I believe," he said, "that the Fourteenth Amendment made the Sixth applicable to the states. But this view, although often urged in dissents, has never been accepted by a majority of this Court and is not accepted today."[105] On the narrower

[102]316 U. S. 455, 62 Sup. Ct. 1252 (1942).
[103]*Id.* at 462, 62 Sup. Ct. at 1256.
[104]*Id.* at 473, 62 Sup. Ct. at 1262.
[105]*Id.* at 474, 62 Sup. Ct. at 1262. For an early appraisal of Justice Black's views on civil liberties, see Vincent M. Barnett, Jr., *Mr. Justice Black and the Supreme Court* (1940) 8 U. OF CHI. L. REV. 20.

ground, however, he felt that denial of counsel to a poor farm hand of little education on a charge this grave is a violation of due process even under the prevailing view. Quoting the majority standard, he said, "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right' which subjects innocent men to increased dangers of conviction merely because of their poverty."[106]

In a subsequent case, in which Justice Black and the majority considered that the requirement of representation by counsel had been met by assignment of counsel just prior to the passing of sentence, Murphy went further than any other member of the Court except Rutledge in insisting on this right. The defendant was 19 years old at the time of the trial, an indigent and uneducated orphan. Counsel had not been assigned until after he had been found guilty and was on the verge of being sentenced. Said Murphy, "Right to counsel means nothing unless it means the right to counsel at each and every step in a criminal proceeding." The Court had not informed the defendant of his right to counsel, and the record did not show that he had waived such right.

> "The complete travesty of justice revealed by the record in this case forces me to dissent. The constitutional right to assistance of counsel is a very necessary and practical one. The ordinary person accused of crime has little if any knowledge of law or experience in its application. He is ill-prepared to combat the arsenal of statutes, decisions, rules of procedure, technicalities of pleading and other legal weapons at the ready disposal of his prosecutor. Without counsel, many of his elementary procedural and substantive rights may be lost irretrievably in the intricate maze of a criminal proceeding. Especially is this true of the ignorant, the indigent, the illiterate and the immature defendant. . . . Courts must therefore be unyielding in their insistence that this basic canon of justice, this right of counsel, be respected at all times."[107]

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[106]316 U. S. 455, 476, 62 Sup. Ct. 1252, 1263 (1942). For other cases involving denial of right to counsel, *see* Tomkins v. Missouri, 323 U. S. 485, 65 Sup. Ct. 370 (1945); Williams v. Kaiser, 323 U. S. 471, 65 Sup. Ct. 363 (1945); Rice v. Olson, 324 U. S. 786, 65 Sup. Ct. 989 (1945); Hawk v. Olson, 326 U. S. 271, 66 Sup. Ct. 116 (1945). In the first three of these Frankfurter dissented from rulings holding that alleged denial of counsel justified hearings on petitions for *habeas corpus* under the Fourteenth Amendment, taking the general position that the Supreme Court was going too far in interfering with matters primarily the concern of state courts. *Cf. also* Walker v. Johnston, 312 U. S. 275, 61 Sup. Ct. 574 (1941) and Smith v. O'Grady, 312 U. S. 329, 61 Sup. Ct. 572 (1941).

[107]Canizio v. New York, 327 U. S. 82, 87, 66 Sup. Ct. 452, 454 (1946). Rutledge also dissented. In addition, Murphy's general attitude is further shown by several cases in which he interpreted Federal legislation in such a way as to give fullest protection to individual rights. In Chatwin v. United States, 326 U. S. 455, 66 Sup. Ct. 233 (1946), he wrote the majority opinion interpreting the Federal Anti-Kidnapping Act narrowly

In one of several cases in this period involving the use of allegedly coerced confessions, Justice Murphy indicated his willingness to define coercion more broadly than the majority in applying the Fourteenth Amendment. This was *Lyons* v. *Oklahoma*,[108] in which Lyons had been convicted, in part, on the basis of a confession which was obtained after coercion had been used in securing an earlier one. The first one was admitted to have been coerced, but it was not used in the trial. The majority held that the record did not show the second confession to have been involuntary, and that hence its use did not infringe due process. Murphy, dissenting, said,

> "Even though approximately twelve hours intervened between the two confessions and even assuming that there was no violence surrounding the second confession, it is inconceivable under these circumstances that the second confession was free from coercive atmosphere that admittedly impregnated the first one. The whole confession technique used here constituted one single, continuing transaction. To conclude that the brutality inflicted at the time of the first confession suddenly lost all of its effect in the short space of twelve hours is to close one's eyes to the realities of human nature."[109]

