

# Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized

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Justice Murphy's labors on the Supreme Court bore rich fruit. In the decade of his association with the Court, he made a contribution that will forever be enshrined in the hearts of those devoted to the preservation and advancement of individual liberties. Time and again he spoke eloquently on behalf of the constitutional and legal rights of the accused, the unpopular, and the oppressed. Sometimes he spoke on behalf of the Court, sometimes for a minority of the Court, and not infrequently he spoke alone. But always he reflected a humane and an understanding sense of justice.

His forthright and eloquent defense of the rights of nonconforming individuals and groups, and his burning condemnation of racism, long will cheer and inspire defenders of freedom in a troubled world. His ability to rise above the popular passions of the moment to affirm the eternal virtues of freedom despite the transient emotions engendered by crisis and war will long stand as an example of judicial fearlessness.<sup>1</sup>

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1. 340 U.S. xii-xiii (1950). These statements are excerpted from the unanimously-adopted Resolution of the Bar of the Supreme Court, read into the U.S. Reports by U.S. Solicitor General Philip B. Perlman on March 6, 1951, followed by the statements of Attorney General J. Howard McGrath and Chief Justice Fred M. Vinson. *See* 340 U.S. pp. v-xxv. Justice Murphy died on July 19, 1949. *See* 338 U.S. iii-iv, vii (1949).

To the Justice's admirers, this eloquent description of Frank Murphy's legacy is altogether fitting and proper. Of the hundreds of Murphy opinions spanning the Justice's nine-year tenure on the United States Supreme Court (1940-49),<sup>2</sup> perhaps none – when viewed in historical perspective – better highlights “[h]is ability to rise above the popular passions of the moment to affirm the eternal virtues of freedom despite the emotions engendered by crisis and war”<sup>3</sup> than four critical cases decided during World War II.

In *Hirabayashi v. United States* (1943),<sup>4</sup> *Korematsu v. United States* (1944),<sup>5</sup> and *Ex parte Endo* (1944),<sup>6</sup> Justice Frank Murphy concurred, dissented, and concurred, respectively, to the United States Supreme Court's opinions upholding World War II curfew restrictions and exclusion programs imposed on all persons of Japanese ancestry living on the West Coast.<sup>7</sup> In *Hirabayashi*, Murphy stated that the race-based curfew “dangerously approached” violating the Fifth Amendment because the discrimination was of “such an injurious character in the application of laws as to amount to a denial of due process.”<sup>8</sup> In *Korematsu*, Murphy argued that the exclusion of all Japanese peoples went “over ‘the very brink of constitutional power,’” depriving “all of those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.”<sup>9</sup> Finally, in *Endo*, while agreeing with the Court's decision to order the release of an American citizen who had proven her loyalty, Justice Murphy reiterated his belief that detaining people of Japanese ancestry was “but . . .

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2. During his tenure on the Court, Justice Murphy “wrote 217 opinions, about 70 of which may be placed in the broad category of civil liberties.” HAROLD NORRIS, MR. JUSTICE MURPHY AND THE BILL OF RIGHTS 3 (1965). In all, Justice Murphy wrote 128 majority, 20 concurring, and 69 dissenting opinions. See *id.* app. c at 523-42.

3. See Resolution, *supra* note 1, at xii-xiii.

4. 320 U.S. 81 (1943).

5. 323 U.S. 214 (1944).

6. 323 U.S. 283 (1944).

7. These measures took place pursuant to Executive Order No. 9066, 7 Fed. Reg. 1407 (1942) and the Act of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. § 97a, and were carried out by U.S. Army Lt. General J. L. DeWitt and the War Relocation Authority. The measures authorized military officials to impose a curfew and to remove “all persons” of Japanese ancestry from the West Coast. More than 100,000 Americans of Japanese ancestry – two-thirds of them native-born citizens – were removed to “relocation centers” in isolated desert and swamp areas. The two most comprehensive works on these actions are JACOBUS TEN BROEK, EDWARD N. BARNHART, FLOYD W. MATSON, PREJUDICE, WAR, AND THE CONSTITUTION (1954) and PETER H. IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983). See also WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 184-211 (1998).

8. 320 U.S. at 112 (Murphy, J., concurring).

9. 323 U.S. at 233, 235 (Murphy, J., dissenting).

another example of the unconstitutional resort to racism inherent in the entire evacuation program.”<sup>10</sup>

On the same day the Court handed down *Korematsu* and *Endo*, the Justices decided *Steele v. Louisville & Nashville R. Co.*<sup>11</sup> In this case, Justice Murphy’s concurrence implored the Court to use the Constitution – in particular the Fifth Amendment – to strike down a railroad union’s discriminatory representation of African-American workers.<sup>12</sup>

Justice Murphy’s opinions in these four critical cases has spawned a great deal of commentary. Murphy’s *Hirabayashi* concurrence has been called “[t]he one discordant note in Murphy’s opposition to racism”<sup>13</sup> and several writers have attempted to explain and atone for his concurrence.<sup>14</sup> Murphy’s *Korematsu* dissent has been universally lauded as “one of democracy’s great documents”<sup>15</sup> and history has

10. 323 U.S. at 307 (Murphy, J., concurring).

11. 323 U.S. 192 (1944). That historic day was December 18, 1944. Although the case was argued later than *Korematsu* and *Endo*, *Steele* appears one case ahead of them in the Supreme Court Reporter.

12. See *infra* note 157.

13. See Eugene Gressman, *Mr. Justice Murphy – A Preliminary Appraisal*, 50 COLUM. L. REV. 29, 36 (1950). Professor Gressman was one of Justice Murphy’s most devoted law clerks, serving at the Supreme Court for him from 1943-48. His five-year term as law clerk remains the longest in the modern history of Supreme Court law clerks.

14. The most comprehensive explanation of Murphy’s concurring opinion is Sidney Fine’s *Mr. Justice Murphy and the Hirabayashi Case*, 33 PACIFIC HIST. REV. 195 (1964). See also, John P. Frank, *Justice Murphy: The Goals Attempted*, 59 YALE L. J. 1, 11 (1949) (“The Court unanimously upheld the order against the challenge that it denied due process, but Murphy concurred specially to emphasize how limited was his acquiescence.”); John H. Pickering, *A Tribute to Justice Frank Murphy*, 73 U. DET. MERCY L. REV. 703, 715 (1996) (“Justice Murphy regretfully concurred in upholding the curfew order [in *Hirabayashi*], but he vigorously dissented from the subsequent exclusion order removing all citizens of Japanese ancestry from the west coast [in *Korematsu*].”); Alfred L. Scanlon, *The Passing of Justice Murphy – The Conscience of a Court*, XXV NOTRE DAME LAWYER 7, 23 (1949) (“[W]hile he concurred reluctantly in *Hirabayashi v. United States*, . . . he publicly proclaimed the prickings of his sensitive conscience and the uneasy apprehensions that must have possessed him . . .”); Byron F. Lindsley, Note, *Constitutional Liberties of Japanese-Americans as Affected by the War*, 32 GEO. L. J. 183, 191 (1944) (“Mr. Justice Murphy’s concurring opinion so limited his assent that, in effect, it amounted to a dissent.”).

15. Letter of Norman Thomas to Frank Murphy (January 6, 1945), reprinted in SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS* 450 (1985) and J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* 337 (1968). See also Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 YALE L.J. 489, 503 (1945) (“In a bewildering and unimpressive series of opinions, relieved only by the dissents of Mr. Justice Roberts and of Mr. Justice Murphy in *Korematsu v. United States*, the Court chose to assume that the main issue of the cases – the scope and method of the judicial review of military decisions – did not exist.”). Professor Fine’s monumental three-volume biography of Murphy should be the starting point for anyone interested in “Michigan’s Leading Citizen.” Professor Howard’s much shorter biography is also valuable. For a con-

generally affirmed the dissent's correctness.<sup>16</sup> The *Endo* concurrence has been included as one of the "best example[s] of Justice Murphy's ability to get the big ones right."<sup>17</sup> The *Steele* concurrence is a staple of labor law and Murphy's candid, passionate condemnation of the racism at play in the case has also drawn much praise.<sup>18</sup>

None of the wartime opinions nor any other commentary or judicial opinion, however, has taken notice of the key doctrinal aspect of Justice Murphy's opinions: *the opinions represent the first time a Supreme Court Justice not only suggested, but recognized and then applied an equal protection guarantee, through use of the Due Process Clause of the Fifth Amendment, to federal governmental action which affected civil rights and liberties.* The Supreme Court failed to acknowledge Murphy's insight in the landmark decision, *Bolling v. Sharpe* (1954),<sup>19</sup> which adopted similar Fifth Amendment Equal Protection analysis. Academic commentators have also failed to clearly credit Justice Murphy's important contributions. Recognition of Justice Murphy's key contribution to the adoption of Fifth Amendment Equal Protection analysis is long overdue. Murphy's opinions in the *Japanese-American Cases*<sup>20</sup> and *Steele* played a significant role in shaping the United States' jurisprudence.

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cise biography of Murphy, see Peter Irons' account in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 331-36 (Melvin I. Urofsky ed., 1994).

16. In 1984, a federal district judge vacated Fred Korematsu's conviction. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). The Ninth Circuit likewise overturned Gordon Hirabayashi's curfew conviction in 1987. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). See also Joel B. Grossman, *THE JAPANESE AMERICAN CASES AND THE VAGARIES OF CONSTITUTIONAL ADJUDICATION IN WARTIME: AN INSTITUTIONAL PERSPECTIVE*, 19 U. HAW. L. R. 649, 663-68 (1997). In 1988, Congress implemented the recommendations of the Commission on Wartime Relocation and Internment of Civilians by acknowledging, much in the same language of Murphy's opinions, the "fundamental injustice of the evacuation, relocation and internment" of the Japanese-Americans during WWII. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 639, 611 (12th ed., 1991). See also PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 46-49 (1988).

17. See Pickering, *supra* note 14, at 708.

18. See, e.g., Madelyn C. Squire, *The National Labor Relations Act and Union's Invidious Discrimination - A Case Review of a Would Be Constitutional Issue*, 30 How. L. J. 783, 785-86 ("What is quite interesting in *Steele* with significant future implications is Justice Murphy's concurring opinion excoriating the Court for not addressing the grave constitutional ramifications the Brotherhood's discriminatory conduct had on minority craft members and deciding the issue solely on a statutory basis. . . . Justice Murphy's opinion and later civil rights cases provided the material to fashion an argument in Black workers' struggle for economic parity.").

19. 347 U.S. 497 (1954).

20. This term collectively refers to *Hirabayashi*, *Korematsu*, and *Endo*. The several other war-time Supreme Court cases that affected Japanese-Americans should not be included under this term.

In some ways, this article puts the proverbial cart-before-the-horse. The article starts at the end of the story, as Part I analyzes the history of the Fifth Amendment Equal Protection doctrine and focuses on its adoption by the Court in Chief Justice Warren's *Bolling* opinion. Part II turns the clock back and looks closely at the cases which led to the adoption of *Bolling*, in particular focusing on Justice Murphy's opinions in the *Japanese-American Cases* and *Steele*. Part III examines the influence that Justice Murphy's opinions had on advocates who argued cases before the Court and challenged the federal government's role in racial discrimination leading up to and including the facts of *Bolling*. Finally, Part IV is a brief biographical sketch of Justice Murphy, going all the way back to his upbringing. The biography helps explain why Justice Murphy was uniquely suited to endorse the Fifth Amendment Equal Protection doctrine. Although the road is long and winding, the examination of both Justice Murphy's life and jurisprudence will hopefully leave readers with a new appreciation for the lasting contributions Justice Murphy made to Fifth Amendment Equal Protection analysis.

### **I. *Bolling v. Sharpe*: The Court Adopts Fifth Amendment Equal Protection**

As early as 1921, the Court indicated that there was an argument for a Fifth Amendment Equal Protection doctrine.<sup>21</sup> These sugges-

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21. See *La Belle Iron Works v. United States*, 256 U.S. 368, 392 (1921) ("The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by article 1, § 8."). The Court's longest exposition on Fifth Amendment Equal Protection analysis during this early period came in Chief Justice Taft's majority opinion in *Truax v. Corrigan*:

The due process clause brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the federal Constitution as a limitation upon the executive, legislative and judicial powers of the federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. . . . [The due process clause] of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' '[t]his is a government of laws and not of men,' '[n]o man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion.

257 U.S. 312, 332 (1921). Lower federal courts had entertained the idea of Fifth Amendment Equal Protection even before these early Supreme Court forays. See *Sims v. Rives*,

tions, however, appeared only in a series of economic cases where the Court's discussion was mere *obiter dictum*.<sup>22</sup> Moreover, in no case did the Court actually adopt the doctrine, as Professor Kenneth L. Karst succinctly described:

[T]he Court hinted in a series of dicta that the fifth amendment might, after all, prohibit arbitrary federal discrimination. The ritual recital in all these opinions was that "the Fifth [Amendment] contains no equal protection clause" – as if the point might otherwise escape even careful readers. But the Court would go on, saying that it assumed for argument that federal discrimination, if completely unjustified, might violate the due process clause of the fifth amendment. At the same time, the Court continued to assure us, the legislation before it did no such thing.<sup>23</sup>

By 1954, however, the Court was ready to make this finding of unjustified discrimination. In *Bolling v. Sharpe*,<sup>24</sup> a companion case to *Brown v. Board of Education*,<sup>25</sup> a unanimous Court adopted Fifth Amendment Equal Protection. In striking down segregated schools in the District of Columbia, Chief Justice Warren's opinion stated:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually ex-

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84 F.2d 871, 878 (D.C. Cir. 1936) ("The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws." (citation omitted)); *United States v. Yount*, 267 F. 861, 863 (W.D. Pa. 1920) ("It seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws,' which no state may deny to any person under the provisions of the Fourteenth Amendment."). See also *Lappin v. District of Columbia*, 22 App. D.C. 68, 75-76 (D.C. Ct. App. 1903) ("It must be conceded that the 14th Amendment, which expressly declares that no State shall deny to any person within its jurisdiction the equal protection of the laws, does not purport to extend to authority exercised by the United States. But it does not follow that Congress in exercising its power of legislation within and for the District of Columbia may, therefore, deny to persons residing therein the equal protection of the laws. All of the guaranties of the Constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several States." (citations omitted)). All of the above cases were economic cases. See *infra* note 22.

22. The term "economic cases" is used throughout this article to mean cases involving commercial regulations or tax measures, as distinguished from those implicating what are typically thought of as "civil rights and liberties cases." See *infra* note 65.

23. See Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 544 (1977).

24. 347 U.S. 497 (1954).

25. 347 U.S. 483 (1954). For the best coverage of *Brown* and *Bolling*, see RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

clusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>26</sup>

As Professor Karst observed in his seminal article on Fifth Amendment Equal Protection, the "slate was far from blank when Chief Justice Warren wrote for a unanimous Court"<sup>27</sup> in *Bolling*, for that opinion "did not so much create the doctrine of fifth amendment equal protection as ratify it."<sup>28</sup> To support this new doctrine, Chief Justice Warren cited three precedents: *Detroit Bank v. United States* (1943),<sup>29</sup> *Currin v. Wallace* (1939),<sup>30</sup> and *Chas C. Steward Machine Co. v. Davis* (1937).<sup>31</sup> These three cases all followed the "ritual recital" pattern described by Professor Karst.<sup>32</sup> In *Detroit Bank*, a tax lien case, Chief Justice Stone stated that "[u]nlike the Fourteenth Amendment the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress" and that "[e]ven if discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment . . . no such case is presented here."<sup>33</sup> *Currin* involved an equal protection challenge to the Tobacco Inspection Act. Chief Justice Hughes, after stating that "[u]ndoubtedly, the exercise of the commerce power is subject to the Fifth Amendment, but that Amendment, unlike the Fourteenth, has no equal protection clause," went on to say that "[i]f it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid."<sup>34</sup> In *Steward Machine*, a challenge to the constitutionality of the Social Security Act, Justice Cardozo explained that while "[t]he Fifth Amendment unlike the Fourteenth has no equal protection clause," the Court "assume[d] that discrimination, if gross enough, is equivalent to confiscation and sub-

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26. 347 U.S. at 497.

27. Karst, *supra* note 23, at 545.

28. *Id.* at 543.

29. 317 U.S. 329 (1943).

30. 306 U.S. 1 (1939).

31. 301 U.S. 548 (1937).

32. Karst, *supra* note 23, at 544.

33. 317 U.S. at 337-38.

34. 306 U.S. at 14 (citations omitted).

ject under the Fifth Amendment to challenge and annulment.”<sup>35</sup> In none of these economic cases did the Court either hold that a Fifth Amendment Equal Protection guarantee existed or that the challenged act violated such a protection if it did exist.<sup>36</sup>

*Bolling* went on to state that “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect,”<sup>37</sup> citing the majority opinions in *Hirabayashi* and *Korematsu*.<sup>38</sup> The “irony” of citing these cases to support this proposition has not been lost on commentators, especially Professor Karst.<sup>39</sup> After all, both *Hirabayashi* and *Korematsu* upheld the racial classifications based on Japanese ancestry and the Court hardly utilized the “scrutin[y] with particular care”<sup>40</sup> that *Bolling* suggests. Thus, on their faces, these opinions are not particularly firm precedents upon which to base this new doctrine. Moreover, as will be shown below, the history behind the opinions suggests that they are perhaps even weaker than their equivocal language might appear.

Murphy’s opinions in the *Japanese-American Cases* and *Steele* would have provided direct support for *Bolling*’s bold move. Why then did Chief Justice Warren fail to cite them in his opinion as a means of bolstering his adoption of the doctrine?<sup>41</sup> It is plausible that

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35. 301 U.S. at 584, 585.

36. Other cases not cited in *Bolling* follow this pattern. See, e.g., *Helvering v. Lerner Stores Co.*, 314 U.S. 463, 468 (1941) (tax case in which Justice Douglas wrote for the majority that “[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment which contains no equal protection clause.”); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401 (1940) (tax case in which Justice Douglas wrote for the majority “[b]ut the Fifth Amendment, unlike the Fourteenth, has no equal protection clause . . . . And there is ‘no requirement of uniformity in connection with the commerce power.’” (citation omitted)); *United States v. Carolene Products Co.*, 304 U.S. 144, 151 (1938) (Commerce Clause challenge to a federal law prohibiting the interstate shipment of “filled milk” in which Justice Stone wrote for the majority “[t]he Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another.”). See Karst, *supra* note 23, at 544 n.13.

37. 347 U.S. at 499.

38. *Id.* at 499 n.3.

39. See Karst, *supra* note 23, at 546 n.28 (“The irony in the drawing the *Bolling* result from *Gibson* thus surpasses even the irony in relying on *Hirabayashi*.”).

40. 347 U.S. at 499.