The scope of the protection afforded by the Fourteenth Amendment against racial discrimination in trial proceedings again found Justice Murphy going beyond the majority of the Court with respect to the breadth

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so as not to apply to a Mormon guilty of contracting a "celestial marriage" with a minor girl of low mentality whom he subsequently took, without physical or moral coercion, across state lines. Again, in Goldman v. United States, 316 U. S. 129, 62 Sup. Ct. 993 (1942), he dissented from a majority interpretation of the Federal Communications Act upholding the admissibility of evidence obtained by the use of a detectaphone, and urged the reversal of the much-criticized holding in Olmstead v. United States, 277 U. S. 438, 48 Sup. Ct. 564 (1928), putting the use of mechanical eavesdropping devices beyond the reach of the Fourth Amendment. In Hartzel v. United States, 322 U. S. 680, 64 Sup. Ct. 1233 (1944), he wrote the majority opinion reversing a conviction under the Espionage Act of 1917. Similarly, he was with the majority in a recent 5-4 decision interpreting the constitutional definition of treason narrowly. Cramer v. United States, 325 U. S. 1, 65 Sup. Ct. 918 (1945); *See also* Hannegan v. Esquire, Inc., — U. S. —, 66 Sup. Ct. 456 (1946) and Girouard v. United States, — U. S. —, 66 Sup. Ct. 826 (1946).

[108] 322 U. S. 596, 64 Sup. Ct. 1208 (1944).

[109] *Id.* at 606, 64 Sup. Ct. at 1214. Murphy pointed out that the majority opinion apparently means that officers can use any methods of getting an initial confession if only they shortly afterwards obtain another one before the effects of the coercion have worn off Black concurred in this dissent. For other cases during this period involving allegedly coerced confessions, *see* Ashcraft v. Tennessee, 322 U. S. 143, 64 Sup. Ct. 921 (1944); Waley v. Johnston, 316 U. S. 101, 62 Sup. Ct. 964 (1942); Ward v. Texas, 316 U. S. 547, 62 Sup. Ct. 1139 (1942); Malinski v. New York, 324 U. S. 401, 65 Sup. Sup. Ct. 781 (1945). In all of these the use of coercion in securing confessions was found and the convictions were reversed. Lisenba v. California, 314 U. S. 219, 62 Sup. Ct. 280 (1941) involved facts held not to constitute coercion. *Cf.* Feldman v. United States, 322 U. S. 487, 64 Sup. Ct. 1082 (1944).

of such constitutional assurance of fair trials. In *Akins* v. *Texas*,[110] the majority found no illegal discrimination in the conviction of a Negro for murder where the grand jury list contained the name of one Negro, who was among the twelve chosen to serve. It was admitted by the commissioners that they never intended to place more than one Negro on the grand jury, although Negroes constituted about 15 per cent of the total population of the community. The majority held that this was not unconstitutional discrimination, since, although the Fourteenth Amendment prevents discrimination, it does not require proportional representation on juries. The presumption must be that the commissioners proceeded fairly, and the facts here did not show purposeful discrimination. Murphy dissented, saying that having one Negro on the jury panel is not sufficient to answer charges of discrimination. "On the contrary," he said, "to the extent that this insistence amounts to a definite limitation of Negro grand jurors, a clear constitutional right has been directly invaded."[111] In effect, all those except the one Negro were thus required to be of white color. This amounts to a refusal to disregard the factor of color in selecting jury personnel. "Our affirmance of this judgment thus tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences in race, color or creed."[112]

Deportation, Relocation, and Trial by Military Tribunals

This discussion would not be complete without at least some reference to a few outstanding cases decided during this period which involved such miscellaneous civil liberties questions as those arising in deportation proceedings, the Japanese wartime curfew and relocation regulations (involving also the general question of racial discrimination), and trials by military tribunals. One of the most widely publicized controversies of recent years concerned the deportation proceedings against Harry Bridges. In the case of *Bridges* v. *Wixon*,[113] the Supreme Court reversed a deportation order on the ground that Bridges was not "affiliated" with an organization urging violent overthrow of the government within the meaning of that term as

[110]325 U. S. 398, 65 Sup. Ct. 1276 (1945).
[111]*Id.* at 409, 65 Sup. Ct. at 1282.
[112]*Id.* at 410, 65 Sup. Ct. at 1282. Stone and Black dissented without opinion. It is interesting to note that in Hill v. Texas, 316 U. S. 400, 62 Sup. Ct. 1159 (1942), the Court reversed the conviction of a Negro because at that time Negroes were being excluded systematically from grand juries in Texas. It appears from the case just discussed that this may now be met by putting a single Negro on a jury panel from time to time.
[113]326 U. S. 135, 65 Sup. Ct. 1443 (1945).

used in the federal statute. Justice Douglas, for the majority, ruled that the order was not sustained by the evidence where it was shown that Bridges was never a member of the Communist Party; that his beliefs, though radical, were such as could be attained within the framework of constitutional democracy; that the journal he sponsored in cooperation with a Communist labor organization did not advocate forceful overthrow; and that his sole object in supporting it was the advance of trade unionism as such.

Justice Murphy's separate concurring opinion is alive with indignation at the record in this case which, he said,

> "will stand forever as a monument to man's intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution."[114]

For more than ten years, according to Murphy, "powerful economic and social forces have combined with public and private agencies to seek the deportation. . . ." The first investigation of 1934 and 1935 by the Department of Justice found not a "shred of evidence" supporting deportation proceedings. Another one was held in 1938 before special examiner Dean Landis of the Harvard Law School, and again the proceedings were dropped. This led to demands for changes in the deportation laws, and even resulted in the introduction and passage of a bill in the House of Representatives specifically naming Bridges and commanding that he be deported. This bill died in the Senate, whereupon, for the same purpose, an amendment was passed in general terms making an alien deportable if he belonged to or was "affiliated" with an organization advocating forceful overthrow of the government.[115] On the basis of this new amendment, Bridges was arrested again and this time was held deportable by the examiner. The Board of Immigration Appeals unanimously rejected the examiner's recommendation, but the Attorney-General reversed the board and ordered deportation.

After a review of these facts, Murphy concluded, "It is not surprising that the background and intensity of this effort to deport one individual should result in a singnlar lack of due process of law." The evidence he

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[114] *Id.* at 157, 65 Sup. Ct. at 1454.

[115] The author of this amendment said, "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges and all others of his ilk." 86 CONG. REC. 9301 (1940). The Court's finding that the term "affiliation" was not intended to cover activities such as Bridges' is somewhat ironic under these circumstances.

held untrustworthy; the statute he felt ignored the basic principle of personal guilt by making "affiliation" punishable; Congressional power of deportation he held not to be so wide as to justify "discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation."[116] Again in this case, as in others involving civil liberties, he urged that the "clear and present danger" test was applicable. The government conceded that such a test was not applied, holding that it was unnecessary under the wording of the amendment to the immigration law. Said Murphy,

> "Deportation, with all its grave consequences, should not be sanctioned on such weak and unconvincing proof of a real and imminent threat to our national security. Congress has ample power to protect the United States from internal revolution and anarchy without abandoning the ideals of freedom and tolerance. We as a nation lose part of our greatness whenever we deport or punish those who merely exercise their freedoms in an unpopular though innocuous manner. The strength of this nation is weakened more by those who suppress the freedom of others than by those who are allowed freely to think and act as their consciences dictate."[117]

Chief Justice Stone, with Justices Roberts and Frankfurter, dissented. They held that there was no novel issue here; that the only question was whether the order was supported by substantial evidence; and that, since it was, the courts were without authority to set it aside.[118]

In *Hirabayashi* v. *United States*,[119] the Court upheld a curfew order issued by the commander of the West Coast military area during the recent war, requiring all persons of Japanese ancestry residing in the area to be in their homes between 8 P.M. and 6 A.M. The Chief Justice, for an unanimous Court, ruled that such an order did not unconstitutionally discriminate against those of Japanese descent under the Fifth Amendment, where the circumstances were such as to make racial distinction relevant. Justice

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[116]326 U. S. 135, 164, 65 Sup. Ct. 1443, 1457 (1945).

[117]*Id.* at 165, 65 Sup. Ct. at 1457.

[118]They remarked pointedly that the Court could not logically reject this finding and still continue to deny *certiorari* with respect to other administrative findings resting on the support of evidence far less persuasive than that in the present record. This, of course, raises in a slightly different light the same issue of judicial self-restraint with respect to administrative findings as is raised about legislation, namely, whether that self-restraint must operate in civil liberties cases to the same degree as in legislative or administrative acts dealing with broad social and economic regulation. For a general discussion of judicial self-restraint relative to administrative findings, *see* Vincent M. Barnett, Jr., *Administrative Justice and Judicial Self-Restraint* (1942) 14 MISS. L. J. 305.