41. It is difficult here not to point out the perhaps not-so-coincidental irony in his speech, “A Tribute to Justice Frank Murphy” before the University of Detroit Mercy Law School’s Justice Frank Murphy Honor Society, Mr. John H. Pickering, Justice Murphy’s law clerk from 1941-43, made this comparison: “Murphy’s insistence on justice and fairness produced a pun on Milton’s phrase, “temper justice with mercy” – to some critics, this



Warren did not want to rely on concurring or dissenting opinions in a controversial decision like *Bolling*. For example, although *Brown* basically overruled *Plessy v. Ferguson*,<sup>42</sup> nowhere in *Brown* did Warren cite Justice John Marshall Harlan's great dissent in *Plessy*,<sup>43</sup> despite the fact that *Brown* essentially vindicated and adopted Harlan's position.<sup>44</sup> It could be that as a legal strategy, Warren simply felt more comfortable relying on the majority opinions in *Detroit Bank*, *Currin*, *Steward Machine*, and the *Japanese-American Cases* for the very fact that they were majority opinions, which he could – whether convincingly or not – marshal to support his Fifth Amendment Equal Protection holding with the full weight of the Court's precedential authority.

Perhaps this explains why Warren quoted Harlan's statement from his unanimous majority opinion in *Gibson v. Mississippi*<sup>45</sup> that "the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the states, against any citizen because of his [or her] race."<sup>46</sup> Warren string-cited Stone's *Steele* opinion to sup-

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became "Justice tempered with Murphy!" *In his emphasis on fairness, Murphy was a precursor for Chief Justice Warren's insistent questioning of counsel – "Is it fair?," a question which counsel often found difficult to answer.*" See *supra* note 14, at 704 (emphasis added). Professor G. Edward White made a similar comparison in his biography, *EARL WARREN: A PUBLIC LIFE* (1982): "The only other Supreme Court justice who approached Warren's jurisprudential posture was Frank Murphy. . . ." *Id.* at 359. This is particularly interesting when one looks closely at Warren's language in *Bolling*: "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499 (emphasis added).

42. 163 U.S. 537 (1896).

43. *Id.* at 552-64.

44. See 347 U.S. at 494-95 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

45. 162 U.S. 565 (1896).

46. 347 U.S. at 499 (quoting *Gibson*, 162 U.S. at 591). *Gibson* addressed an allegation of discrimination brought against the state of Mississippi in its jury selection for the murder trial of a black man accused of killing a white man. Harlan's opinion entertained the proposition that discrimination by both the "General Government" and the states is forbidden by the Constitution:

All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. Those guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the nation and of the state, without reference to considerations based upon race.

162 U.S. at 591. Professor Karst, however, observed that *Bolling's* reliance on this precedent was "shaky," citing the "hollow[ness]" of such a "pious statement [of] (dictum as to

port this quote. It is striking that the *Steele* language that Warren cited was not nearly the strongest support for Fifth Amendment Equal Protection he could have found in Stone's opinion, to say nothing of the much stronger case that could have been made using Murphy's concurrence to supplement the creation of Fifth Amendment Equal Protection doctrine.<sup>47</sup> Warren, however, probably felt that Stone's opinion in *Steele*, with a solid eight-man majority behind it, was strong enough to justify *Bolling*. Warren, therefore, simply added this citation to throw a little more modern authority behind his somewhat "shaky"<sup>48</sup> *Gibson* citation.

However plausible this argument, it seems likely that there is more to the story. More personal motivations probably explain Warren's failure to mention Murphy's contributions to the Fifth Amendment Equal Protection doctrine, especially in light of Murphy's opinions in the *Japanese-American Cases*.<sup>49</sup>

It is likely that Warren's failure to mention Justice Murphy's *Hirabayashi*, *Korematsu*, or *Endo* opinions was not an accident. One must remember that, as California's Attorney General and Governor during World War II, Warren was a "vital moving force in the formulation of the Japanese relocation program . . . [who] more than fully cooperat[ed] with the military . . . [as] the most visible and effective California public official advocating internment and evacuation of the American Japanese."<sup>50</sup> Thus, it seems only natural that Warren would not be inclined to cite Murphy's opinions – especially his passionate condemnation in *Korematsu* of the exclusion program's inherent racism – which called into question the constitutionality of these actions.

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the federal government since the case involved a fourteenth amendment claim against a state. . . .)" Karst, *supra* note 23, at 546 n.28. This point is well-taken, given that the Court denied John Gibson's motion to remove the case to federal court despite the showing that a jury pool consisting of 7000 blacks and 1500 whites produced a list of 200 whites selected for the jury panel. Further, no black had served on a Mississippi grand jury for years. See *id.*

47. It appears that Warren was citing to Stone's statement explaining why the Court did not have to reach the constitutional issue of Fifth Amendment Equal Protection:

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

323 U.S. at 199.

48. See Karst, *supra* note 23.

49. It should be noted that the Earl Warren Papers at the Library of Congress contain nothing that discusses Justice Murphy's opinions in these cases.

50. White, *supra* note 41, at 71.

Warren's personal stake in the legacy of these measures perhaps influenced the failure to cite Murphy's scathing dissent.

Moreover, the fact that Warren did cite the majority opinions upholding the curfew restriction and exclusion order in the *Japanese-American Cases* is even more revealing. As Mr. Richard J. Flynn, one of the Chief Justice's law clerks that term recalled, Warren "defended these [actions], so no citation to them would have been an affront to him."<sup>51</sup> That is, the majority citations were not offensive to Warren because they reaffirmed the legality of the measures and, by extension, Warren's role in them. Mr. Flynn recollected that Warren was "receptive to the [majority] cites we gave, but I didn't think we could have pushed him any further. We didn't talk about the *Exclusion Cases* with him. We knew better."<sup>52</sup>

Roger K. Newman shed more light on this line of thought in his biography of Justice Hugo Black.<sup>53</sup> Referring to the fact that Warren altered his first draft opinion in *Bolling*, which included an argument that segregation violated black children's substantive due process rights to education,<sup>54</sup> Newman reported Justice William O. Douglas' recollection that "I think Black said something to Warren about those [citations]," for Black rejected the substantive due process doctrine, and urged the Chief to decide the case only on the racial discrimination at issue.<sup>55</sup> In 1954, Black, the senior associate justice, made several efforts to help the newly-appointed Chief Justice get "comfortable in his new surroundings" and the two "spent much time talking about the [desegregation] cases."<sup>56</sup> If Douglas and Newman's speculation is correct, then it is critically relevant that Black may have influenced the fact that "[w]ith the flick of a wrist [Warren] changed *Bolling v. Sharpe* from an education case into a race case."<sup>57</sup> After all, Black wrote the majority opinion in *Korematsu*. Although he "hate[d]

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51. Telephone interview with Mr. Richard Flynn (June 19, 1998). Special thanks to Mrs. Kay Flynn, who gave permission to use Mr. Flynn's helpful comments.

52. *Id.*

53. See ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* (1994).

54. For an evolution of *Bolling*, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-58*, 68 GEO. L. J. 1, 44-50 (1979). It is interesting that one of the citations which Warren included in his original draft was *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927), where the Court invalidated on Fifth Amendment grounds territorial law restricting the operation of foreign language schools. As discussed later, Justice Murphy had included *Farrington* in his original *Hirabayashi* draft to support his Fifth Amendment Equal Protection argument, only to eliminate it.

55. NEWMAN, *supra* note 53, at 435.

56. *Id.* at 436.

57. Hutchinson, *supra* note 54, at 46.

to write against civil liberties”<sup>58</sup> and privately harbored doubts about the constitutionality of the exclusion order,<sup>59</sup> Black stood by *Korematsu* until his death.<sup>60</sup> Like Warren, Black had a personal stake in the exclusion measure’s legacy, and he, too, would not wish to cast doubt upon its legality by allowing *Bolling* to cite Murphy’s *Korematsu* dissent. Thus, Black may have encouraged Warren to cite to *Korematsu*’s majority statement that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect”<sup>61</sup> as support for the result in *Bolling* and validation of the decision in *Korematsu*.<sup>62</sup> At the same time, it is likely that Black discouraged Warren from citing Murphy’s condemnation of the exclusion. For both Black and Warren, citing Murphy’s *Japanese-American Cases* in *Bolling* would have tacitly admitted that their roles in the discriminatory actions at issue were constitutionally suspect. Deciding these cases, only ten years after World War II, neither man was willing to publicly acknowledge such a mistake in *Bolling*.<sup>63</sup> Perhaps Warren’s

58. NEWMAN, *supra* note 53, at 316.

59. *Id.* at 315. Newman included this note:

Privately, however, very privately, Black harbored doubts. “He wasn’t sure,” recalled George Reynolds (int.), “moving the Japanese was the right thing to do to people who had lived in the country quite a long time, but he supported it on the ground that you couldn’t take any chances of domestic bombing in wartime. He told me we shouldn’t second-guess the President. Second-guess was the word he used. He indicated that during a war the Court shouldn’t exercise independent judgment in the way it would otherwise. He also led me to believe that he wouldn’t have done that to the Japanese if he were President. He never criticized Roosevelt, you have to remember. In his usual indirect way he said, ‘If I were President, I’m not sure I would have done that. These people are American citizens and have lived here for a long time.’”

*Id.*

60. *See id.* at 319. Newman reports one account recalled by Sidney Davis, Black’s clerk during the term of *Korematsu*: “[Black] said, ‘Under those circumstances we did the right things. Under those circumstances we couldn’t have done anything else. I still think I did the right thing.’” *Id.*

61. 323 U.S. at 216.

62. It should be noted that an early Warren Memorandum on the District of Columbia Case has a margin note penciled explaining that “[t]he ‘equal protection of the laws’ is more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore we do not imply that the two are always interchangeable phrases. But discrimination may be so unjustifiable as to be violative of due process.” Earl Warren Papers, Box 571. This sentence basically survived intact to the final opinion. This sentence, however, was followed by the substantive due process argument. *See id.* Thus, Black evidently had not yet persuaded Warren to drop the substantive due process argument when this sentence was added to the opinion.

63. Unlike Black, Warren did eventually change his mind about the internment program. In *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN (1977)*, with the benefit of 35 years of reflection, he wrote: “I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of free-

conspicuous failure to mention Murphy's *Japanese-American Cases* opinions in *Bolling* is, therefore, somewhat understandable, though nevertheless unfortunate.<sup>64</sup>

Whatever the reasons for the omission, the commonalities amongst all of the cases that *Bolling* did cite – and indeed among all of the cases which suggest a Fifth Amendment Equal Protection guarantee – present two historically relevant points: 1) the cases were all, with the exception of the *Gibson, Steele*, and the *Japanese-American Cases*, economic cases which the post-1937 “Roosevelt Court” was unlikely to uphold in favor of the parties claiming unconstitutional federal classifications; and 2) the language in these cases, which proposed a Fifth Amendment Equal Protection doctrine was extremely equivocal. Given the questionable rationales underlying these early Fifth Amendment Equal Protection cases, the Justices who authored these opinions should not receive exclusive credit for laying the critical link in *Bolling*. It is only fair that Justice Murphy who recognized and expressly advocated the application of a Fifth Amendment Equal Protection guarantee against federal incursions on civil rights and liberties,<sup>65</sup> be given at least some credit for his role in the doctrine's eventual adoption in *Bolling*.

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dom and the rights of citizens. . . . It was wrong to react so impulsively without positive evidence of disloyalty . . . .” *Id.* at 149.

64. It is especially unfortunate because Murphy would have been very proud to have his opinions support such a decision. He was part of the *per curiam* Court that ordered the state of Oklahoma to provide an African-American student with a legal education at a state institution as it did for white students in *Sipuel v. Board of Regents*, 332 U.S. 631 (1948). Moreover, he was also apparently the only justice who declared his opposition to the separate-but-equal doctrine and favored integrated education at the conference following *Sipuel*. When the case came back before the Court in *Fisher v. Hurst*, 333 U.S. 147 (1948), because the student argued that Oklahoma's having set aside a section of the state capitol and assigning three teachers to instruct her did not comply with the Court's instructions, Murphy dissented, as did Rutledge, from the Court's weak *per curiam* conclusion that Oklahoma had complied with its mandate. See FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 563-65. Commentators noted Justice Murphy's commitment to ending the “separate-but-equal” doctrine upon his death. See Scanlon, *supra* note 14, at 23 (“Frank Murphy joined informally with his close colleague, the late Justice Rutledge, in a dissent [in *Fisher*] which indicated that had both lived, further judicial perpetration of the fallacious “separate but equal” maxim would have had at least two dissenters. When that fantastic fiction is finally wiped away, Justice Murphy's spirit, perhaps, will rest easier.”); Frank, *supra* note 14, at 15 (“It is no wonder that those engaged in litigation to end segregated education believe that a major source of strength was lost by the unexpected death of Justice Murphy.”).

65. Throughout this article, the phrase “civil rights and liberties” is used somewhat interchangeably and collectively to refer to those rights protecting citizens from governmental discrimination and intrusions. It is generally understood that civil rights and civil liberties are not exactly the same thing, with the Equal Protection Clause relating primarily

Neither court opinions – with the possible exception of Justice O'Connor's majority opinion in *Adarand Constructors v. Peña* (1995)<sup>66</sup> – nor academic commentary, however, has recognized Murphy's contributions. Indeed, Professor Karst's article on Fifth Amendment Equal Protection stated that “the critical opinion in this series was written by Chief Justice Stone in *Hirabayashi v. United States*,”<sup>67</sup> ignoring Murphy's *Hirabayashi* concurrence entirely and giving only cursory mention to his *Korematsu* dissent.<sup>68</sup> Professor Karst further observed that despite its unfortunate results, Stone's *Hirabayashi* opinion “pointed the way to the adoption by the Court of the doctrine of fifth amendment equal protection.”<sup>69</sup> Other commentators – with the possible exception of one author<sup>70</sup> – have followed

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to the former and the Due Process clause covering the latter. However, for simplification, this article takes the liberty of grouping them together.

66. 515 U.S. 200, 214-15 (1995). In her discussion of the doctrine's history, Justice O'Connor wrote:

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank*, that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.” 323 U.S., at 216, 65 S. Ct., at 194. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications than are the States. *Cf. id.*, at 234-235, 65 S. Ct., at 202 (Murphy, J., dissenting) (“[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment”).

*Id.* This is the clearest reference to Justice Murphy's role in Fifth Amendment Equal Protection jurisprudence in the United States Reports, but it hardly constitutes the breadth of recognition his contribution deserves.

67. Karst, *supra* note 23, at 544.

68. *Id.* at 545 (“[B]ut for Justice Murphy, the exclusion order was a deprivation ‘of the equal protection of the laws as guaranteed by the Fifth Amendment.’”).

69. *Id.* at 544. *See also* KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 91 (1989) (“Not all the lessons of *Korematsu* are so dismal. As a judicial precedent, the decision set the stage for two major egalitarian developments that retain vigor today. One is the application of constitutional guarantees of equality against the national government despite the absence of any explicit equal protection clause in the Bill of Rights.”).

70. Professor James R. Kerr did recognize *Bolling's* disregard for Murphy's opinions in his excellent and aptly titled article *The Neglected Opinions of Mr. Justice Murphy*, 1977 *DET. C.L. REV.* 7 (1977). In his discussion of Murphy's jurisprudence on racial discrimination, Professor Kerr twice correctly observed:

Racial classifications were always suspect to Murphy, although Warren did not announce that they were constitutionally suspect until *Bolling v. Sharpe*, which repudiated racial segregation in the public schools of the District of Columbia.

*Id.* at 14.

suit.<sup>71</sup> The neglect of Justice Murphy's contributions to the adoption of Fifth Amendment Equal Protection should be corrected. Murphy's willingness to find an equal protection component in the Fifth Amendment's Due Process Clause and then apply the doctrine in a civil rights and liberties context should be recognized and accorded the historical praise it deserves.

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In *Bolling v. Sharpe*, Warren said: "Classifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." This language is extremely close to that used by Murphy in *Hirabayashi* and *Oyama*, but there are no references to Murphy's opinions.

*Id.* at 16-17. This article essentially makes the same argument, but also presents a broader explanation and provides a deeper background of Professor Kerr's sharp and succinct statements.

71. See, e.g., David P. Currie, *The Constitution and the Supreme Court: The Second World War, 1941-1946*, 37 CATH. U. L. REV. 1, 19 (1987) (Therefore, in Justice Murphy's [*Korematsu*] opinion, "the order deprive[d] all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. There is only one weakness in this argument: There is no such provision."); Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence, and Judicial Deference*, 16 OHIO N.U. L. REV. 591, 596-98 (1989) (no mention of Murphy's opinions in its discussion of the doctrine's history); Grossman, *supra* note 16, at 649 ("In a[n] *Adarand*] footnote O'Connor expressed clear sympathy with the *Korematsu* dissenters, especially Murphy's condemnation of the orders as falling into the ugly abyss of racism."); Christine Ann Lobasso, *Elevation of the Individual: International Legal Issues that Flow from the American Internment of the West Coast Japanese During World War II*, 8 Touro J. TRANS-NAT'L L. 45, 53 (1998) ("When *Hirabayashi*, *Korematsu*, and *Endo* were decided, Supreme Court Justice Murphy wrote separately to sharply criticize the program of mass restriction, exclusion, and eventual internment of West Coast residents of Japanese ancestry."); Michael J. Perry, *Brown, Bolling, & Originalism: Why Ackerman and Posner (Among Others) are Wrong*, 20 S. ILL. U. L. J. 53, 73 n.74 (1995) ("About ten years earlier, in *Hirabayashi v. United States*, and then in the related, and notorious, case of *Korematsu v. United States*, the Court first deployed its misreading of the Fifth Amendment Due Process Clause to assess the constitutionality of action of the national government discriminating against Americans of Japanese ancestry. Justice Murphy's dissenting opinion in *Korematsu* argued that the military exclusion order at issue there "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." Murphy then claimed that in sustaining the order, the majority had participated in "the legalization of racism."); Russell N. Watterson, Jr., *Adarand Constructors v. Pena: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race Conscious Legislation*, 1996 BYU L. REV. 301, 313-15 (1996) (no mention of Murphy's opinions in its discussion of the doctrine's history); Mary J. Reyburn, Note, *Strict Scrutiny Across the Board: The Effect of Adarand Constructors v. Pena on Race-Based Affirmative Action Programs*, 45 CATH. U. L. REV. 1405, 1458 n.62 (1996) ("Justice Murphy dissented, arguing that the exclusionary order 'falls into the ugly abyss of racism.' He further stated, '[b]eing an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.'" (citations omitted).

## II. The Road to *Bolling*

Although Professor Karst correctly observed that “[t]he slate was . . . far from blank when Chief Justice Warren wrote for a unanimous Court in *Bolling v. Sharpe*,”<sup>72</sup> the critical opinions supporting the adoption of the doctrine in civil rights cases were of a particular and relatively recent vintage. Justice Murphy’s opinions, as the following discussion argues, had an important role in this evolution.

### A. Chief Justice Stone and *Hirabayashi*

In his majority opinion upholding the war curfew,<sup>73</sup> Chief Justice Stone discussed “whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.”<sup>74</sup> Stone’s answer seemed to imply that, although there may be an equal protection guarantee implicit in the Fifth Amendment’s Due Process Clause, that protection was not violated by the curfew order:

The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. *Detroit Bank v. United States*, 317 U.S. 329, 337-38, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent. *Keokee Consol. Coke Co. v. Taylor*, 234 U.S. 224, 227.