[119]320 U. S. 81, 63 Sup. Ct. 1375 (1943).

Murphy concurred separately, but indicated serious misgivings. Except in great emergencies, racial discrimination of this sort would be a violation of due process; and it was only in view of the critical military situation which prevailed at the time that he felt the order could stand. "Discrimination based on color and ancestry," he said,

> "are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. . . . Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. . . . In my opinion this goes to the very brink of constitutional power."[120]

In the following year, "the very brink of constitutional power" was exceeded in the opinion of three minority Justices in another wartime Japanese segregation case. This was *Korematsu* v. *United States*,[121] in which Justice Black, for the Court, upheld a military order excluding all those of Japanese descent from the West Coast as a valid exercise of the war power at the time. Said Black, "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."[122] Justice Murphy dissented, saying that such exclusion of citizen and alien alike in the absence of martial law "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[123] He indicated that the correct test in this case, as in so many others, must be the "clear and present danger" concept. The government may not, even on a plea of military necessity, validly deprive an individual of his constitutional rights except where the deprivation is "reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to

[120] *Id.* at 110-111, 63 Sup. Ct. at 1390. Yasui v. United States, 320 U. S. 115, 63 Sup. Ct. 1392 (1943), involved similar issues and the same result.

[121] 323 U. S. 214, 65 Sup. Ct. 193 (1944).

[122] *Id.* at 223-224, 65 Sup. Ct. at 197. Said Frankfurter, characteristically, in a separate concurrence, "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours." *Id.* at 225, 65 Sup. Ct. at 198.

[123] *Id.* at 233, 65 Sup. Ct. at 202.

alleviate the danger."[124] Murphy thought it "incredible" that hearings as to the loyalty of these citizens could not have been held. Without such hearings, he characterized this "obvious racial discrimination" as "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law."[125]

In a case decided at the same time, the Court freed a citizen of Japanese descent being held under orders of the War Relocation Authority, a civilian agency which was detaining her in a relocation center in Utah.[126] Her loyalty to the United States was unquestioned. Justice Douglas, for an unanimous Court ruled that she was illegally detained because WRA was not given any power by statute or executive order to subject concededly loyal citizens to its procedures. Justice Murphy concurred, adding that this "is another example of the unconstitutional resort to racism inherent in the entire evacuation program."[127]

Murphy's position with respect to the military trials of Japanese Generals Yamashita and Homma was referred to at the beginning of this article. He also held that the establishment of martial law in Hawaii during the war, and the trial of civilians by military tribunals, were contrary to the Constitution. The majority of the Court agreed as to the invalidity, but based its opinion on an interpretation of the Organic Act of Hawaii. Murphy's separate concurring opinion went beyond this. Not only were such trials forbidden by the Organic Act. "Equally obvious, as I see it," said Murphy,

> "is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United States, which applies both in spirit and letter to Hawaii. Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action."[128]

After emphasizing that the well-known *Ex Parte Milligan* rule should apply, he said,

> "To retreat from that rule is to open the door to rampant militarism and the glorification of war, which have destroyed so many nations in history. There is a very necessary part in our national life for the military; it has defended this country well in the darkest hours of trial. But militarism is not our way of life. It is to be used only in the most extreme circumstances. Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties."[129]

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[124] *Id.* at 234, 65 Sup. Ct. at 202.
[125] *Id.* at 235, 65 Sup. Ct. at 202. Roberts and Jackson also dissented, each separately.
[126] *Ex Parte* Mitsuye Endo, 323 U. S. 283, 65 Sup. Ct. 208 (1944).
[127] *Id.* at 307, 65 Sup. Ct. at 221.
[128] Duncan v. Kahanamoku, — U. S. —, 66 Sup. Ct. 606, 616 (1946).
[129] *Id.* at —, 66 Sup. Ct. at 620.