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356; *Yu Cong Eng v. Trinidad*, 271 U.S. 500; *Hill v. Texas*, 316 U.S. 400. *We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means*

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72. Karst, *supra* note 23, at 545.

73. Gordon Hirabayashi was charged with violating General DeWitt’s Public Proclamation No. 3, issued on March 24, 1942, which declared in pertinent part:

[A]ll alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereafter referred to as the hours of curfew.

*Hirabayashi*, 320 U.S. at 88.

74. *Id.* at 85.



follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category than others.<sup>75</sup>

In characteristically subtle fashion,<sup>76</sup> Stone basically established the doctrine of Fifth Amendment Equal Protection by strategically “assum[ing]” that such a guarantee was a part of the Due Process Clause, being “irrelevant and therefore prohibited” for even the federal government to make such distinctions. In essence, Stone’s opinion seems to say something like this: “Yes, the doctrine exists, and yes, it would strike down this racial discrimination – a distinction that is much more ‘odious’ than the economic distinctions that we upheld in cases like *Detroit Bank* – but for the fact that, in this specific case, the military necessity of this ancestry distinction justifies the violation of Japanese-Americans’ civil rights.”

Professor Karst praised Stone’s language as the “critical opinion in th[e] series” of cases which “pointed the way to the adoption by the Court of the doctrine of fifth amendment equal protection” in *Bolling*.<sup>77</sup> One need not argue with Karst’s statement on its face. Indeed, as Warren’s *Bolling* citation to the case indicates, Stone’s *Hirabayashi* opinion, coming as it did in the majority opinion of the first civil rights case to make a Fifth Amendment Equal Protection argument before the Court, was quite influential in the eventual adoption of the doctrine.<sup>78</sup> To give Stone the exclusive credit for “point[ing] the way” to *Bolling* on the foundation of his “assum[ption]” – completely ignoring the contributions of Justice Murphy and others – is unjustified for two reasons.

First, Stone’s language in *Hirabayashi* is only suggestive dicta. No matter how one spins it, Stone equivocated in “assum[ing]” that

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75. *Id.* at 100 (emphasis added).

76. Stone used a variety of techniques, such as the subtle suggestive approach mentioned in the text or by floating trial balloons in footnotes as in *Carolene Products*’ Footnote 4, to “effectively propose new doctrine . . . ‘when he [was] unable to bring his colleagues along . . . .’” See Matthew Perry, *Justice Stone and Footnote 4*, 6 GEO. MASON U. CIV. RTS. L.J. 35, 63 n.99 (1996).

77. Karst, *supra* note 23, at 544.

78. Moreover, Chief Justice Stone’s contribution to the doctrine by his opinion in *Detroit Bank*, which was also cited in *Bolling*, as well as his famous Footnote 4’s concern for “discrete and insular minorities,” should not be minimized, especially as it relates to Stone’s feelings on discrimination against racial minorities. See generally, Perry, *supra* note 76, at 50-61; SAMUEL J. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 252 n.68 (1946).

the doctrine, if established, would strike the discriminatory curfew down if the curfew was unjustified and, thus, avoid the important constitutional question at issue in the case. Professor Samuel Konefsky criticized the opinion for this reason:

It is regrettable, however, that the Court has not been more enlightening on the precise distinctions. Whether or not the principle is sound, considering the vital connection in which it was being applied in the *Hirabayashi* case, the Court might have ventured to explain more fully.

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The Court thus declined even to consider the one objection on which all the briefs filed against the actions of General DeWitt placed the greatest emphasis, namely, that the enforced evacuation of persons of Japanese descent was a denial of that minimum equal protection of the laws implicit in the due process clause of the Fifth Amendment.<sup>79</sup>

Moreover, the cases which Stone cited to support his “assum[ption]” really did not help establish Fifth Amendment Equal Protection against the federal government. *Yick Wo v. Hopkins* (1886)<sup>80</sup> and *Hill v. Texas* (1942)<sup>81</sup> applied to the states through express terms of the Fourteenth Amendment’s Equal Protection Clause and *Yu Cong Eng v. Trinidad* (1926)<sup>82</sup> involved a challenge based on the express terms of the Philippine Bill of Rights’ Equal Protection Clause. Thus, these citations did not address the critical question at issue in *Hirabayashi* namely whether the Fifth Amendment, which has no express Equal Protection Clause, contained an implicit equal protection guarantee, as interpreted through the Due Process Clause, against federal racial discrimination.

Second, the history behind the all-important Fifth Amendment “assum[ption]” in *Hirabayashi* further weakens the argument that the decision deserves exclusive credit for “pointing the way” to *Bolling*. A close inspection of *Hirabayashi*’s evolution reveals that not until Stone’s second recirculation of his draft opinion did he augment the standard Fifth Amendment discussion<sup>83</sup> with the critical statements that “[w]e may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of

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79. KONEFSKY, *supra* note 78, at 252, 253.

80. 118 U.S. 356 (1886).

81. 316 U.S. 400 (1942).

82. 271 U.S. 500 (1926).

83. *See* Karst, *supra* note 23, at 544.

populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited . . . .”<sup>84</sup> Thus, at least initially, Stone’s draft did not contain these key statements which would considerably strengthen the majority’s general condemnation of all government-sanctioned racial discrimination and, more importantly, provide support for Warren’s adoption of Fifth Amendment Equal Protection in *Bolling*.

This initial omission perhaps weakens Karst’s observation because one can speculate that the other justices on the Court, including Justices Douglas, Roberts, and Murphy, influenced the Chief’s addition of this important language. Although the specific timing of the following account is somewhat murky, it is possible to piece together a reasonable theory of what may have occurred.

At the initial *Hirabayashi* conference on May 17, 1943, Justice Douglas voted with Stone to affirm Gordon Hirabayashi’s convictions. However, once Stone circulated his first draft opinion – it appears he did so on May 30 – Douglas sent a letter to the Chief which objected to Stone’s statement which stated that because of prejudice against them, Japanese-Americans “have maintained here a racial solidarity which has tended to prevent their assimilation as an integral part of the white population and has encouraged their attachment to Japan and Japanese institutions.”<sup>85</sup> Douglas’ May 31 letter asked Stone to eliminate “any suggestion of racial discrimination,” because the Chief’s reasoning, in part “implies or is susceptible to the inference that the Japs who are citizens cannot be trusted because we have treated them so badly they will seize on this way to get even. ‘Racial solidarity’ and lack of ‘assimilation’ do not show lack of loyalty as I

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84. Frank Murphy Papers, Reel 127 [hereinafter FM Papers]. The FM Papers, which are now available only on microfilm, are housed at the Bentley Historical Library at the University of Michigan. Whenever reference is made to Stone’s *Hirabayashi* “assum[ption],” it refers to this language. The Stone draft opinion that did not include the “assum[ption]” read:

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. But it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances [which are] relevant to measures for our national defense and for the successful prosecution of the war, [and] which [may in fact] place citizens of one ancestry in a different category from others.

*Id.* (citations omitted).

85. IRONS, *supra* note 7, at 237.

see it. Such circumstances may . . . give rise to conditions which may breed disloyalty. But that is quite a different matter.”<sup>86</sup>

In his note, Douglas also asked Stone whether it was necessary “to provide an opportunity at some stage (although not necessarily in lieu of obedience to the military order) for an individual member of the group to show that he has been improperly classified?”<sup>87</sup>

Stone apparently did not directly respond to Douglas’ letter, so Douglas “promptly drafted a four-page concurring opinion which he circulated on June 3.”<sup>88</sup> Stone did, however, try to placate the rebellious Justice and earn his much-desired support by circulating another draft on June 7 which eliminated the Court’s reference to “encourag[ing Japanese-Americans]’ attachment to Japan and Japanese institutions.”<sup>89</sup> However, by then, it was too late for the Chief to prevent Douglas from writing separately. Nevertheless, Stone did not use the language Douglas had objected to in his final *Hirabayashi* opinion. Thus, perhaps a good case can be made that Justice Douglas had a fairly significant role in the drafting of Chief Justice Stone’s “critical opinion,” especially by influencing the opinion’s general condemnation of racial discrimination.

It appears that Justice Roberts was responsible for adding to Stone’s condemnation. Roberts influenced Stone’s addition of important language that found racial discrimination, in most circumstances, “wholly irrelevant” to government action and, “therefore,” prohibited. Roberts returned Stone’s second recirculation<sup>90</sup> with this margin comment and Stone incorporated it – dropping only the word “wholly” – into his final opinion.<sup>91</sup> Could it be that Roberts con-

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86. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 673 (1956).

87. MASON, *supra* note 86, at 674.

88. IRONS, *supra* note 7, at 237.

89. MASON, *supra* note 86, at 674-75. See also IRONS, *supra* note 7, at 240-41.

90. These margin notes appear on the second recirculation and are dated June 21, 1943. See Harlan Fiske Stone Papers at the Library of Congress, Box 68. This is the date the final opinion was handed down, and Mr. Bennett Boskey, Chief Justice Stone’s clerk during the 1943 term explained that one should assume that this date “was later affixed to show the date the opinion was handed down, and has nothing to do with the date on which the second recirculation was sent around by Stone.” Letter from Bennett Boskey to MJP (May 3, 1999)(on file with author).

91. Roberts marginalia has “wholly irrelevant and therefore” pointing to follow “circumstances.” See Stone Papers, Box 68. Without the benefit of a professional graphologist, one can see characteristics which strongly suggest that this is Roberts’ work. Mr. Boskey wrote: “On page 14, the words “wholly irrelevant and therefore” look to me as if they are in Justice Roberts’ handwriting, though I cannot be certain. As you know, the words do appear in the final opinion, and hence probably resulted from Justice Roberts’ suggestion.” Letter from Bennett Boskey to MJP (May 3, 1999)(on file with author).

vinced Stone to include this addition to strengthen the majority's general condemnation of racism? It is consistent with the concerns Justice Roberts later expressed in his *Korematsu* dissent which, like Murphy's, squarely addressed the racism inherent in the exclusion order.<sup>92</sup> Additionally, it is noteworthy to mention that both Roberts and Murphy concurred in *Endo*, imploring the Court to decide the basic constitutionality of the exclusion measure, indicating the two Justices certainly thought along the same lines in these cases. Although somewhat attenuated, this argument shows that exclusive credit for *Hirabayashi's* condemnation of racial classifications cannot rightly be given only to Chief Justice Stone; Justice Roberts seems to deserve at least some of the praise.

The same could be said of Justice Murphy, who initially reserved his vote in the May 17 *Hirabayashi* conference. It is not clear exactly when, but sometime in early June – probably around June 5 – after Stone had circulated his first majority draft and Douglas his concurring draft, Murphy decided to dissent from Stone's opinion and “at least some of his brethren had in their hands the draft of a powerful [Murphy] opinion.”<sup>93</sup> Like Douglas, Murphy objected to Stone's discussion of Japanese-Americans' racial and cultural characteristics. For example, one comment on Murphy's copy of Stone's draft asks whether “Stone's remarks about Japanese-language schools were equally applicable to ‘Catholic and other church schools.’”<sup>94</sup> Murphy's powerful dissenting draft left no doubt that he believed that the racial basis upon which the curfew restriction rested failed constitutional muster. Moreover, Murphy staked this argument on the implied guarantee of equal protection as interpreted through the Fifth Amendment's Due Process Clause:

This is the first time, so far as I am aware, that a substantial restriction on the personal liberty of citizens based solely on the accident of race or ancestry has been upheld by this Court. The

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92. See 323 U.S. at 226 (“On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.”).

93. Fine, *Mr. Justice Murphy and the Hirabayashi Case*, *supra* note 14, at 202. Unfortunately, this opinion was undated. However, judging from comments that Murphy made to Justice Frankfurter about both Stone and Douglas' draft opinions (“Well, if the Chief's [opinion] was addressed to the American Legion, Bill's was addressed to the mob.”) before the June 5 conference, it appears safe to speculate that Murphy had decided to dissent by then and begun writing his draft. *Id.*

94. *Id.* at 204.

result is to permit the creation in this country of two classes of citizens for the purposes of the war – to sanction discrimination between groups of United States citizens on the basis of ancestry. This is in contravention of principles that have always been regarded as immutable and sacred to our ways of life. *Cf. Truax v. Corrigan*, 257 U.S. 332. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. *Cf. Wong Wing v. United States*, 163 U.S. 228, 238; *Yick Wo v. Hopkins*, 118 U.S. 356, 369; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524-528; *Farrington v. Tokushige*, 273 U.S. 284. *It is true that even the guaranty of equal protection of the laws allows a measure of reasonable classification, but a reasonable classification based solely upon race or creed is hardly a reasonable one. It is also true that the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws. Cf. Currin v. Wallace*, 306 U.S. 1, 14. *It by no means follows, however, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment. I think that point is reached when we have one law for the majority of our citizens and another for those of a particular racial heritage.*<sup>95</sup>

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95. FM Papers, Reel 127 (emphasis added). The fact that Justice Murphy's draft opinion included both *Wong Wing* (1896) and *Farrington* (1927) to support his Fifth Amendment Equal Protection argument shows that Justice Murphy did do serious – and original – thinking in this area, as these citations were not included in Gordon Hirabayashi's brief nor the amicus briefs filed in the case. Moreover, it is somewhat unfortunate that Murphy did not keep these citations and fairly ingenious legal theory for his final opinion, as they would have lent additional support to his theory, not to mention this article's claim. The relevant excerpt from *Wong Wing* reads:

And in the case of *Yick Wo v. Hopkins*, 118 U. S. 369, it was said: 'The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' Applying this reasoning to the Fifth and Sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

163 U.S. at 238.

The *Farrington* citation relies on substantive due process, a then-discredited doctrine, which might explain why Murphy eliminated it from his final opinion:

The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools has been announced in recent opinions. *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*,

It is impossible to say whether the language of this dissent had any effect on Stone's addition of the Fifth Amendment racial "assum[ption]" to his draft opinion. One could speculate that Murphy communicated with the Chief regarding the reservations he felt towards the racial and cultural characteristics in Stone's first circulated draft. This is unlikely, however, for the simple fact that Stone and Murphy rarely communicated. Mr. John Pickering, Justice Murphy's law clerk during that term, agreed with this conclusion,<sup>96</sup> and Professors Fine and Howard seemed to also agree on this point.<sup>97</sup>

It is perhaps more likely that upon reading Murphy's powerful draft, Stone added the racial "assum[ption]" to keep Justice Rutledge, who had initially joined Douglas' June 3 opinion, from going over to

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262 U.S. 404; *Pierce v. Society of Sisters*, 268 U.S. 510. While that amendment declares that no state shall 'deprive any person of life, liberty, or property, without due process of law,' the inhibition of the Fifth Amendment, 'No person shall be deprived of life, liberty, or property, without due process of law,' applies to the federal government and agencies set up by Congress for the government of the territory. Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the states, are guaranteed by the Fifth Amendment against action by the territorial Legislature or officers.

273 U.S. at 298-99. As discussed above, Chief Justice Warren also included *Farrington* in his *Bolling* draft, before he eliminated the opinion's reliance on substantive due process.

96. "My recollection from long ago is that [Murphy and Stone] were correct, but not close or cordial, even though they shared some common views." E-mail from John H. Pickering to MJP (March 17, 1999) (on file with author).

97. Professor Fine first described Justice Frankfurter's efforts to deter Murphy from dissenting in *Hirabayashi*, which Frankfurter successfully managed in part by urging Murphy to "take the initiative with the Chief in getting him to take out everything that either offends you or that you would want to express more ironically." However, as Professor Fine pointed out:

Murphy does not appear to have followed this advice, but judging from the futile effort of Justice William O. Douglas to persuade Stone to omit from his opinion "any suggestion of racial discrimination" and to indicate that the "individual member of the group" should be given the "opportunity at some stage . . . to show that he has been improperly classified," it is unlikely that Murphy, whose objections to the Chief Justice's opinion were even stronger than those of Douglas, could have persuaded Stone to alter his draft in any substantial way. At one point, Stone, as a matter of fact, had added a reservation to his opinion in order to satisfy Douglas, but, in the end, to hold other members of the Court, he had decided "to stand by the substance of my opinion."

Fine, *Mr. Justice Murphy and the Hirabayashi Case*, *supra* note 14, at 205.

Professor Howard echoed this same account:

Penetrating as was his criticism, however, Justice Murphy was filled with nagging insecurities about a lone dissent in the middle of a war. There is no evidence that he took his doubts to Stone, who was having difficulties enough holding Justice Douglas to the racial ovations in his opinion, while at the same time satisfying Justice Frankfurter's strong convictions that waging war was an executive and legislative responsibility.

HOWARD, *supra* note 15, at 307.

Murphy's side.<sup>98</sup> His recirculated opinion, Stone could now claim, effectively dealt with and disposed of Murphy's Fifth Amendment Equal Protection argument. Lending additional credibility to this speculation is the fact that Murphy clearly noticed Stone's addition, highlighting Stone's entire "assum[ption]" statement in the text of the majority opinion.<sup>99</sup> It is almost as if Justice Murphy recognized that his dissent had at least strengthened the majority opinion's condemnation of the racially-based curfew restriction and Murphy was resigned to accept this limited victory, which would someday make an important contribution to the adoption of the doctrine as Professor Karst later correctly observed.<sup>100</sup>

### B. Justice Murphy and *Hirabayashi*

Of course, Justice Murphy eventually concurred reluctantly in *Hirabayashi*, in great part due to Justice Frankfurter's intense lobbying that the Court needed to present a united front in this highly charged case,<sup>101</sup> but also as a result of the more gentle influence of Justice Stanley Reed.<sup>102</sup> Nevertheless, Murphy's concurrence "bore a

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98. Justice Rutledge, who eventually wrote a short concurrence in *Hirabayashi*, stated in a June 12 message to Stone that he "had more anguish over this case than any I have decided, save possibly one death case in the Ct. of Appeals," adding that "I have strong sympathy with Mr. Justice Murphy's views" in the case. Irons, *supra* note at 247, 248.

99. See FM Papers, Reel 127.

100. See Karst, *supra* note 23, at 544. It should be noted that Mr. Boskey was skeptical of this theory: "As a guess, I might add, I would be a little bit surprised if anything circulated by Justice Murphy had had any influence on revisions which occurred in Chief Justice Stone's opinion." Letter from Bennett Boskey to MJP (March 30, 1999) (on file with author).

101. See Fine, *Mr. Justice Murphy and the Hirabayashi Case*, *supra* note 14, at 205-06. By analyzing the Frank Murphy Papers, Professor Fine convincingly argued that Murphy concurred "only with the greatest reluctance and, to a degree, against his better judgment," *id.* at 208, due primarily to Justice Frankfurter's campaign, as revealed through many correspondences between the two justices in the days leading up to the final decision. Some of these letters reveal just how heavy-handed and to what levels Frankfurter would stoop to get his way; the answer being very heavy and to utterly no downward limit. Professor Fine did not reveal Frankfurter's name in his article, referring to him simply as "the Justice," because Frankfurter was still alive when it was published in 1964. After Frankfurter's death, Fine identified him in *THE WASHINGTON YEARS* (published in 1985), *supra* note 15, at 441-44. There, Professor Fine further speculated that Murphy's decision not to dissent could have been because of "a lack of confidence in his judgment regarding the reasonableness of the curfew order, or a decision to bide his time until the far more important question of the relocation process itself inevitably came before the Court . . ." FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 443.

102. Professor Irons provided the most complete account of Justice Reed's influence on Murphy's *Hirabayashi* concurrence:

As the day for the final decision approached, Murphy developed second thoughts about his isolated position as the only dissenter in the *Hirabayashi* case. Justice



striking resemblance to the dissenting opinion he had intended to issue,"<sup>103</sup> as he made only "cosmetic changes"<sup>104</sup> to his initial draft.

The Fifth Amendment Equal Protection argument in Murphy's published *Hirabayashi* concurrence reads:

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. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour – to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356; *Yu Con Eng v. Trinidad*, 271 U.S. 500, 524-528. *See also Boyd v. Frankfort*, 117 Ky. 199, 77 S.W. 669; *Opinion of the Justices*, 207 Mass. 601, 94 N.E. 558. It is true that the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws. *Cf. Currin v. Wallace*,

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Stanley Reed applied the first gentle push. "Murphy had a considerable rapport with Justice Reed, their chambers were next to each other, and Reed had been making various suggestions about the *Schneiderman* case" on which Murphy was writing the Court's opinion, John Pickering recalled. The first draft of Murphy's dissent in *Hirabayashi* had conceded that if "substantial evidence" existed of that Japanese Americans were "generally disloyal," or had "otherwise by their behavior furnished reasonable ground" for dealing with them as a group, the curfew order "might be defended and upheld against legal attack in the light of the conditions and the military situation which then prevailed." Reed found this argument "appealing," but not totally convincing. "If you admit this you give your case away," he wrote [in the margins of Murphy's draft]. "Military protection only needs reasonable grounds, which this record has. You cannot wait for an invasion to see if loyalty triumphs." Murphy bowed to this criticism. "Whether the record provides reasonable grounds, whether the evidence shows 'general disloyalty,' is a question of opinion," he informed Pickering on June 8. "I assumed it did not." Nonetheless, he instructed Pickering to strike the offending sentences from the draft.

IRONS, *supra* note 7, at 245-46.

103. Fine, *Mr. Justice Murphy and the Hirabayashi Case*, *supra* note 14, at 206-07.

104. IRONS, *supra* note 7, at 247.

306 U.S. 1, 14. It is also true that even the guaranty of equal protection of the laws allows a measure of reasonable classification. It by no means follows, however, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment. I think that point is dangerously approached when we have one law for the majority of our citizens and another for those of a particular racial heritage.<sup>105</sup>

There are some obvious changes here from Murphy's drafted dissent. Most importantly, he eliminated the statements that "a classification based solely on race or creed is hardly a reasonable one" and that the curfew restriction "reached [a denial of due process] when we have one law for the majority of our citizens and another for those of a particular racial heritage."<sup>106</sup> Instead, Murphy held that the point of denying such a due process right was only "dangerously approached" by this racially-based measure, "go[ing] to the very brink of constitutional power."<sup>107</sup> He also eliminated the *Truax v. Corrigan*<sup>108</sup> reference, and changed a few citations.<sup>109</sup>

However, when Justice Murphy changed his dissent to a concurrence, he added the lamentation that the curfew order's restriction of Japanese-Americans' liberty bore "a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe,"<sup>110</sup> using this dark analogy to greatly strengthen his condemnation of the curfew.<sup>111</sup> Thus, even while he

105. 320 U.S. at 111-12. Murphy attached Footnote 2 at the end of the next-to-last sentence.

106. FM Papers, Reel 127.

107. 320 U.S. at 111-12.

108. See FM Papers, Reel 127.

109. As discussed above, Justice Murphy substituted *Boyd* and *In re Opinion of the Justices for Wong Wing and Farrington*. This is unfortunate, as both *Boyd* and *In re Opinion* were state cases covered by the Fourteenth Amendment, as was *Yick Wo*. *Yu Con Eng* involved the express Equal Protection Clause of the Philippines Bill of Rights. Thus, these citations do not seem to support Murphy's implied Fifth Amendment Equal Protection argument as well as *Wong Wing* and *Farrington*, both territorial cases which seemed to implicate a Fifth Amendment Equal Protection guarantee as interpreted through the Due Process Clause, since the Fourteenth Amendment did not apply.

It also appears that Reed may have suggested striking the *Wong Wing* and *Farrington* citations, as in the same draft which contained Reed's margin comments above, there is a line drawn through the citations with "Out" written in the margin. Whether Reed was the one who suggested eliminating these or whether it was Murphy or Pickering is indecipherable from the handwriting, but it seems open to speculation that the citations were eliminated due to Reed's influence. See FM Papers, Reel 127.

110. *Hirabayashi*, 320 U.S. at 111.

111. This sentence does not appear in any of his earlier dissenting drafts. It appears that Murphy added it only after he had decided to concur. See FM Papers, Reel 127.

was retreating from his dissent, this sobering passage illustrated that Murphy was not backpedaling from his personal antipathy towards the curfew measure's racial bases.<sup>112</sup> As Professor Fine neatly summarized:

The published concurrence contained the same language as the unpublished dissent with regard to the applicability of the Bill of Rights in wartime, Murphy's abhorrence of distinctions based on ancestry, his faith in the American melting pot and his lack of concern about ethnic differences in American society, and the relationship of the due process clause to discrimination based on racial heritage.<sup>113</sup>

Justice Murphy's *Hirabayashi* concurrence, like Stone's majority opinion, demonstrates one of the first times a Supreme Court Justice suggested that an equal protection guarantee, as interpreted through the Fifth Amendment's Due Process Clause, might exist in a civil rights case challenging a federal government racial distinction. But Murphy went farther than Stone. Murphy also provided a rationale to justify his conclusion, which was more than could be said about Stone's added "assum[ption]" which cited to little or no authoritative support. Murphy's argument that an instance of discrimination might be "of such an injurious character in the application of laws as to amount to a denial of due process"<sup>114</sup> was squarely revealed in the language of *Currin* and *Detroit Bank*.<sup>115</sup> Moreover, in a footnote, Jus-

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112. This particular line did not go unnoticed. The Frank Murphy Papers contain a letter from a San Francisco lawyer who respectfully asked Justice Murphy whether he "intentionally or [ ] inadvertently" used the term "Jewish race" in his opinion, because the attorney was worried that Nazi propagandists would use Murphy's statement of this anthropological controversy as an authoritative citation:

I hope you do not regard me as captious upon this matter. Knowing of your broad understanding and your manifest sensitivity to problems affecting minority groups, I am sure you would not intentionally do anything that would give comfort to present or future bigots, or to those who glory in being intolerant.

Letter from Nat Schmulowitz to Frank Murphy (August 16, 1943) in FM Papers, Reel 127. Justice Murphy, sensitive to this letter's concerns, promptly replied:

The statement you refer to in the first paragraph of your letter was inserted in my opinion to assail bigotry and racialism not to give comfort to present or future bigots.

Thank you for your letter and for bringing the point to my attention. I will explore your suggestion without delay.

Letter from Frank Murphy to Nat Schmulowitz (August 25, 1943) in FM Papers, Reel 127.

113. Fine, *Mr. Justice Murphy and the Hirabayashi Case*, *supra* note 14, at 207.

114. *Hirabayashi*, 320 U.S. at 112.

115. *Currin* stated that "[i]f it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment. . . ." 306 U.S. at 14. *Detroit Bank* surmised that "[e]ven if discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment. . . ." 317 U.S. at 338.

tice Murphy gave an example of when such injurious discrimination might arise:

For instance, if persons of an accused's race were systematically excluded from a jury in a federal court, any conviction undoubtedly would be considered a violation of the requirement of due process of law, even though the ground commonly stated for setting aside convictions to obtained in state courts is denial of equal protection of the laws. *Cf. Glasser v. United States*, 315 U.S. 60, with *Smith v. Texas*, 311 U.S. 128.<sup>116</sup>

This was an interesting argument. Murphy seemed to argue that the Court essentially had already adopted a Fifth Amendment-like Equal Protection guarantee and applied it in *Glasser*, a 1942 Murphy-authored majority opinion which dealt with, among other issues, the composition of federal juries. In *Glasser*, the petit jury panel had been selected primarily from lists supplied by the League of Women Voters which contained only names of the group's members. The Court accepted the argument that "[t]he deliberate exclusion of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of a jury trial," even though the Court held that *Glasser* had not proven this had happened in his trial.<sup>117</sup> Murphy's *Hirabayashi* opinion compared *Glasser*, a federal jury case, to *Smith*, a unanimous opinion written by Justice Black

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116. *Hirabayashi*, 320 U.S. at 112 n.2.

117. 315 U.S. at 86, 87. The relevant *Glasser* language reads:

Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84.

Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner. Secs. 275, 276, Jud.Code, 28 U.S.C. secs. 411, 412, 28 U.S.C.A. ss 411, 412. This duty of selection may not be delegated. *United States v. Murphy*, D.C., 224 F. 554; *In re Petition for Special Grand Jury*, D.C., 50 F.2d 973. And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a body truly representative of the community', and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

315 U.S. at 85-86.

that held that a state's conviction based on an indictment returned by a jury which "intentionally and systematically excluded [African-Americans] from grand jury service solely on account of their race and color" violated the Fourteenth Amendment's Equal Protection Clause.<sup>118</sup> In doing so, Murphy seemed to suggest that it was only a small leap to infer that a similar conviction by a federal jury so illegally constituted would also violate equal protection of the law as interpreted through the Fifth Amendment's Due Process Clause, because that protection guaranteed the same civil rights as the Fourteenth Amendment's Equal Protection Clause. Moreover, Murphy appeared to rely on *Smith's* statement that "racial discrimination [resulting] in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."<sup>119</sup> Certainly, Murphy believed, the exclusion of jurors on the basis of race – whether in a federal or state trial – also violated these "basic concepts of a democratic society"<sup>120</sup> whether or not a specific, express equal protection guarantee applied to the government action at issue. Whatever the merit of this argument, it is interesting that Justice Murphy attempted to justify his suggestion that a Fifth Amendment Equal Protection doctrine existed and might apply to a federal racial discrimination by citing his own *Glasser* opinion. It certainly seems to support the thesis here that his role in the road to *Bolling* was more substantial than has been previously recognized.

Murphy's *Hirabayashi* concurrence followed his Fifth Amendment Equal Protection discussion by begrudgingly concluding that the injurious racial discrimination based on Japanese ancestry was justified by the "critical military situation which prevailed on the Pacific Coast area in the spring of 1942."<sup>121</sup> Murphy was quick to point out that this would not be the case in "normal times" and that even during this crisis period, the Court had the "inescapable duty of seeing that the mandates of the Constitution are obeyed,"<sup>122</sup> a clear warning that he was not likely to defer to military actions that treaded upon on constitutional rights beyond the curfew restrictions at issue. Although *Hirabayashi* was an extremely close case for Justice Murphy, the war-time distinction only "[went] to the very brink of constitutional

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118. 311 U.S. at 129.

119. *Id.* at 130.

120. 311 U.S. at 130.

121. 320 U.S. at 112.

122. *Id.* at 113.

power,”<sup>123</sup> rather than reaching it, as he had previously wanted to conclude.

Despite the regrettable fact that Justice Murphy concurred in *Hirabayashi*, there can be no doubt that his opinion provided powerful and perhaps persuasive advocacy of the Fifth Amendment Equal Protection doctrine. Although Chief Justice Warren’s *Bolling* opinion failed to cite to Murphy’s opinion, Warren’s language was fairly similar: *Bolling* stated that “discrimination may be so unjustifiable as to be violative of due process,”<sup>124</sup> while Murphy’s *Hirabayashi* concurrence opined that discrimination may be “of such an injurious character in the application of laws as to amount to a denial of due process. . . .”<sup>125</sup> *Bolling* also held that “[c]lassifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”<sup>126</sup> This language is strikingly similar to Justice Murphy’s *Hirabayashi* observation that “[d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals.”<sup>127</sup>

If nothing else, this discussion at least disproves Professor Karst’s statement that Chief Justice Stone’s *Hirabayashi* opinion should be given *all* the credit for “point[ing] the way to the adoption by the Court of the doctrine of fifth amendment equal protection.”<sup>128</sup> Justice Murphy’s contributions to *Bolling*’s evolution deserve some recognition, too.

### C. Justice Black and *Korematsu*

In *Korematsu*, Justice Black’s opinion for the Court upheld the exclusion program of “all persons of Japanese ancestry” from certain parts of the West Coast.<sup>129</sup> In *Bolling*, Chief Justice Warren cited,

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123. *Id.* at 111.

124. 347 U.S. at 499.

125. 320 U.S. at 112. Again, Professor Kerr’s observation of the similarities here and Warren’s failure to cite Murphy’s opinions should be noted here. *See* Kerr, *supra* note 70, at 16-17.

126. 347 U.S. at 499.

127. 320 U.S. at 110.

128. Karst, *supra* note 23, at 544.

129. Fred Korematsu was charged with violating General DeWitt’s Civilian Exclusion Order No. 34, issued on May 3, 1942, which declared in pertinent part: “[I]t is hereby ordered . . . all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1. . . .” *Korematsu v. United States*, 140 F.2d 289, 294 (9th Cir. 1943). *Korematsu* dealt only with the exclusion order; the Court expressly declined to reach the constitutionality of the entire detention and relocation program itself:

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of

along with Stone's *Hirabayashi* opinion, to Justice Black's statement in *Korematsu* that

[i]t should noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>130</sup>

Warren cited this passage to support his statement that “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”<sup>131</sup> It should be emphasized, however, that there is an interesting history behind Black's *Korematsu* admonition. According to Professor Peter Irons, Justice Black had earlier included this paragraph in a draft, but crossed it out before circulating his first opinion to the Court.<sup>132</sup> Black eliminated this “[p]erhaps in response to Murphy's dissent,” which questioned whether “there was a ‘factual foundation of record’ in the *Korematsu* case to support the mass evacuation of Japanese Americans.”<sup>133</sup> Further, Black might have feared that the statement would be an embarrassing reference to the strict scrutiny standard of *United States v. Carolene Products*' Footnote 4,<sup>134</sup> which neither *Hirabayashi* nor *Korematsu* applied.<sup>135</sup> However, because Black was now “under fire from the dissenters,” including Murphy, for the Court's insensitivity to the racial discrimination at issue in the case, “Black retrieved his earlier draft and revised the paragraph for the final opinion,” putting the race admonition back in his opinion.<sup>136</sup> Thus, Professor Irons' account suggests that Justice Murphy possibly played a significant role in the presence of Black's strong *Korematsu* language. This indirectly supports the argument that Mur-

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those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

*Korematsu v. United States*, 323 U.S. 214, 222 (1944).

130. *Id.* at 216.

131. *Bolling*, 347 U.S. at 499.

132. See IRONS, *supra* note 7, at 339.

133. *Id.*

134. 304 U.S. at 152 n.4 (1938).

135. See IRONS, *supra* note 7, at 339.

136. *Id.* at 339.

phy should be recognized for his contribution to *Bolling*. In *Bolling*, Warren cited Black's condemnation of racial discrimination as support for his adoption of Fifth Amendment Equal Protection analysis.

There is little else in Black's *Korematsu* opinion that mentions Fifth Amendment Equal Protection; Black simply ignored the Fifth Amendment Equal Protection arguments Fred Korematsu made in his briefs.<sup>137</sup> There is no express discussion of the doctrine anywhere, although one might argue that it was implied from Black's "immediately suspect" admonition of racial classifications. This idea, however, is weakened by Black's special efforts to preempt any equal protection debate. Black would not concede that Fred Korematsu was "excluded

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137. It should be noted that the Frank Murphy Papers contain drafts of Justice Robert Jackson's *Korematsu* dissent which reveal that Jackson considered making a subtle-but-powerful Fifth Amendment Equal Protection argument, only to tone down his rhetoric and omit any mention of the doctrine in his published opinion. In his draft, Jackson argued that "guilt is personal and not inheritable," but that the exclusion order was

[A]n attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. *If people of any foreign country should make one a criminal because of prenatal events, the American people would think them very backward and no doubt would dispatch missionaries for their enlightenment. If Congress in peace-time legislation should classify citizens according to ancestry for frankly unequal treatment in criminal law, I should suppose this Court would refuse to enforce it.*

FM Papers, Reel 129 (emphasis added). In his published opinion, Jackson omitted the "missionary enlightenment" statement entirely and tempered his "frankly unequal treatment" statement by instead substituting "such a criminal law," a much less severe condemnation of the exclusion order than in his draft. *Korematsu*, 323 U.S. at 243-44. Moreover, Jackson also omitted entirely a footnote that he had originally attached to this discussion which, among several other citations, quoted at length Chief Justice Taft's *Truax v. Corrigan* dicta and might well have contributed to the adoption of the Fifth Amendment Equal Protection doctrine had he published it. The omitted footnote read:

See *Yick Wo v. Hopkins*, 118 U.S. 536; *Buchanan v. Warley*, 245 U.S. 60; *Terrace v. Thompson*, 263 U.S. 197; *Yu Cong Eng v. Trinidad*, 271 U.S. 500; *State v. Darnell*, 166 N.C. 300; *Carey v. Atlanta*, 143 Ga. 192. But cf. *Harden v. Atlanta*, 147 Ga. 248; *Harris v. Louisville*, 165 Ky. 559; *Hopkins v. Richmond*, 117 Va. 692. There is of course no equal protection clause applicable to the Federal Government. But Chief Justice Taft, referring to the Fifth Amendment, said: "It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' - are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws." *Truax v. Corrigan*, 257 U.S. 312, 332.

FM Papers, Reel 129. For some reason, Jackson decided not to include this footnote in his final opinion. If he had kept it, in addition to the stronger language he originally used to describe the "frankly unequal treatment" resulting from the exclusion order, perhaps he would also deserve some of the credit for "point[ing] the way" to *Bolling*. See Karst, *supra* note 23, at 544.



from the Military Area because of hostility to him or his race.”<sup>138</sup> Korematsu, as all other Japanese-Americans, was excluded only because the United States was at war with the Japanese Empire. The exclusion order was, therefore, designed to deal with nothing more than the domestic threat to national security.<sup>139</sup>

Ten years later, however, Black joined the *Bolling* decision, evidence that Black was not absolutely opposed to the idea of Fifth Amendment Equal Protection. Despite the fact that the doctrine seemed at odds with Black’s overall theory of judicial interpretation, the Justice offered some philosophical justification for his *Bolling* support. One of Black’s biographers noted:

Black’s support of *Bolling* seemingly violated his own principles: the Fifth Amendment does not contain, nor can it be read to incorporate, the Fourteenth Amendment’s equal protection clause. When a clerk later asked how Black could justify this, he replied: “A wise judge chooses, among plausible constitutional philosophies, one that will generally allow him to reach results he can believe in – a judge who does not to some extent tailor his judicial philosophy to his beliefs inevitably becomes badly frustrated and angry . . . . A judge who does not decide some cases, from time to time, differently from the way he would wish, because the philosophy he has adopted requires it, is not a judge. But a judge who refuses ever to stray from his judicial philosophy, and be subject to criticism for doing so, no matter how important the issue involved, is a fool.”<sup>140</sup>

Thus, Black was not opposed to the doctrine itself. It appears that Black only wished to establish the doctrine when the proper case came before the Court. *Korematsu* and *Hirabayashi* were war-time

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138. *Korematsu*, 323 U.S. at 223.