Conclusions: Civil Liberties and Judicial Self-Restraint

Out of the welter of differing factual situations and varying constitutional provisions comes one central problem around which much of the difference of opinion on the Court in these civil liberties cases may be oriented. Stated briefly, it is whether the presumptive validity of legislation inherent in the revitalized doctrine of judicial self-restraint shall apply to cases involving civil liberties. It is elear that the Court as a whole has gone a great way toward broadening the scope of protection afforded to civil liberties in the last few years. It has gone farther than is consistent with any meaningful concept of judicial deference to legislative judgment in tbese cases, and has, moreover, indicated on several occasions that the ordinary presumption of constitutionality simply does not apply in this area. This it has done over the vigorous protest of a minority, whose most eloquent and forceful spokesman has been Justice Frankfurter. On the other hand, it has not gone so far as to adopt the "clear and present danger" test in all cases as the criterion against which state and federal power to inhibit these liberties is to be measured. In declining to do this, it has in several instances encountered the protest of a different minority, whose most libertarian spokesman has been Justice Murphy.[130] It is perhaps oversimplifying the matter to use the "clear and present danger" doctrine as the apotheosis of the Murphy view, but its application and extension to the cases discussed is characteristic of the basic approach to civil liberties which animates his opinions in contrast to the Frankfurter view. Justice Holmes once said that general propositions do not decide concrete cases. But adherence to the general proposition of judicial tolerance of legislatures on the one hand as against the general proposition of resolving all doubts in favor of civil liberties on the other, seems to go more than part way in explaining the positions of the Justices in these cases.

The fundamental question here is whether there is any basis in law, logic, or democratic philosophy for the segregation of cases involving acts of legislators and administrators into two categories—those concerning social and economic legislation and those concerning civil liberties—and proceeding to apply to the first the tenets of judicial self-restraint while reversing the usual presumption of validity with respect to the second. A corollary and

[130]It is interesting to note that Frankfurter's only lone dissent in these cases was in the second flag salute case, stressing the power of the state to use its judgment free from judicial interposition, while Murphy's only lone dissent was in Prince v. Massachusetts, 321 U. S. 158, 64 Sup. Ct. 438 (1944), in which he thought even state child labor laws were inapplicable to children selling religious literature. Both cases, fittingly enough, involved Jehovah's Witnesses.

equally interesting, although perhaps somewhat more academic, question is whether the Holmes constitutional tradition which is drawn on freely by Justices on both sides of this issue is basically self-contradictory or can be related to an overriding philosophy which reconciles the apparent differences. On the first question, Professor H. S. Commager in a recent book[131] has argued the case against any distinction of the kind indicated, and has urged that true Jeffersonian liberals should favor judicial self-restraint in all cases—whether involving civil liberties or not. Misunderstanding as to the undemocratic nature of judicial review, he says, is no monopoly of the conservatives who look to it for the protection of republicanism; "it distinguishes equally liberals who for the most part deprecate judicial intervention in the economic realm but rejoice exceedingly at judicial intervention on behalf of civil liberties."[132] Although a strong emotional case can be made for judicial protection of these liberties, he says, if we

> "grant the desirability or necessity of calling in the judiciary to protect civil liberties . . . we concede that the majority is not to be trusted in what is perhaps the most important field of its legislative activity. If we are compelled to make that concession here, in a matter so vitally affecting the liberty and happiness of every member of society, then we might indeed despair of democracy."[133]

This position is based ultimately on the belief that "majority will does not imperil minority rights, either in theory or in operation."[134] Thus, we would reach mature democracy only in placing full reliance in the acts of the majority, unrestrained by judicial censorship.

A vigorous exposition of the contrary view is to be found in an article by Louis B. Boudin, criticizing the conclusion that we should insist on judicial self-restraint in cases involving civil liberties as well as those dealing with economic regulation.[135] He argues that the civil liberties cases are prosecutions of the kind the framers of the Bill of Rights had in mind —cases involving a particular man's individual civil rights, not regulations of the economic life of the community in which he is treated no differently from all others similarly situated. Moreover, civil liberties are specifically enshrined in the language of the First Amendment and elsewhere, while

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131COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943). It is perhaps not without significance that this book should be dedicated "To Felix Frankfurter, whose opinions confess an undismayed faith in democracy."

132*Id.* at 39.

133*Id.* at 67-68.

134*Id.* at 82.

135Boudin, *Majority Rule and Constitutional Limitations* (1944) 4 LAWYERS GUILD REV. 1.

economic conservatism is not in the Constitution itself unless the judges insert it by an illegal operation. Finally, since most of the legislation under review in these cases is state legislation, what is involved is merely the judgment of a local majority—a minority of the whole people, who have expressed the larger majority view in a Bill of Rights which overrides local prejudices of local majorities.

In evaluating these contrary views of Justices and publicists, the ultimate question is whether the protection of minorities in the exercise of free speech, press, assembly, religion and other liberties is basically undemocratic as thwarting the will of the majority. Before the question as phrased is answered, it must be pointed out that neither the majority of the people nor their representatives ever had any "will" with respect to the manner in which some statutes have been applied in civil liberties cases. The resurrection of old and disused statutes, passed to meet entirely different circumstances, and their application to a religious minority such as the Jehovah's Witnesses can hardly in any real sense be said to reflect the "will" of the majority or even of the legislatures which passed it. The same is true of many other situations in which general statutes are applied to particular situations which it may be seriously doubted were in the minds of the legislators in passing the acts. And this type of case is a not infrequent occurrence in the story of judicial protection of civil liberties. However, even where the majority had a "will" on the specific point, and that will is thwarted by judicial protection of minority rights of free speech, press, assembly, or religion, is the result fundamentally undemocratic?

It would seem to be helpful to distinguish between the *substance* of democratic decisions (which should not be subject to judicial invalidation on the basis of vague constitutional clauses) and the *procedure* by which the dominant opinion in a democracy is formulated and expressed (which must be kept as pure and free as judicial alertness in enforcing the specific freedoms of the Fifth Amendment can contrive). Indeed, for the substance of the decisions to be truly democratic, the process by which they are reached must give as much free play as possible for the transmutation of present minorities into future majorities by the unencumbered operation of freedom of thought, communication, and discussion. From this point of view, the uninhibited freedom to argue and discuss (limited only by grave and immediately impending danger to the state) is in fact an integral part of, although antecedent to, the democratic legislative process itself. Thus to uphold the restrictions on freedom of thought and communication which may be placed in effect by a temporary majority would be actually to reduce the facility

with which the democratic process of transforming that transient majority into a minority—a process essential to the very concept of democracy—could take place. Democracy is, in the light of this proposition, basically improved every time such obstructions to the full operation of the *procedural* prerequisites to mature popular decisions are removed or reduced, just as it is by the adoption of a policy of honoring the *substantive* results of such mature popular judgments embodied in general social and economic legislation.

It is, indeed, in these terms that the apparent paradox in the Holmes constitutional tradition is best explained. The outstanding authority in this country on free speech has taken a comparable view of the Holmes heritage. Professor Chafee remarks the familiar fact that the Justices who uphold wide legislative control over business are often the very same men who want to invalidate any wide legislative control over discussion. Justices who fall in this category "know that statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. Discussion is really legislation in the soft."[136] From this point of view, Professor Chafee continues, drastic restrictions on free discussion are similar to rigid constitutional limitations on lawmaking. Laws which prevent the questioning of the present distribution of property, for example, would tend to crystallize that distribution in much the same way as a rigid interpretation of the due process clause. "Therefore," he says,

> "the critical judicial spirit which gives the legislature a wide scope in limiting the privileges of property owners will also tend to allow speakers and writers a wide scope in arguing against those privileges. So it is not really surprising that Justice Holmes dissented in both *Lochner* v. *New York* and *Abrams* v. *United States*. Liberty for the discussion which may lead to the formulation of a dominant opinion belongs side by side with the liberty of lawmakers to transform this dominant opinion into the statute that is its natural outcome."[137]

This, like most other problems of government, remains in the last analysis a question of degree. Hence the Justices on the present Supreme Court, a majority of whom adopt this general position, continue to disagree as to

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[136] CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 360-361.

[137] *Id.* at 361. In the course of a very useful brief survey of civil liberties in a recent study, Professor Carl B. Swisher also adopts essentially this view. While responsibility for government rests with the people in a democracy, he says, we nevertheless "find ourselves under the necessity of limiting it by the proviso that self-government imposed by the people must not go so far as to cut off the facilities of expression and self-education so as to make it impossible for the people to continue to govern themselves. In other words, no tenable principles of political liberty will permit political liberty to decree its own execution." SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES (1946) 161.

its application to particular sets of facts. But the espousal of this fundamental approach—regardless of its application in the "clear and present danger" test or in other less specific criteria—renders at once inoperative by the very nature of the problem the doctrine of judicial self-restraint and the concomitant presumption of legislative validity when litigation involving infringement of civil liberties is before the Court. The careful examination of civil liberties cases before the reconstituted high tribunal points to the conclusion that this has now become the general attitude of a majority of its Justices. Similarly, such an examination reveals that the most vigorous and consistent spokesman for this general view—a view which has occasionally carried him beyond all the other members of the Court in specific cases—has been Mr. Justice Murphy. Those who look behind the governmental mechanism of democracy to its fundamental roots in the free interplay of ideas among its people will not regard this approach—even in the broad terms urged by Mr. Justice Murphy—as basically inconsistent or confusing or fraught with peril to our democratic institutions.