139. *See id.*

140. *See* NEWMAN, *supra* note 53, at 435 (discussing then-Professor Guido Calabresi’s – the law clerk who asked the question – article *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 132 (1991)). Between *Hirabayashi* and *Bolling*, only one other case besides the ones discussed in this article mentioned Fifth Amendment Equal Protection. In *United States v. Petrillo*, 332 U.S. 1, 8-9 (1947), Justice Black’s majority opinion rejected the appellants’ invitation for the Court to adopt and apply the doctrine:

It is contended that the statute denies equal protection of the laws to radio-broadcasting employees as a class, and, for this reason, violates the due process clause of the Fifth Amendment. . . . But it is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. . . . Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, *see Steward Machine Co. v. Davis*, 301 U.S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

Again, this case was an economic case, challenging the Communications Act of 1934, 47 U.S.C.A. § 506.

military necessity cases which, to Black, justified substantial judicial deference to military and political judgments.<sup>141</sup> *Bolling*, by contrast, was a peace-time racial discrimination case and the issue of school desegregation was never one where Black counseled deferential restraint from the federal bench.<sup>142</sup> Thus, perhaps by 1954, Black thought that the doctrine of Fifth Amendment Equal Protection had ripened and *Bolling* was a case which would serve as the appropriate vehicle for the doctrine's adoption.<sup>143</sup>

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141. In *Korematsu*, Black wrote:

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

323 U.S. at 219. Additionally, as a Conference Memorandum from Chief Justice Stone to the Court reveals, Justice Black was directly responsible for the inclusion of a similarly deferential statement in Stone's *Hirabayashi* opinion:

Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. at 93. For the Conference Memorandum, see the Hugo Black Papers at the Library of Congress, Box 270. Judge Joseph A. Greenaway, Jr. also has shed some light on the reasons behind Justice Black's positions in the war-time cases:

Black's decision making in *Korematsu* was undoubtedly influenced by several factors outside the record. Black had served in the military and both of his sons were serving in World War II. Black served as President Roosevelt's emissary in win-the-war rallies and in 1942 went to Birmingham, Alabama—at Roosevelt's direction—to investigate production slow-downs that affected the war effort. Most important, General DeWitt was a family friend of Black's. Black's faith in DeWitt added to his belief that it should be the commander in the field that makes such decisions. More important, this relationship allowed Black, wrongly in my view, to rely on DeWitt's representations rather than critically analyze them.

Joseph A. Greenaway, Jr., *The Weintraub Lecture: Judicial Decision Making and the External Environment*, 51 RUTGERS L. REV. 181, 189 (1998).

142. Black's insistence that the Court order Southern schools to cease their dilatory resistance to *Brown's* desegregation order, indicative of the Justice's refusal to require deference in matters of school desegregation. Black initially drafted a dissent in *Alexander v. Holmes County*, 396 U.S. 19 (1969), in which he thundered that it was the duty of courts "to extirpate all racial discrimination from our system of public schools NOW." See NEWMAN, *supra* note 53, at 601-02. See also 396 U.S. 1218 (1969) (opinion of Black, J.).

143. Chief Justice Rehnquist seems to imply a similar relationship to some degree:

A decade later, the Court decided the watershed case of *Brown v. Board of Education*, holding that the Kansas legislature had violated the Equal Protection Clause of the Fourteenth Amendment by requiring public schools to segregate students by race. But with *Brown* there was argued a companion case, *Bolling v. Sharpe*, challenging a similarly imposed requirement of segregation in public schools in the District of Columbia. This requirement, however, had not been imposed by a state government but by Congress. It was therefore subject to the Fifth Amendment, but not to the Fourteenth. The Court in *Bolling*, in a brief

#### D. Justice Murphy and *Korematsu*

In *Korematsu*, Justice Murphy “was able to make partial amends for his troubled concurrence in *Hirabayashi* and to eventually present the same conclusions embodied in his unpublished *Hirabayashi* dissent.”<sup>144</sup> Murphy worked with a vengeance to declare that the exclusion policy “goes over ‘the brink of constitutional power’ and falls into the ugly abyss of racism.”<sup>145</sup> Murphy atoned for his *Hirabayashi* concurrence with the Fifth Amendment Equal Protection doctrine, which he had recognized but failed to apply in *Hirabayashi*:

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether 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 alleviate the danger. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast ‘all persons of Japanese ancestry, both alien and non-alien,’ clearly does not meet that test. *Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.* It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order *also* deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an ‘immediate, imminent, and impending’ public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.<sup>146</sup>

One might say that Justice Murphy was guilty of constitutional overkill in finding not one, but three independent constitutional doc-

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opinion not noted for notable clarity of reasoning, held that the Due Process Clause of the Fifth Amendment imposes on the federal government a limitation similar to that imposed on the states by the Equal Protection Clause of the Fourteenth Amendment. Had this doctrine been the law ten years earlier, the Supreme Court might have found it easier to reach a different result in *Hirabayashi* and *Korematsu*.

Rehnquist, *supra* note 7, at 208.

144. Fine, *Mr. Justice Murphy and the Hirabayashi Case*, *supra* note 14, at 209.

145. *Korematsu*, 323 U.S. at 233.

146. *Id.* at 234-35 (citations omitted) (emphasis added). It should be noted also that in early drafts of his dissent, Justice Murphy did not specifically mention a violation of the Fifth Amendment in the emphasized portion above, but rather just a generalized violation of the equal protection of the laws. See FM Papers, Reel 129. This suggests that perhaps he did think somewhat specifically about the notion of Fifth Amendment Equal Protection, as at some point he inserted this particular guarantee into his opinion.

trines – Fifth Amendment Equal Protection, substantive due process, and procedural due process – upon which to strike down the exclusion order. Murphy certainly left no doubt that he rendered the exclusion order unconstitutional, once again refusing to turn a blind eye to military judgments of necessity.

Whichever argument one accepts, the *Korematsu* language is of critical importance. Murphy's use of the conjunctions "further" and "also" to describe how his second and third doctrines voided the exclusion order strongly suggests that he believed Fifth Amendment Equal Protection was separate from the substantive and procedural guarantees of the Fifth Amendment Due Process Clause, despite the fact that all three doctrines were rooted in that same clause. As he demonstrated in *Hirabayashi*, the Fifth Amendment Equal Protection doctrine was not dependent on substantive or procedural due process; the doctrine stood on its own.<sup>147</sup> Thus, Murphy advocated that Fifth Amendment Equal Protection could be used unilaterally to strike down unconstitutional racial discrimination by the federal government.

Unlike *Hirabayashi*'s more detailed and thorough discussion of the *law* behind Fifth Amendment Equal Protection, however, Murphy's *Korematsu* opinion quickly identified the doctrine as the opinion's constitutional "hook" and then moved on to the more detailed analysis of the *facts* of the case. The facts convincingly demonstrated why the exclusion program was not reasonably related to the claimed military dangers sufficient to justify "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation."<sup>148</sup> Murphy's thundering conclusion reemphasized his firm belief that Japanese-Americans had not received their deserved equal protection under the law:

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the

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147. Moreover, in an early draft, Justice Murphy had concluded this paragraph by stating that "[t]here is, in short, no military necessity for this flagrant violation of the basic American precept that all men have equal rights, regardless of race, color, or religion." FM Papers, Reel 129. Unfortunately, Murphy eliminated this sentence in his final opinion. Nevertheless, its obvious equal protection overtones strengthen the claim that Justice Murphy was primarily concerned with the military's violation of Fifth Amendment Equal Protection in *Korematsu*, and that that doctrine could be used to strike down the exclusion order.

148. *Korematsu*, 323 U.S. at 235.

United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. *They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.*<sup>149</sup>

This final exhortation, particularly its demand that “all the rights and freedoms guaranteed by the Constitution” must be recognized “at all times” to “all residents of this nation,” was unmistakably cast in terms of the equal protection of law for all citizens and from all governments.<sup>150</sup> As his result indicates, this guarantee included protection from the federal government, despite the absence of a specific provision of the Bill of Rights expressly imposing such a duty on that entity.

Thus, Murphy’s *Korematsu* opinion illustrated that he believed the Fifth Amendment Equal Protection doctrine was sufficiently established to actually strike down racial discrimination by the federal government. In so doing, Murphy became the first Supreme Court Justice to conclude that the Fifth Amendment contained such a power. Justice Murphy’s *Korematsu* opinion was the first to accept and then apply – albeit in dissent – that guarantee in a civil rights case. Until Chief Justice Warren ratified this doctrine for the unanimous *Bolling* Court, no other justice would make this same argument.

### E. Justice Murphy and *Endo*

In *Ex parte Endo*,<sup>151</sup> decided on the same day as *Korematsu*, the Court held that the War Relocation Authority lacked authority to detain and relocate a Japanese-American citizen who had proven her loyalty to the United States. By some legal craftsmanship, Justice Douglas’ majority opinion ordered the release of Mitsuye Endo, while strategically managing to “avoid constitutional issues which are necessarily involved.”<sup>152</sup> Just as Justice Black had done in *Korematsu*, Douglas skirted the issue of deciding whether the relocation program violated the due process and equal protection rights of Japanese-Americans.<sup>153</sup>

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149. *Id.* at 242 (emphasis added).

150. *Id.*

151. 323 U.S. 283 (1944).

152. *Id.* at 308 (Roberts, J., concurring).

153. *See id.* at 297 (“We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority

Not surprisingly, this opinion did not go far enough for Justice Murphy. As one would expect, he concurred with Mitsuye Endo's release. However, Murphy went one step further and squarely addressed the critical question which the Court was avoiding. Murphy succinctly reemphasized his firm belief that both the exclusion order and relocation measure were unconstitutional because they violated the Fifth Amendment Equal Protection guarantee that Murphy previously argued should have decided *Korematsu*:

I join in the opinion of the Court, but I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive *but is another example of the unconstitutional resort to racism inherent in the entire evacuation program*. As stated more fully in my dissenting opinion in *Fred Toyosaburo Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people.<sup>154</sup>

There can be no doubt that Justice Murphy's attack on the relocation program's "unconstitutional resort to racism" refers primarily to his rationale in *Korematsu* for striking down the exclusion order: that the order violates the Fifth Amendment's Equal Protection guarantee as interpreted through the Due Process Clause. This brief opinion further established Justice Murphy's position on the Fifth Amendment Equal Protection doctrine and strengthens the argument that he should be given some credit for its application to federal incursions on civil rights.<sup>155</sup>

#### F. Chief Justice Stone and *Steele*

In *Steele*,<sup>156</sup> decided the same day as *Korematsu*, the Court struck down, as a matter of statutory interpretation, the Brotherhood of Locomotive Firemen and Enginemen's racially discriminatory union representation under the Railway Labor Act (RLA).<sup>157</sup> Adhering to the Court's canon of deciding a case through available statutory interpre-

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may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.").

154. *Id.* at 307-08 (emphasis added).

155. Murphy also argued that the Court had failed to address the violation of Mitsuye Endo's right to "pass freely from state to state" because she was excluded by the order from returning to her home in California. *Id.* at 308.

156. 323 U.S. 192 (1944).

157. 45 U.S.C. § 151. Bester William Steele and other African-American locomotive firemen sued the Brotherhood and twenty-one railroads regarding the racially discriminatory collective bargaining agreement reached between union and employers in February

tation, rather than reaching constitutional issues unnecessarily,<sup>158</sup> Chief Justice Stone's majority opinion was characteristically subtle both in its manner of decision and in its condemnation of the Brotherhood's racism under the Act:

Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. *Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. Cf. Yick Wo v. Hopkins, 118 U.S. 356; Yu Cong Eng v. Trinidad, 271 U.S. 500; State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Hill v. Texas, 316 U.S. 400.*<sup>159</sup>

Two facts are noteworthy here, as they bear a striking resemblance to the background of *Hirabayashi*. First, the cases Stone cited supporting his subtle condemnation of this federally-sanctioned racial discrimination are all cases which challenged state action under the Fourteenth Amendment's Equal Protection Clause,<sup>160</sup> not the Fifth Amendment's Due Process Clause. These citations do not address *Steele's* critical question: whether the Fifth Amendment, which has no express Equal Protection Clause, nevertheless contained an implicit equal protection guarantee as interpreted through the Due Process Clause against federal racial discrimination. Thus, Stone's opinion added nothing substantively to support the Fifth Amendment Equal Protection doctrine except a fairly case-specific but nevertheless generic statement that here the racial discrimination was "obviously irrelevant and invidious."<sup>161</sup> Like Stone's and Black's generalized admonitions against racial discrimination in *Hirabayashi* and *Korematsu*, respectively, *Steele* represented another missed opportunity to

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1941 which severely restricted the employment and promotion of African-American firemen. See *Steele*, 323 U.S. at 194-96.

158. See, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1935) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

159. *Steele*, 323 U.S. at 203 (emphasis added) (citations omitted).

160. Again, an exception must be recognized for *Yu Cong Eng v. Trinidad*, which involved the Philippine Bill of Rights, which actually contained an Equal Protection Clause.

161. *Steele*, 323 U.S. at 203.

seriously advance the adoption of a Fifth Amendment Equal Protection guarantee.

Second, Stone's first draft and recirculation of *Steele* did not contain the statements that "discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations."<sup>162</sup> Just as was the case with Stone's addition of his Fifth Amendment "assum[ption]" in *Hirabayashi*, this race-sensitive language was added during the opinion's evolution. Again, like in *Hirabayashi*, one must wonder: where did this language come from? Did anyone influence the Chief Justice's incorporation of the doctrine into his opinion? Perhaps Justice Murphy, who was circulating his powerful moral condemnation of the racism at work in *Steele*, discussed below in greater detail, somehow communicated to Stone that the doctrine should be incorporated. Professor Gressman and Judge Nickerson, Murphy's and Stone's respective law clerks during the 1944 term, however, were both skeptical of this possibility, as there was little communication between Murphy and Stone.<sup>163</sup> Nevertheless, it is quite possible that Stone added this condemnation in response to the scathing attack that Murphy was then circulating on the racial discrimination at issue in *Steele*. Perhaps in an effort to protect his solid 8-man majority from defections to Murphy's position – Justice Rutledge seemed the most likely to abandon the majority<sup>164</sup> – Stone supplemented his opinion with this stronger language. Indeed, Professor Gressman's comment that "whether Stone changed anything in light of Murphy's circulation, I would not know,"<sup>165</sup> certainly leaves this possibility open to speculation.

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162. FM Papers, Reel 129.

163. Professor Gressman recalled: "As to Stone's draft, I doubt that he eliminated or added anything because of what Murphy may have done. Stone didn't like Murphy. But whether Stone changed anything in light of Murphy's circulation, I would not know. There was very little 'communication' between [Stone and Murphy]." Letter from Eugene Gressman to MJP (December 31, 1998) (on file with author). Judge Nickerson echoed these thoughts: "[I have] no recollection of Justice Murphy communicating with Chief Justice Stone on any of the cases you mention (including *Steele*). I do have a vivid recollection of working on *Steele v. Louisville* but have no knowledge as to Justice Murphy talking with or writing to the Chief Justice concerning the opinions in that case." Letter from Eugene H. Nickerson to MJP (January 27, 1999) (on file with author).

164. Rutledge was Murphy's closest friend and ideological ally on the Court, and they only rarely did not vote together. Rutledge once wrote: "Never did I disagree, when [Murphy] was on the other side without stopping to think over my position more carefully – indeed without agony." FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 248.

165. Letter from Eugene Gressman to MJP (December 31, 1998) (on file with author).



### G. Justice Murphy and *Steele*

Whether or not one can actually credit Murphy for influencing Stone's opinion, there is no doubt that Murphy's *Steele* concurrence pushed for the adoption of a Fifth Amendment Equal Protection guarantee. Murphy disliked the majority's reliance on "legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees" to invalidate the Brotherhood's racist conduct.<sup>166</sup> Instead of merely interpreting the RLA, Murphy urged that the Court "squarely face[ ]" the "grave constitutional issue" presented by this federally-sanctioned discrimination, which "demand[ed] the invocation of constitutional condemnation."<sup>167</sup> In other words, Justice Murphy thought the racist conduct challenged in *Steele* was so repugnant that the Court should strike it down on constitutional grounds. Stone's elaborate statutory interpretive method just did not satisfy Murphy.<sup>168</sup> For Murphy, racism was such a virulent problem that whenever it occurred, the Court should depart from its interpretive canon and "expose and condemn it" with the full force of the Constitution.<sup>169</sup>

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166. *Steele*, 323 U.S. at 208 (Murphy, J., concurring).

167. *Id.*

168. Indicative of their different approaches, Stone's opinion is over 15 pages, with a multitude of citations and a less-than-explicit holding, not to mention the subtle racial condemnation discussed above. By contrast, Murphy's concurrence is less than two pages, contains no citations, and reads more like a stump speech denouncing the Brotherhood than it does a sterile, objective judicial opinion.

169. *Steele*, 323 U.S. at 209. Murphy also took this position when other rights he considered important were at issue, such as freedom of speech. *See, e.g., Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 585 (1947). In *Rescue Army*, Murphy dissented from Justice Rutledge's majority opinion, a rare occasion in itself, because he wanted the Court to rule on the First Amendment constitutionality of the city's ordinance, which regulated solicitations for charitable contributions. The Court chose rather to follow its *Ashwander* principle – which Rutledge cited – and refused to rule on the constitutional issues because they were not properly presented. Murphy wrote:

It is difficult for me to believe that the opinion of the Supreme Court of California is so ambiguous that the precise constitutional issues in this case have become too blurred for our powers of discernment.

[T]he constitutional issues thereby raised seem clear to me. Simply stated, they are: (1) Does it violate the constitutional guarantee of freedom of religion to prohibit solicitors of religious charities from using boxes or receptacles in public places except by written permission of city officials? (2) Is that guarantee infringed by a requirement that such solicitors display an information card issued by city officials?

Those issues were properly raised below and the courts necessarily passed upon them. The time is thus ripe for this Court to supply the definitive judicial answers. Its failure to do so in this case forces me to register this dissent.

*Rescue Army*, 331 U.S. at 585. Also, in a very similar fashion to his belief that Chief Justice Stone's *Steele* opinion focused too much on "legal niceties," *see Steele*, 323 U.S. at 208, Murphy lamented the majority's treatment of the important First Amendment issues in

If the Court were to constitutionally analyze the Brotherhood's actions under the RLA, Murphy had little doubt that the Fifth Amendment's Equal Protection guarantee would strike down the Brotherhood's racist conduct:

The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. *But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect.* For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals.<sup>170</sup>

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*Rescue Army*. In a draft opinion, he warned that "[t]he danger that some of our religious freedom may be lost by the enforcement of seemingly innocent regulations is too great to be ignored, especially under the guise of applying hypertechnicalities." See FM Papers, Reel 129. Unfortunately and inexplicably, Murphy replaced this statement with the last line quoted above. See also Murphy's concurrence in *Bridges v. Wixon*, 326 U.S. 135, 160 (1945) ("When the immutable freedoms guaranteed by the Bill of Rights have been so openly and concededly ignored [by a federal statute], the full wrath of constitutional condemnation descends upon the action taken by the Government. And only by expressing that wrath can we give form and substance to 'the great, the indispensable democratic freedoms' to which this nation is dedicated.") (citation omitted).

170. *Steele*, 323 U.S. at 208-09 (emphasis added). There is a draft of this opinion in the Murphy Papers that has many handwritten notes in the margins of additions and changes from how *Steele* was published. Professor Gressman has identified the handwriting on this draft as his. Letter from Eugene Gressman to MJP (December 31, 1998) (on file with author). One particular change of note is a line which reads: "Fortunately the Court has construed the Railway Labor Act as not justifying or permitting these actions of the Brotherhood, thus saving the Act in this respect from invalidity under the Fifth Amendment." This sentence was crossed out, and next to it was penciled in: "Thus if the Railway Labor Act were construed to justify or permit this racial discrimination by the Brotherhood, the Act in this respect would be invalid under the Fifth Amendment. Fortunately, the Court has construed the Act otherwise." Murphy Papers, Reel 129. Both of these thoughts were basically incorporated into the published opinion, by the paragraph quoted above in the text and the following conclusion:

If the Court's construction of the statute rests upon this basis, I agree. But I am not sure that such is the basis. Suffice it to say, however, that this constitutional issue cannot be lightly dismissed. The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly ex-

Just as he had in *Hirabayashi*, *Korematsu*, and arguably *Endo*, Murphy alone called for the application of an equal protection guarantee against federal discrimination which violated civil rights. Although his argument for reading the guarantee into the Fifth Amendment's Due Process Clause was not as explicit in *Steele* as it was in the *Japanese-American Cases*, the key point is that, once again, Murphy was the lone voice on the Court advocating the adoption of this doctrine. Professor Fine recognized this, but he did so almost in passing, not quite grasping the important contribution Justice Murphy had made: "Murphy was the first Supreme Court justice to hold that union discrimination against a minority group whom it represented under the law violated constitutional guarantees. He has been criticized for not heeding 'the strong reasons for gradualism in breaking new ground.'"<sup>171</sup>

A nearly identical claim can and should be made in discussing Justice Murphy's opinions in the *Japanese-American Cases*. In these cases, as well as *Steele*, Murphy should in fact be praised for not heeding "the strong reasons for gradualism in breaking new ground."<sup>172</sup> Buoyed by the courage of his convictions, Murphy boldly exposed racism wherever he found it and used the Constitution to condemn it. Murphy was the first Supreme Court justice to suggest (as in *Hirabayashi*) and then conclude (as in *Korematsu*) that the federal government's discrimination against a racial minority group violated the guarantee of equal protection of law found in the Fifth Amendment's Due Process Clause. And, although legal commentary generally has not recognized Murphy's contribution, history has vindicated Murphy's views. A *Washington Post's* editorial regarding *Steele* echoed

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ample of economic cruelty against colored citizens of the United States. Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights by an organization purporting to act in conformity with its Congressional mandate. Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.

The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.

*Steele*, 323 U.S. at 209. The Murphy Papers contain no other drafts which elaborate on the evolution of the opinion from these drafts to its published form.

171. FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 394. The "gradualism" criticism is from Howard, *supra* note 15, at 352, who further wrote that Murphy's concurrence was a clear example of his "judicial activism" which rejected "the Chief Justice's skillful blend of statutory case law in support of the result." *Id.*

172. HOWARD, *supra* note 15, at 352.

this historical vindication, stating that although the *Post* “thought ‘constitutional condemnation’ unnecessary,” the paper nevertheless found the condemnation “heartening,” as did others, that Murphy had spoken out on the issue as he did.<sup>173</sup>

### III. Justice Murphy’s Influence on Fifth Amendment Equal Protection

Although Murphy was the lone voice on the Court who expressly called for the adoption of a Fifth Amendment Equal Protection doctrine – albeit from dissenting and concurring opinions, hardly the strongest foundation from which an advocate would urge the adoption of such an interpretation – Murphy’s theory did not go unnoticed by practitioners who argued cases before the Court during the years preceding *Bolling*.<sup>174</sup> In several civil rights and liberties cases challenging federal racial discrimination, advocates cited Justice Murphy’s opinions in the *Japanese-American Cases* and *Steele* to support their arguments for Supreme Court adoption of the Court to adopt Fifth Amendment Equal Protection.

In *Korematsu*, the appellant argued that the exclusion program “den[ie]d [Fred Korematsu] the equal protection of the laws which is implicit in the due process clause of the 5th Amendment.”<sup>175</sup> Although this brief did not cite to *Hirabayashi* at all, *amicus curiae* briefs filed on behalf of Korematsu did cite the Murphy concurrence. The American Civil Liberties Union’s brief argued that “the classification of citizens based solely on ancestry is a denial of due process and is forbidden by the Fifth Amendment.”<sup>176</sup> Although it recognized that the Fifth Amendment contains no equal protection clause, the ACLU contended that

[n]evertheless, the due process clause of Fifth Amendment does limit the power of the Federal Government in respect to classification. (See *Detroit Bank v. United States*, 317 U.S. 329, 337, and cases cited). In the *Hirabayashi* case this Court recognized that classification on racial grounds is ordinarily arbitrary. But the Chief Justice concluded that the fact of racial ancestry was relevant so as to justify the imposition of a curfew order on citizens of Japanese origin only. But he was careful to point out that the

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173. FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 395.

174. 347 U.S. 497 (1954).

175. See Brief for Appellant at 48, *Korematsu v. United States*, 323 U.S. 214 (1944).

176. See Amicus Curiae Brief of the American Civil Liberties Union at 6, *Korematsu v. United States*, 323 U.S. 214 (1944).

Court did no more than determine the circumstances afforded a reasonable basis for the action taken in imposing a curfew:

We decide only that the curfew order, as applied, at the time it was applied, was within the boundaries of the war power.

*And Mr. Justice Murphy, specially concurring, said that the decision then being rendered went "to the very brink of constitutional power."<sup>177</sup>*

The Japanese American Citizens League's amicus brief for *Korematsu* also relied heavily on Murphy's *Hirabayashi* concurrence to make its case against relocation, quoting extensively his "brink of constitutional power" language and the Justice's skepticism as to the "reasonableness of the [curfew program]" in its Fifth Amendment Equal Protection argument.<sup>178</sup>

In *Steele*, Charles Hamilton Houston, the famous NAACP lawyer arguing for the appellant, stated that "the [Railway Labor] Act should be so interpreted to avoid the necessity of deciding the constitutional question that he also had presented."<sup>179</sup> The constitutional argument was that "unless the grant of power is to violate both the Fifth and Thirteenth Amendments and place the Negro firemen in economic serfdom to the Brotherhood, the grant must be subject to constitutional restraints."<sup>180</sup> Thus, Houston did not urge the Court to adopt a Fifth Amendment Equal Protection guarantee against the federal government and, therefore, Murphy's *Hirabayashi* concurrence was not mentioned. Houston probably chose this more conservative, *Ashwander*-type of argument because he was more concerned simply with winning Bester William Steele's specific case than obtaining a broader doctrinal victory.<sup>181</sup>

However, whatever doubts Houston might have had about the doctrine were erased when, four years later, he argued *Hurd v. Hodge*<sup>182</sup> before the Court. *Hurd*, a companion case to *Shelley v.*

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177. *Id.* at 6-7 (emphasis added).

178. Amicus Curiae Brief of the Japanese American Citizens League at 5-6, *Korematsu v. United States*, 323 U.S. 214 (1944).

179. See Jack Greenberg, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2161, 2164 (1998).

180. Brief in Support of Petition for Writ of Certiorari at 17, *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192 (1944).

181. For an excellent discussion of *Steele*, and particularly Murphy's concurrence, see J. Clay Smith and E. Desmond Hogan, *A Tribute to Charles Hamilton Houston: Remembered Hero, Forgotten Contribution: Charles Hamilton Houston, Legal Realism, and Labor Law*, 14 HARV. BLACKLETTER J. 1 (1998).

182. 334 U.S. 24 (1948).

*Kraemer*,<sup>183</sup> challenged racially restrictive covenants in the District of Columbia, where the Fourteenth Amendment's Equal Protection Clause had no application. In urging the Court to overturn the restrictive covenants on Fifth Amendment Equal Protection grounds,<sup>184</sup> Houston's brief argued:

The opinions of this Court, particularly in recent years, have eloquently expressed the national policy against racial discriminating. Illustrative are the following decisions: *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 203: ". . . discriminations based on race alone are obviously irrelevant and invidious." Justice Murphy concurring (at p. 208):

"The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed, or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of the Constitution that abhors it, to expose and condemn it whenever it appears in the course of a statutory interpretation."<sup>185</sup>

The brief also quoted, among others, Justice Black's and Chief Justice Stone's respective statements condemning racial discrimination in *Korematsu* and *Hirabayashi*.

In his *Hurd* reply brief, Houston continued to rely on Murphy's concurrence in *Steele* to support his Fifth Amendment Equal Protection argument. The brief stated that "[f]reedom from racial discrimination by governmental power is a field especially protected under our Constitution."<sup>186</sup> A footnote to this statement followed the same pattern as the original brief, citing Black and Stone's *Korematsu* and *Hirabayashi* statements, and then citing both Stone and Murphy's *Steele* opinions.<sup>187</sup>

*Hirabayashi*, *Korematsu*, *Endo*, *Steele*, and *Hurd* are the only cases that came before the Court challenging federal racial distinctions prior to *Bolling*, and thus the only cases in which the challengers to the distinctions argued for the adoption and application of a Fifth

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183. 334 U.S. 1 (1948). *Shelley* addressed state court enforcement under the Fourteenth Amendment's Equal Protection Clause of the once widely used practice of restrictive covenants, agreements among property owners to exclude persons of designated races. See Gunther, *supra* note 16, at 899.

184. Houston's Fifth Amendment Due Process argument centered on a deprivation of the rights of white sellers' and black buyers' of property. The racial component to this argument is the key to it, so although Houston did not make his Fifth Amendment argument in the explicit terms of equal protection guarantees through the Due Process Clause, there can be no mistaking that this is what he was really doing.

185. Brief for Appellant at 117, *Hurd v. Hodge*, 334 U.S. 24 (1948).

186. Reply Brief for Petitioners at 16, *Hurd v. Hodge*, 334 U.S. 24 (1948)

187. See *id.*

Amendment Equal Protection guarantee.<sup>188</sup> With the exception of *Hurd*,<sup>189</sup> the contributions of Justice Murphy to the legal discussion of

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188. In *United States v. Petrillo*, 332 U.S. 1 (1947), the respondents “contended that the statute Communications Act of 1934, 47 U.S.C. § 506, denies equal protection of the laws to radio-broadcasting employees as a class, and, for this reason, violates the due process clause of the Fifth Amendment.” There was no citation here to any of the Murphy opinions above to support this claim, although Petrillo’s brief did cite *Yount*, *supra* note 21, and Stone’s *Hirabayashi* language that the Fifth Amendment restrains “such discriminatory legislation by Congress as amounts to a denial of due process.” Brief for Appellee at 61, *United States v. Petrillo*, 332 U.S. 1 (1947). The fact that this economic case did not cite Murphy doesn’t really detract from the importance of his opinions in leading to *Bolling* because, as continually stressed above, the distinction between economic cases and civil rights and liberties cases is key to understanding the difference between Murphy’s contribution to the doctrine, separating it from the *Detroit Bank* progeny that came before it. Additionally, Justice Black’s majority opinion explicitly rejected Petrillo’s Fifth Amendment Equal Protection argument, on the sound reasoning that “it is not within [the Court’s] province to say that because Congress has prohibited some [economic] practices within its power to prohibit, it must prohibit all within its power.” *Petrillo*, 332 U.S. at 8.

189. It should be noted that the *Hurd* Court declined Houston’s invitation to adopt Fifth Amendment Equal Protection, choosing instead to decide the case on statutory grounds in adherence to *Ashwander*. See *Hurd*, 334 U.S. at 30 (“Upon full consideration, however, we have found it unnecessary to resolve the constitutional issue which petitioners advance; for we have concluded that judicial enforcement of restrictive covenants by the courts of the District of Columbia is improper for other reasons hereafter stated.”).

Justice Murphy went along with this choice and joined Chief Justice Vinson’s majority opinion. Why did he pass up this golden opportunity to make another strong push for the adoption of the Fifth Amendment Equal Protection, especially in this case where racism was just as “virulent,” as it had been in *Steele*? Professor Gressman, in retrospect, perhaps has provided the best answer: “I can only guess, at this late date, that Murphy did not want to disturb or weaken the effect of a 6-man decision, which constitutes a quorum of the Court. 3 Justices were out of the case. [Justices Rutledge, Jackson, and Reed all recused themselves from the case]. These opinions were written by Vinson’s clerk, Francis Allen. . . We thought then, and I think now, the *Shelley* and *Hurd* opinions were the best that could be had at this point in time.” Letter from Eugene Gressman to MJP (December 31, 1998) (on file with author). Certainly, as shown by his decision to concur rather than dissent in *Hirabayashi* in part because of his concern for Court unity, Murphy was willing at times to subordinate his desire to write separately even though he believed the Court hadn’t condemned the challenged racism in strong enough terms. It could also be that Justice Murphy, remembering the violent rage that race and housing incited during the infamous Sweet trials which he presided over back in Detroit in 1925-26, was even more attuned to the need of the Court to provide a united front on this volatile issue. See SIDNEY FINE, FRANK MURPHY: THE DETROIT YEARS 145-70 (1975). As Professor Gressman reflected upon Murphy’s death: “It was a source of great satisfaction to him that the Court met the issue squarely and was able to present a united front against the use of the judicial process to effectuate such a blatant racial discrimination.” See Gressman, *A Preliminary Appraisal*, *supra* note 13, at 36. Finally, Murphy suffered from numerous illnesses which caused him to miss a great deal of the 1947 and 1948 terms. This “reduced his productivity and left him a rather frustrated justice. . . . He wrote only 18 of the 224 Court opinions during these terms, as well as 15 dissents and 3 concurrences.” FINE, THE WASHINGTON YEARS, *supra* note 15, at 485. Thus, one can speculate that Murphy’s poor health may have contributed to his failure to independently advocate the use of the Fifth Amendment Equal Protection in *Hurd* as he had in the *Japanese-American Cases* and *Steele*.

Fifth Amendment Equal Protection in these important cases, while perhaps not rising to the level of substantial, were not entirely negligible. Legal advocates, the media, and court watchers in general noticed, if not his specific argument that the doctrine should be adopted, at least his unwillingness to allow the federal government or those acting under the authority of federal law to escape the duty of providing equal protection of the laws for all racial minorities.<sup>190</sup> Murphy thus deserves at least some credit for influencing the continued vitality of the doctrine leading up to its eventual adoption in *Bolling*.

Finally, and perhaps most importantly, Justice Murphy had an unmistakable influence – indeed a strong case can be made that he had the most influence of any justice – on the briefs filed in support of Spotswood Thomas Bolling, the petitioner challenging segregation of the District of Columbia’s public schools in *Bolling v. Sharpe*. Murphy’s opinions in the *Japanese-American Cases* are cited four times by the NAACP brief – more than any other Supreme Court Justice’s opinion – to support the NAACP’s contention that segregation in the District was unconstitutional.

In the brief’s Fifth Amendment Due Process passage, the brief’s first and arguably most important argument, the NAACP asserted: “One of the constitutional guarantees, which petitioners may not lawfully be deprived of the benefit of, is that as citizens no distinctions be made between them and other citizens because of race or color alone.”<sup>191</sup> The brief supported this position by citing citations to Chief Justice Stone’s and Justice Murphy’s *Hirabayashi* opinions:

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190. For example, the Frank Murphy Papers contain a letter sent to Chief Justice Stone from a St. Louis attorney which contained the following commentary on *Hirabayashi*:

With all due respect to you, Mr. Chief Justice, and to the Court, I must say that I find the Court enunciating in this case a most amazing doctrine for application to the relation between the Federal Government and its citizens.

On [page 100 of the opinion], I find the Court, through you, stating this principle:

“Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.”

I agree with what Mr. Associate Justice Murphy said [on page 110 of the opinion]: “Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war.”

Letter from William L. Mason to Harlan Fiske Stone (July 24, 1943) in FM Papers, Reel 127.

191. Brief for Petitioners at 11, *Bolling v. Sharpe*, 347 U.S. 497 (1954).



This Court, in *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) said:

“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection . . .”

In that same case, in a concurring opinion where this Court upheld the deprivation of the liberty of 70,000 under a war-time curfew law, Mr. Justice Murphy said at page 111:

“The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour – to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. . . .”<sup>192</sup>

Thus, Murphy’s opinion – in addition to Chief Justice Stone’s – is expressly and heavily relied on in the first major argument of Bolling’s brief. There is simply no plausible way that Chief Justice Warren could have avoided noticing this citation and, thus, his failure to mention Murphy’s opinion in *Bolling* can not be dismissed as a mere accident or oversight.<sup>193</sup>

192. *Id.* at 11-12.

193. The brief immediately followed this quote with the following argument: “Another constitutional guarantee, which minor petitioners may not lawfully be deprived of, is the right to go to Sousa Junior High School without any limitations based solely upon race or color.” To support this somewhat attenuated right-to-travel contention, the NAACP again relied on Justice Murphy:

Mr. Justice Murphy, in a concurring opinion in *Ex Parte Endo*, 323 U.S. 283, 308 (1944), said:

“For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction.”

In the instant case minor petitioners would have a right to go to Sousa Junior High School but for respondents’ action in excluding them solely because of their race or color, and action forbidden by the due process clause of the Fifth Amendment.

*Id.* at 12.

Later in its brief, the NAACP brief twice cited Murphy’s concurrence in *Oyama v. California*, 332 U.S. 633 (1948), a challenge to California’s alien land exclusion law, twice. The

Moreover, the NAACP concluded its brief with this strong argument:

Government action has passed beyond the brink of constitutionality when it imposes disabilities upon Negro people, loyal in war and peace, native born citizens, limiting their liberty of choice of schools solely because of their race or color. This Court has approved of comparable federal action only when the fate of the Nation was at stake, and even then, it subjected the Government's action to a searching inquiry and laid down definite standards which the Government was required to meet. The actions of respondents in the instant case not only were not taken under such perilous circumstances, but did not meet even the minimum standards set for imposing racial distinctions under those conditions.<sup>194</sup>

It is difficult to overlook the striking similarity this language bears to Murphy's *Hirabayashi* and *Korematsu* opinions. Clearly, the NAACP borrowed Murphy's "brink of constitutionality" metaphor from those opinions and used it to drive home its argument that segregated schools in the District of Columbia violated the Fifth Amendment.<sup>195</sup>

Thus, Justice Murphy's influence is evident in both the opening and closing arguments of the NAACP brief. Murphy's influence could

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first supported its argument that segregation on the basis of race constituted an arbitrary punishment on African-American children on account of their color: "Mr. Justice Murphy, in a concurring opinion in *Oyama v. California*, *supra* observed that no rational basis for legislation existed where laws discriminating against citizens were motivated by racial hatred and intolerance." *Id.* at 45.

The second *Oyama* reference was included in the NAACP's argument that segregation violated Articles 55 and 56 of the United Nations Charter:

In one of the concurring opinions, Mr. Justice Murphy, with whom Mr. Justice Rutledge joined, outlined the discriminatory aspects of the statute, examined the embarrassing history, and stated at page 673:

"Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

"And so in origin, purpose, administration and effect, the Alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations. . ."

*Id.* at 57-58.

194. *Id.* at 65.

195. See *Hirabayashi*, 320 U.S. at 111 (Murphy, J., concurring) ("In my opinion, this [ancestry-based curfew restriction] goes to the very brink of constitutional power."); *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting) ("Such an exclusion [of all persons of Japanese ancestry] goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.").

not have escaped Chief Justice Warren as he – with advice from Justice Black – wrote his *Bolling* opinion.<sup>196</sup> Nothing could make the point more readily apparent, despite the absence of any direct citation to him in *Bolling*, than the NAACP's heavy reliance on Justice Murphy that Murphy deserves at least some credit for “point[ing] the way to the adoption by the Court of the doctrine of fifth amendment equal protection.”<sup>197</sup>

#### IV. Why Justice Murphy?

It really should come as little surprise that Frank Murphy was among the first Supreme Court Justices to suggest and then actually apply a Fifth Amendment Equal Protection guarantee against federal invasions of civil rights. In his personal life and professional career, Murphy had many experiences from which to draw a healthy distrust of government oppression. In fact, his fierce protection of vulnerable racial and ethnic minority groups was a staple of his entire public life. Thus, when given the opportunity to use the Constitution to extend equal protection of law to Japanese-Americans and African-Americans, Justice Murphy was unlikely to allow the lack of an express provision in the Bill of Rights guaranteeing such equal treatment to prevent him from finding a way to guarantee equal protection for all Americans.<sup>198</sup>

##### A. Frank Murphy: The Progressive Politician

Murphy's heritage would not allow him to “remain silent in the face of wrong.”<sup>199</sup> His great-grandfather was accused of insurrection and hanged by the British, his paternal grandparents were “Forty-Eighters” from County Mayo, and his father, a Democratic lawyer in

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196. Perhaps it should be noted that Murphy's opinions apparently were not discussed in either of *Bolling's* two rounds of oral argument before the Court, although the NAACP counsel expressly discussed the *Japanese-American Cases* in at least the first argument before the Vinson Court in 1952. See Kluger, *supra* note 25, at 577-80; 676-77. This really doesn't detract from the argument that Warren consciously ignored Murphy's opinions, since the written briefs have always taken precedence in importance over oral arguments according to Court experts.

197. Karst, *supra* note 23, at 544.

198. Many of the following observations have already been identified by other commentators trying to explain why Justice Murphy took the positions he did in these and other cases. Some of the more notable ones, in addition to Professor Fine's exhaustive biography – every fiber of it justifying the results reached in these cases, one could argue – are IRONS, *supra* note 7, at 242-43; Scanlon, *supra* note 14, at 8-13; Kerr, *supra* note 70, at 12-14. Thurman W. Arnold, *Mr. Justice Murphy*, 63 HARV. L. REV. 289, 290-92 (1949).

199. HOWARD, *supra* note 15, at 6.

the Republican-dominated town of Sand Beach, Michigan,<sup>200</sup> was jailed as a youth in Canada for participating in the Fenian disturbances of 1866.<sup>201</sup> His mother's devout Catholicism instilled a zealous sincerity in Murphy to put the Golden Rule into action, teaching him that "the most precious virtue of all is the desire to serve mankind"<sup>202</sup> and rearing him in an egalitarian tradition which "never forg[ot] the obligation of the strong toward the weak."<sup>203</sup>

Murphy implemented these ideals throughout his public life. Among other leaders in his era, it would be hard to find a more sympathetic fighter for the "down-trodden people and the people of the lower classes . . . [in] their struggles for social and industrial uplift"<sup>204</sup> than Murphy.<sup>205</sup> Shortly before he died, Murphy wrote: "Instead of children, which I have been denied, I have. . . a distressed minority group or an unhappy friend awaiting me. All of it sums up happiness to me. I love to help. . . ."<sup>206</sup> That affection was reciprocated by the people whom Murphy helped, as he always received electoral support from ethnic and racial minorities when running for office,<sup>207</sup> and praise from concerned organizations like the ACLU, NAACP, and United Jewish Appeal when serving as a Supreme Court Justice.<sup>208</sup>

While working as a young lawyer in Detroit, Murphy taught night school as part of the Americanization campaign undertaken by the

200. Now Harbor Beach, Michigan.

201. See HOWARD, *supra* note 15, at 4.

202. *Id.* at 5.

203. *Id.* at 6.

204. FINE, *THE DETROIT YEARS*, *supra* note 189, at 178.

205. Justice Frankfurter once compiled a list of "F.M.'s Clients" which humorously manifested this statement: "Reds, Whores, Crooks, Indians and all other Colored people, Longshoremen, M'gors and other Debtors, R.R. employees, Pacifists, Traitors, Japs, Women, Children, Most men." See Eugene Gressman, *The Controversial Image of Mr. Justice Murphy*, 47 GEO. L. J. 631, 639-40 (1959). The fact that this list comprehensively covers the litigants who Justice Murphy sympathized with in the cases discussed in this article is obvious.

206. FINE, *THE DETROIT YEARS*, *supra* note 189, at 178.

207. One African-American Michigan newspaper declared that "[it was] the duty of every Negro to vote and work for [Murphy's] re-election" in the 1938 gubernatorial race. See SIDNEY FINE, *THE NEW DEAL YEARS* 493 (1979).

208. Then-NAACP Special Counsel Thurgood Marshall echoed this in his tribute, *Mr. Justice Murphy and Civil Rights*, 48 MICH. L. REV. 745 (1950):

[I]n the field of civil rights, Mr. Justice Murphy was a zealot. To him, the primacy of civil rights and human equality in our law and their entitlement to every possible protection in each case, regardless of competing considerations, was a fighting faith. . . . But Mr. Justice Murphy's orientation in matters of civil liberties was fixed. His sense of values was unchanging. He followed wherever his abiding conviction of the primacy of civil rights might lead.

*Id.*

Detroit Board of Commerce. His students were primarily Armenians of Delray. Murphy and his students inevitably formed a strong bond. Murphy helped familiarize his students with the mysterious English language and social and economic life in America. Murphy also defended his students' rights to preserve and observe their own ethnic customs and traditions.<sup>209</sup> The sentiments of his students can be symbolized by a letter from one of his former Armenian students which warmly concluded, "I know you my broder [sic]."<sup>210</sup>

As a judge in Detroit's Recorder's Court, Murphy always took special care to alleviate the hardships faced by those who came before him, especially for immigrants who did not speak English or fully understand the legal process. "handicap of the newcomer. . . [in the] uphill fight in any court of justice," especially for those immigrants who did not speak English or fully understand the legal process. Murphy's even-handedness towards all who came before him earned the respectful reputation as a "soft" judge, especially among the thousands of Poles, Hungarians, Italians, Armenians, and Jews of Detroit.<sup>211</sup> Murphy served on the advisory board of the Detroit Council for Protection of Foreign Born Workers in 1928, was instrumental in founding the American Anti-Bigotry Committee in the mid-1940s, and was a Christian spokesman for the United Jewish Appeal.<sup>212</sup>

Of all the disadvantaged minority groups, Murphy perhaps had the greatest empathy for African-Americans, because "they are so out of luck and get the worst of every deal."<sup>213</sup> Murphy recognized the unequal treatment blacks received, observing that "[t]he equal citizenship of the colored man, even though politicians throw him sops in the form of 'civil rights' statutes, is as much a myth today as in the days of slavery."<sup>214</sup> Murphy strove to change this reality: "To me, there is but the human family. Class and caste and race and creed I struggle to eliminate."<sup>215</sup>

In no case was this more apparent than in the famous Sweet trials of 1925-26, a murder trial of 11 African-Americans charged with shooting into a mob of whites that attacked a family who dared to integrate a white Detroit neighborhood. Young Judge Murphy pre-

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209. See FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 179.

210. SIDNEY FINE, *FRANK MURPHY: A MICHIGAN LIFE* 3 (1985). This student obviously meant "brother."

211. FINE, *THE DETROIT YEARS*, *supra* note 189, at 179.

212. See *id.* at 230-233.

213. *Id.* at 179.

214. *Id.*

215. *Id.*

sided over these highly-charged cases and his conduct earned him the praise of progressives throughout the country. Clarence Darrow, the lead defense attorney, called Murphy “the kindest and most understanding man I ever happened to meet on the bench” and remarked that “it was the first time in all my career where a judge really tried to help, and displayed a sympathetic interest in saving poor devils from the extreme forces of the law, rather than otherwise.”<sup>216</sup> David Lilienthal, editor of *Nation*, hailed the proceedings as “probably the fairest [trial] ever accorded a Negro in this country.”<sup>217</sup>

The Sweet trial endeared Murphy to Detroit’s black community. African-Americans were faithful Murphy supporters throughout his public career, helping Murphy form a winning coalition with ethnic groups and organized labor which—in turn—propelled him to victories in Detroit mayoral and Michigan gubernatorial elections in the 1930s. Murphy’s Depression-relief programs as mayor were among the most progressive in America, as he realized that the plight of out-of-work blacks was usually even worse than that of similarly-situated whites. Murphy formed a Colored Advisory Committee which monitored programs to ensure that relief was distributed without regard to “race, creed, or color.”<sup>218</sup> Though not without problems, the effort was fairly successful at limiting widespread discrimination in city government. Murphy’s gubernatorial administration included several African-Americans who held the highest-ranked positions in Michigan history and documented record numbers of blacks on the government payroll.<sup>219</sup> An African-American newspaper wrote of the Murphy governorship: “Never before in the history of America has a State Administration so clearly demonstrated by actual appointments that they believe in equal opportunity and fair recognition for all, regardless of race, creed, or color.”<sup>220</sup> Murphy later became an NAACP board member.

Murphy also served as President Roosevelt’s Governor General of the Philippines from 1932-36. These years helped shape his view of peoples of other cultures, especially those of the often misunderstood Asian lands. Murphy rejected colonial beliefs and practices and encouraged the Filipino movement for independence, successfully brokering the peaceful transfer to independence and earning the title of

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216. HOWARD, *supra* note 15, at 28.

217. FINE, *THE DETROIT YEARS*, *supra* note 189, at 163.

218. *Id.* at 287-288.

219. See FINE, *THE NEW DEAL YEARS*, *supra* note 207, at 278-79.

220. See *id.* at 279.

the people's "best advocate" and "truest friend."<sup>221</sup> Through his dedicated and just service in the Philippines, "Frank Murphy and the Filipino people established an affair of the heart from which neither fully recovered."<sup>222</sup> In addition, there was a fairly large Japanese population in the Philippines during Murphy's service and he developed a respect and understanding for the Japanese people that few Westerners possessed.<sup>223</sup>

Murphy's experience in the federal government also shaped his views of governmental power, and by the time he joined the Supreme Court, he was well-aware of the already-existing potential for federal agencies to abuse civil rights. As U.S. Attorney General from 1939-1940, Murphy presided during a period of considerable activity as Europe exploded into war and America felt internal and external pressures to get involved. Heading the "the largest law office in the world" and the chief enforcement arm of the federal government, Murphy had firsthand knowledge of the immense power the federal government wielded, as well as its potential for violating citizens' civil rights and liberties. However as Professor Fine pointed out, Murphy tried to balance the tension between national security and individual liberty:

"In a time of 'national emergency,'" the American Civil Liberties Union (ACLU) observed in its report for 1939-40, "the Department of Justice becomes at once the powerful agency of government either for the protection or invasion of civil rights." No one was more aware of this fact than Attorney General Murphy, who as a federal attorney in Michigan during the Red Scare of 1919-20 had seen the Justice Department trammel upon the rights of the individual. From the time war broke out in Europe and led to a "miniature Red Scare" in the United States until he left the attorney generalship, Murphy sounded one insistent note: the Justice Department would do what was necessary to protect the nation against espionage, sabotage, and internal subversion, but it would not violate the civil liberties of the individual in the process.<sup>224</sup>

Consistent with this theme, in February 1939, Murphy created the Civil Liberties Unit (CLU)<sup>225</sup> as a part of the Justice Department's

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221. *See id.* at 81-82.

222. HOWARD, *supra* note 15, at 117.

223. Murphy "thought that Americans were extraordinarily naïve about the Far East . . . . He was impressed with 'the energy of character, the discipline, capacity to sacrifice, [the] enterprise and above all the simplicity of life among the Japanese . . . .'" FINE, *THE NEW DEAL YEARS*, *supra* note 207, at 104.

224. FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 111.

225. The CLU was later renamed the Civil Rights Division, as it remains today.

Criminal Division. This unit's charge was "to study the relevant portions of the Constitution and the federal statutes, make appropriate recommendations regarding them, and prosecute violators of federally protected civil rights."<sup>226</sup> Murphy wanted to use the considerable power of the Justice Department to protect civil rights and liberties from state and local government incursions. He specifically pledged the federal government "to protect civil liberties for. . . the people of all racial extractions in our midst."<sup>227</sup> For example, Murphy authorized the Justice Department's *amicus curiae* brief on behalf of black Congressman Adrian Mitchell of Illinois, who challenged an Arkansas' "Jim Crow" statute – and the Interstate Commerce Commission's rejection of his challenge – which had required him to move from a well-equipped railcar he had boarded in Illinois into a car reserved for African-Americans once he crossed into Arkansas.<sup>228</sup> The Supreme Court unanimously struck down the Arkansas law.<sup>229</sup> Thus, the Murphy Justice Department, and the CLU in particular, manifested the Janus-faced role of Justice discussed in the ACLU report.

During Murphy's tenure at the Justice Department, he confronted many situations which put civil rights and liberties in jeopardy of federal violation. Murphy made many decisions regarding fingerprinting and wiretapping by federal agencies, both widely-used weapons of surveillance. When faced with these difficult and potentially dangerous decisions, Attorney General Murphy sometimes "proved to be something other than the uncompromising defender of civil lib-

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226. FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 79.

227. Fine, *Mr. Justice Murphy and the Hirabayashi Case*, *supra* note 14, at 201.

228. KLUGER, *supra* note 25, at 220. The Justice Department's brief made a very Murphy-like argument when it stated:

[T]he distribution of commerce powers between state and nation cannot proceed upon mathematical formulae. The task of this Court under the Constitution is one of adjustment and reconciliation. In performance of this task it cannot, of course, ignore other provisions of the Constitution. The Thirteenth, Fourteenth, and Fifteenth Amendments set up a constitutional policy against racial discrimination. *Those amendments have been held not to contain any specific prohibitions against racial segregation. But, while they fall short of a specific prohibition, they remain as a factor which must be weighed in the commerce clause adjustments.* There is, in other words, no occasion to permit state power to reach into the field of interstate commerce in order to accomplish an end at variance with basic policy of the Amendments.

Memorandum for the United States at 11-12, *Mitchell v. United States*, 313 U.S. 80 (1941) (emphasis added). As he would later do himself as a Supreme Court Justice, Murphy found a way to make an argument against racial discrimination without the textual grounding of a "specific prohibition" from the Constitution. Of course, by the time this case reached the Court, Murphy was already sitting on the bench and was part of the unanimous Court which struck the Arkansas statute down.

229. See *Mitchell v. United States*, 313 U.S. 80 (1941).



erties he had appeared to be” prior to assuming the reigns of Justice.<sup>230</sup> One can speculate that just a few years later, when considering whether other federal officials – men that he knew were not as committed in the first instance to the protection of civil rights and liberties as he was – should be restrained by an equal protection guarantee, Justice Murphy concluded that they must be. After all, if even he could be swayed into the use of such invasive techniques in the name of national security, then surely others could be, too. To guard against this, protections must be afforded to civil rights and liberties from the federal as well as state governments.

For example, although Murphy had a cordial public relationship with FBI Director J. Edgar Hoover, privately their association was “considerably strained.”<sup>231</sup> Towards the end of Murphy’s tenure as Attorney General, the strain increased “probably because of differences stemming from the federal government’s effort to combat subversion and potential subversion after war broke out in Europe.”<sup>232</sup> Hoover’s anti-subversion methods were more intrusive than Murphy would have liked, even as Murphy continued to authorize and publicly support the Director’s efforts. Moreover, shortly after President Roosevelt had appointed Murphy as Attorney General, Hoover had “opened a secret file” on Murphy.<sup>233</sup> Although it is not clear that Murphy knew about the file, it is probably safe to assume that he was attuned to the considerable power that Hoover and his agents held over he and other high-ranking governmental officials. Murphy’s awareness of Hoover’s broad power might have influenced the future Justice’s willingness to extend an equal protection guarantee against federal interference.<sup>234</sup>

Another federal body that Murphy pinpointed as a threat to the civil rights and liberties of all citizens was the House Un-American Activities Committee (HUAC), chaired by Rep. Martin Dies (D-

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230. FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 98.

231. *Id.* at 20.

232. *Id.*

233. *Id.*

234. It is interesting to note that the FBI took issue with many of the rationalizations for and conclusions of General DeWitt’s Final Report upon performing its own investigation which directly rejected the Final Report’s specific allegations of sabotage and espionage by Japanese-Americans, concluding that “the present military situation does not at this time require the removal of American citizens of the Japanese race.” Irons, *supra* note 7, at 44, 52, 280-81. Nevertheless, for purposes of this article, Murphy was certainly aware of other instances where the FBI did engage in constitutional violations of citizens’ rights to justify his skepticism and desire to designate an equal protection guarantee from the agency.

Texas). Murphy was a “prime target of the Dies Committee” during the Michigan gubernatorial campaign of 1938,<sup>235</sup> primarily because of his support for autoworkers during the great Flint Sit-Down Strike of 1937 and the subsequent endorsement his re-election campaign received from the Michigan Communist Party.<sup>236</sup> Only weeks before the election, HUAC held hearings on the Sit-Down Strike in Washington. The hearings were a carefully orchestrated political lynching, in which “[a] parade of witnesses, not a single one friendly to Murphy, testified [to] ‘effectively smear[ ]’ Murphy.”<sup>237</sup> Although Governor Murphy tried to deflect the attacks, denouncing them as “un-American and vicious . . . untruths”<sup>238</sup> led by a chairman who was “running errands for the same vested interests [who were] determined to block every progressive measure advanced by the New Deal,”<sup>239</sup> many believed that that the one-sided hearing “was a severe blow to the Murphy campaign.”<sup>240</sup> Indeed, Murphy lost the 1938 election. As Attorney General, he continued to be leery of Dies’ committee. Although he urged the Justice Department’s cooperation with HUAC and held his own healthy desire to protect America against threats posed by communism and fascism during the early years of WW II, Murphy “held Dies in low esteem and deprecated the investigation methods employed by his committee . . . in part because he feared that HUAC would seek to discredit liberal and progressive organizations and individuals, not just subversive elements.”<sup>241</sup> Thus, Murphy was personally aware of the political trauma HUAC could inflict on any citizen or group.

## B. Frank Murphy: The Supreme Court Justice

Simply pointing out “Frank Murphy the Progressive Politician’s” experiences does not sufficiently show how “Frank Murphy the Supreme Court Justice” was able to use Fifth Amendment Equal Protection as he did in the *Japanese-American Cases* and in *Steele*. Murphy, his jurisprudence shaped in great part by his personal experiences, still had to justify his constitutional approach and its results. Clues from his larger judicial philosophy can help explain his opinions in these cases.

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235. FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 99.

236. *See* FINE, *THE NEW DEAL YEARS*, *supra* note 207, at 499-500, 502-07.

237. *Id.* at 503.

238. *Id.* at 504.

239. *Id.*

240. *Id.* at 505.

241. FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 100.

In *Adamson v. California* (1947),<sup>242</sup> the Court – particularly Justices Frankfurter and Black – engaged in a famous dialogue regarding selective incorporation of the Bill of Rights into the Fourteenth Amendment’s Due Process Clause and the subsequent application of the Bill of Rights to the states. The case involved the Self-Incrimination Clause of the Fifth Amendment; no racial issues were at bar. In a brief concurrence, Justice Murphy stated his philosophy:

I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. *Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.*<sup>243</sup>

This famous statement<sup>244</sup> perhaps sheds some light on Justice Murphy’s willingness to find an equal protection guarantee “despite the absence of a specific provision in the Bill of Rights” or in the Fifth Amendment. As the Court had long pointed out, there was no explicit Equal Protection Clause that applied to the federal government. The Court, however, had long indicated that discrimination might be of “such an injurious character as to bring into operation the due process clause of the Fifth Amendment.”<sup>245</sup> Murphy, although not generally recognized as one of the Court’s more creative members,<sup>246</sup> took

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242. 332 U.S. 46 (1947).

243. *Id.* at 124 (emphasis added).

244. Professor Gunther has described this as something of a “having your cake and eating it too” position. Gunther, *supra* note 16, at 417 n.3. Professor Kerr dubbed it “a more expansive and flexible concept of due process, what might be called ‘total incorporation plus.’” Kerr, *supra* note 70, at 5. Professor Howard called this dissent “a remarkable performance,” and thoroughly discussed its ramifications. HOWARD, *supra* note 15, at 440-43.

245. *Currin*, 306 U.S. at 14.

246. In fact, his legal skills have never been accorded much acclaim by commentators, although most acknowledge that his heart was always in the right place and that his passion was matched by few. Professor Gressman’s 1959 article, *The Controversial Image of Mr. Justice Murphy*, *supra* note 201, is a spirited defense of Justice Murphy’s jurisprudence which answered many of the criticisms leveled at the Justice. If this article was perhaps understandably biased in favor of Justice Murphy – Murphy once called Gressman “one of the most superb characters that I have met in my lifetime,” FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 163 – then one should consider the account given by a perhaps more impartial observer, Professor Thurman Arnold, in appraising Murphy:

In connection with Justice Murphy’s skills as a legal craftsman, I recall being interviewed by a layman, a writer of national prominence, who was preparing an article on the Court. He had already seen a number of legal experts who had informed him that Justice Murphy was an accident that had happened on the Court. The judgment of the experts found the Justice wanting as a legal crafts-

the initiative to find this injurious discrimination. Using the wonderful vagaries of the Fifth Amendment's Due Process Clause, Murphy condemned the racism at issue in the *Japanese-American Cases* and *Steele* as unconstitutional, and perhaps his statement in *Adamson* provides something of a *de facto* explanation of how Justice Murphy was able to do manipulate these vagaries.

Moreover, as Professor J. Woodford Howard explained, Justice Murphy "doggedly, and sometimes savagely"<sup>247</sup> argued that "[n]othing short of 'constitutional condemnation,' he declared again and again, was fit to denounce evidence of racial discrimination at the bar."<sup>248</sup> Murphy developed the "special, symbolic theory to oppose racism"<sup>249</sup> in *Steele*, as discussed above, and in other cases like *Akins v. Texas* (1945),<sup>250</sup> *Malinsky v. New York* (1945),<sup>251</sup> and *Oyama v. California* (1948).<sup>252</sup> "As a rule," Murphy told his brother George, "the Court is ticklish about involving the Constitution if the case can be decided on any other grounds. For my part, I want to utilize the great charter wherever it is necessary to sustain the rights of man."<sup>253</sup> Murphy's crusade did not garner many corresponding majority opinions,

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man. I told him to read Murphy's opinions for himself. He came back astonished. He said that he had discovered that Murphy's writing was better than most judicial writing. It did not have the fault common to judicial opinions of spinning like a pinwheel, shooting off observations and formulas in all directions, and then slowly dying away to a conclusion. He told me that Murphy's opinions had a beginning and a middle and an end; that they were informed with a distinctive and personal style born of sincerity and conviction. He thought that as a writer Murphy had made an outstanding contribution to the Court; that he had an instinct for going to the substance of a controversy and that his conclusions were usually right.

Mr. Justice Murphy was a great judge because of three qualities. The first was simplicity; the second was courage; the third was insight into the substance of the problems of the changing times in which he lived.

Arnold, *supra* note 194, at 292-93. See also Professor Kerr's defense of Justice Murphy's jurisprudence, *supra* note 70, as well as John P. Roche's *The Utopian Pilgrimage of Mr. Justice Murphy*, 10 VAND. L. REV. 369 (1957).

247. HOWARD, *supra* note 15, at 353.

248. *Id.* at 352.

249. *Id.*

250. 325 U.S. 398, 407 (1945) (objecting to the Court's inaction before evidence of systematic inclusion of a single African-American to meet equal protection standards).

251. 324 U.S. 401, 433-34 (1945) (denouncing a prosecutor for making alleged racial references to a jury).

252. 332 U.S. 633, 650-74 (1948) (exposing the racism of underlying California's alien land exclusion law). See Randall Kennedy, *Justice Murphy's Concurrence in Oyama v. California: Cussing Out*, 74 TEX. L. REV. 1245 (1996). See also *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (denouncing the racial animosity behind a California law excluding fishing licenses from resident aliens).

253. HOWARD, *supra* note 15, at 353.

but, as Howard discussed, it did establish his position as one of the Court's greatest protectors of civil rights:

The fact that he spoke infrequently for the Court on a subject of such personal concern was not merely a function of style but that his colleagues saw the problems of judicial action as far more complex. . . [P]ositive judicial action clashed with competing constitutional values that could not be ignored. The federal government, after all, was a latecomer in pressing for racial equality in its own house, not to mention the states. Concepts and statutes required considerable stretching to provide even nonconstitutional remedies, much less constant constitutional relief. [For example,] "Here is gross wrong," the Chief Justice remarked in *Steele*. "The only question is can courts handle it." But for Murphy the very statement carried its answer. "The light of human freedom burns far too dimly to warrant ignoring any opportunity, however modest, to increase its intensity," he declared in an unpublished reply. "The least we can do is voice the Constitution's disapproval of such action." Because the cases [involving racial discrimination] invariably presented wrongs and opportunities for preachment Justice Murphy became a constant irritant on a Court engaged in probing the boundaries of its authority on race relations. Piercing the conscience with stubborn facts, he tore at traditional limits on federal judicial power.<sup>254</sup>

Professor Gressman echoed this general theme: "I think that Murphy's strong 'convictions'<sup>255</sup> about the unconstitutionality of race accounts for this phenomenon. Remember, this was the beginning of the modern resurrection of the Equal Protection Clause. The Court (and Murphy) was just beginning to apply that constitutional concept to the racial cases."<sup>256</sup> Justice Murphy took the lead in this "resurrection" and he did so with a vengeance, authoring "[t]he opinions in the United States Reports that condemn racist practices in America with the most candor, care, thoroughness, and passion."<sup>257</sup>

Finally, it was not surprising that in the *Japanese-American Cases* and in *Steele*, Murphy was the justice who embraced the doctrine of increased judicial scrutiny for governmental acts that affected "discrete and insular minorities."<sup>258</sup> Chief Justice Stone did not imple-

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254. *Id.* at 354-55.

255. "Convictions" was my term in one of my written questions to Professor Gressman.

256. Letter from Eugene Gressman to MJP (December 31, 1998) (on file with author).

257. Kennedy, *supra* note 252, at 1245. See also Frank, *supra* note 14, at 11 ("Murphy's castigations of 'racism' were part of a larger antipathy to what might be called 'groupism,' or the practice of holding one member of a group responsible for the independent deeds of another.").

258. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

ment his own theory, articulated first in his famous *Carolene Products'* Footnote 4.<sup>259</sup> As Professor Peter Linzer pointed out, Murphy's 1940 opinion in *Thornhill v. Alabama*,<sup>260</sup> a case that struck down an Alabama statute restricting labor picketing on First Amendment grounds, was "[t]he first use of Footnote Four by the Court."<sup>261</sup> Although *Thornhill* concerned paragraph one of Footnote Four, while the *Japanese-American Cases* and *Steele* concerned paragraph three, the fact is inescapable that Murphy took footnote four's strict scrutiny suggestion very seriously. Murphy did not hesitate in applying such a strict standard to these cases, even though he believed that none of these cases even passed the more deferential "reasonableness" test.<sup>262</sup> Stone's failure to apply his own standard is not particularly surprising either, as "[he] was not always on the same side as the justice citing the footnote"<sup>263</sup> when the footnote was expressly used, let alone when Footnote 4 tacitly underlied the opposing justice's opinion.

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259. While it is true that Murphy did not actually cite to Footnote 4 in any of these opinions, the obvious relevance of it to these cases is apparent. Indeed, several commentators have noted the regrettable irony of Stone's decisions, especially in *Hirabayashi*, with his authorship of the Footnote. See, e.g., FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 440; IRONS, *supra* note 15, at 334.

260. 310 U.S. 88 (1940).

261. Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 293 (1995).

262. See *Hirabayashi*, 320 U.S. at 112 ("It is also true that even the guaranty of equal protection of the laws allows a measure of reasonable classification. It by no means follows, however, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment. I think that point is dangerously approached when we have one law for the majority of our citizens and another for those of a particular racial heritage."); *Korematsu*, 323 U.S. at 235 ("In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshaled in support of such an assumption."); *Endo*, 323 U.S. at 307-08 ("As stated more fully in my dissenting opinion in *Fred Toyosaburo Korematsu v. United States*, 323 U.S. 214, racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people.").

263. Linzer, *supra* note 261, at 292-93.

### C. Summary: Justice Murphy and the *Japanese-American Cases* and *Steele*

So, by the time the *Japanese-American Cases* and *Steele* came before the Court, Justice Murphy had a wealth of personal and judicial experience to draw upon. Murphy had lived among and worked closely with Asian peoples while in the Philippines, including those of Japanese descent. Thus, his opinion was not clouded by stereotypes about Asians, unlike perhaps Chief Justice Stone's *Hirabayashi* opinion.<sup>264</sup> Instead, Murphy viewed Japanese-Americans in the same light as he viewed all ethnic minority groups in America: as a vital part of "the great American experiment" which had always won over its immigrant citizens' loyalty "when confronted with the normal attachment of certain groups to the lands of their forefathers."<sup>265</sup> Murphy's *Korematsu* dissent makes this point even more explicitly, condemning General DeWitt's Final Report as an "accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and eco-

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264. See, e.g., 320 U.S. at 96 ("There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population."). As is obvious from this statement, despite the influences of Justices Douglas, Reed, and Murphy, Stone's final opinion contained subtle affirmations of stereotypical views of Japanese-Americans.

265. *Hirabayashi*, 320 U.S. at 111. As Justice Frankfurter lobbied Murphy not to dissent in *Hirabayashi*, Murphy responded to one of Frankfurter's notes by stating: "Felix, I would protect rights on the basis of ancestry. But I would never deny them." FINE, *THE WASHINGTON YEARS*, *supra* note 15, at 442.

On the same day *Hirabayashi* was decided, Murphy's majority opinion in *Schneiderman v. United States*, 320 U.S. 118 (1943), restored the naturalized citizenship of a Communist Party official who had been stripped of his status because of his political activities. Murphy echoed this same belief in the American diverse union theory:

We are directly concerned only with the rights of this petitioner and the circumstances surrounding his naturalization, but we should not overlook the fact that we are a heterogeneous people. In some of our larger cities a majority of the school children are the offspring of parents only one generation, if that far, removed from the steerage of the immigrant ship, children of those who sought refuge in the new world from the cruelty and oppression of the old, where men have been burned at the stake, imprisoned, and driven into exile in countless numbers for their political and religious beliefs. Here they have hoped to achieve a political status as citizens in a free world in which men are privileged to think and act and speak according to their convictions, without fear of punishment or further exile so long as they keep the peace and obey the law.

320 U.S. at 120. Stone dissented from this opinion. Mr. Pickering noted this: "Murphy and Stone were completely at odds in the citizen denaturalization case, *Schneiderman v. U.S.* Murphy had a much more expansive approach to the concept of liberty in the 5th and 14th Amendments than did Stone, especially in time of war." E-mail from John H. Pickering to MJP (March 17, 1999) (on file with author).

nomic prejudices”<sup>266</sup> and concluding that the “questionable racial and sociological grounds”<sup>267</sup> relied upon by DeWitt did not prove “a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage.”<sup>268</sup>

Moreover, as Professor Gressman discussed, “Murphy’s background was such that he could fairly appraise the merits of a military viewpoint.”<sup>269</sup> Murphy had served in the Army during World War I, trained for active service during the summer of 1942, and had been involved in many matters of important military consequence during his time in the Philippines:

These experiences, plus his service in the Cabinet during 1939 and his close relationship with President Roosevelt, gave him more than an ordinary layman’s idea of matters which might affect the military security of the nation. He was therefore able to combine his devotion to civil liberties with a considerable understanding of military affairs. Refusing to accept blindly the judgments of military authorities where the Bill of Rights was infringed, he calmly brought to bear on these war-born issues an independent, informed intellect.<sup>270</sup>

Thus, Justice Murphy was not bedazzled by General DeWitt’s authority or expertise. He refused to defer his better judgment to DeWitt, a man who had testified in 1942 before a congressional committee that “[a] Jap’s a Jap. It makes no difference whether he’s an American citizen or not. There is no way to determine their loyalty.”<sup>271</sup> Murphy saw the virulent racism behind DeWitt’s military orders, and by *Korematsu* and *Endo*, Murphy refused to lend his name to the Court’s imprimatur upholding the West Coast wartime measures.

Similarly, his relationship with the African-American community and his lifelong crusade to ensure their equal protection of law almost certainly colored the passion with which he wrote his concurrence in *Steele*. Murphy had seen plenty of “utter disregard for the dignity and

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266. *Korematsu*, 323 U.S. at 239.

267. *Id.* at 236.

268. *Id.* at 239.

269. Gressman, *A Preliminary Appraisal*, *supra* note 13, at 37. Another example of this is found Justice Murphy’s dissent in *Falbo v. U.S.*, 320 U.S. 549, 561 (1944). The Court affirmed a Jehovah’s Witness minister’s conviction for refusal to obey an order of a local draft board to report for assignment to work of national importance. Murphy’s lone dissent concluded: “The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.”

270. Gressman, *A Preliminary Appraisal*, *supra* note 13, at 37.

271. NEWMAN, *supra* note 53, at 313.



well-being of colored citizens”<sup>272</sup> in his day and wanted the “ugly example[s] of economic cruelty against [African-Americans]”<sup>273</sup> at issue in *Steele* condemned by the Court on the strongest possible grounds. Just as he had done as judge, mayor, governor, and attorney general, Murphy sought to help vulnerable people “so out of luck and [who] get the worst of every deal.”<sup>274</sup>

And, finally, the Justice’s first-hand experience witnessing and exercising the vast power of the federal government raised Murphy’s awareness of the need to protect the civil rights and liberties of all Americans. His own civil rights and liberties were arguably violated by Hoover’s secret file and by the Dies Committee’s one-sided hearings in 1938. Moreover, as U.S. Attorney General, even Murphy had authorized federal surveillance techniques, such as finger-printing and wiretapping, that arguably violated other citizens’ civil rights and liberties. One can speculate that Justice Murphy, reflecting on his own experiences, could have no doubt that ethnic and racial minorities needed just as much protection from federal violations of their civil rights and liberties – provided out of necessity by the Fifth Amendment’s Due Process Clause – as they did from state governments as provided by the Fourteenth Amendment’s Equal Protection Clause. Thus, his use of such a doctrine to denounce in *Hirabayashi* and strike down in *Korematsu* and *Endo* General DeWitt’s racially discriminatory orders and, further, Murphy’s call to constitutionally condemn the Locomotive Brotherhood’s federally-sanctioned racism in *Steele* were merely par for the course, a course which Frank Murphy followed throughout his entire public career.

## V. Conclusion

“I’m not sure that Justice Murphy thought much about the Fifth Amendment having reversely incorporated an equal protection component. That notion did not come about until *Bolling v. Sharpe*, in 1954. And I recall that equal protection analysis was practically non-existent in the 1940s. But if you find some of the early doctrinal beginnings in Murphy’s *Hirabayashi* or *Korematsu* opinions, you would be doing a great service to a long-neglected Justice.”<sup>275</sup>

In many ways, this quote from Professor Gressman, Justice Frank Murphy’s longest serving law clerk at the Court and among his most

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272. 323 U.S. at 208.

273. *Id.* at 209.

274. FINE, *THE DETROIT YEARS*, *supra* note 189, at 179.

275. Letter from Eugene Gressman to MJP (March 20, 1998) (on file with author).

devoted admirers, sums up the point of this entire article. Even Professor Gressman, who knew Justice Murphy intimately and has written extensively about him, never quite recognized – as no other judicial opinion or academic commentator has – the wonderful contribution his Justice made to the doctrine adopted in *Bolling v. Sharpe*. It is probably true that, like Professor Gressman observed, Murphy did not actually think much about Fifth Amendment Equal Protection. Nor is it necessary to say that Murphy was the only justice to write on this issue or that he was a great pioneer in this field. At the same time, however, Justice Murphy's basic sense of right and wrong – symbolized in his *Japanese-American Cases* and *Steele* opinions – perhaps unknowingly but nevertheless importantly contributed to the dialogue about a doctrine that has evolved into an imperative protection for all Americans from their national government's excesses. Although his regrettable *Hirabayashi* concurrence was rightfully called “[t]he one discordant note in Murphy's opposition to racism,”<sup>276</sup> it was a critical part of a series of opinions which “pointed the way to the adoption by the Court of the doctrine of fifth amendment equal protection.”<sup>277</sup> Such recognition seems well-deserved for “a long-neglected Justice” like Frank Murphy.

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276. Gressman, *A Preliminary Appraisal*, *supra* note 13, at 36.

277. Karst, *supra* note 23, at 544.