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Linda C. Gugin

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Sherman Minton was not a great U.S. Supreme Court Justice, but he was far better than the image that scholars have created for him would indicate. Although there are exceptions, scholars generally consider Minton to have been an ineffective Justice who was put on the bench only because he was a crony of President Harry Truman. Indeed, the scholars who periodically provide a list of the "greatest" and "worst" Justices inevitably relegate Minton to the "worst" category. For example, Bernard Schwartz, who classified Minton as one of the ten worst Justices, said Minton "was below mediocrity as a Justice. His opinions, relatively few for his tenure, are less than third-rate, characterized by their cavalier approach to complicated issues."[1] This Article attempts to provide a fairer and more informed assessment of Minton's tenure as a Supreme Court Justice. It first will explore the shortcomings of judicial ranking schemes and then illustrate how the biases in these schemes have resulted in an unfair

* Professor of Political Science at Indiana University Southeast. The author wishes to thank Andrew J. Perryman for his valuable research assistance for this Article, and Jim St. Clair for his helpful comments and suggestions on earlier drafts of the Article. Also, the author is indebted to the Lilly Library at Indiana University for generously providing copies of letters from the Sherman Minton collection.

1. BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS 45 (1997).

evaluation of Minton's record. The remainder of the Article will provide a more in-depth analysis and explanation of Minton's philosophy of judicial restraint and how it guided his approach to judicial decisionmaking.

I. MINTON AND FLAWED RANKING SCHEMES

A. A Critique of Judicial Rankings

In 1978, Blaustein and Mersky reported the results of a poll of sixty-five experts.[2] Of the ninety-six Justices assessed, fifty-five were rated as average, six were ranked below average, and eight were deemed to be failures.[3] Together these Justices represented over seventy percent of the Justices who had served on the Court up to the time of the poll. Further undermining the validity of these ranking schemes is the fact that those asked to make the ratings were not given any standards by which to make their judgments.[4] A set of standards at least forces evaluators to look systematically at the subject rather than allowing them to rely on personal impressions.

Critics of judicial rankings point to the inevitable flaws in the ranking systems. At a Symposium on "neglected Justices" in April 2008, G. Edward White noted numerous methodological problems with the Blaustein and Mersky ratings. He concluded that they had "totaled up the grades each Justice had received, drawn lines between aggregate grades at various points, placed Justices in categories based on those lines, and then attempted, without much help from their respondents, to explain what their categories signified about judicial performance. The categories had not signified much."[5] Particularly pertinent in Minton's assessment is White's observation that the Justices who are listed as failures "were all twentieth-century figures, and all associated by respondents with 'anti-progressive' postures toward economic regulation, civil rights, or other forms of Warren Court activism."[6] Their careers, White noted, "had been recent enough to offend the sensibilities of late 1960s progressives and civil libertarians."[7] Mersky himself acknowledges the methodological

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2. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES (1978).

3. *Id.* at 38–40.

4. *Id.* at 36.

5. G. Edward White, *Neglected Justices: Discounting for History*, 62 VAND. L. REV. 319, 340 (2009).

6. *Id.* at 341.

7. *Id.* at 342.

shortcomings of rankings, pointing to the small number of observers who generate the rankings and the academic orientations of the evaluators—mostly law professors. Plus, Mersky says these ratings tend to have a liberal bias that could translate into a bias in favor of activist Justices,[8] which is relevant to their assessment of Minton, who was one of the Court's staunchest advocates of judicial restraint.

Labeling Justices as "failures" is a far more pernicious exercise than identifying those Justices who were great. The latter is a much more edifying effort, although it too suffers from the lack of agreed-upon criteria for determining what entitles a Justice to such a high status. For example, Justices Benjamin Cardozo, Felix Frankfurter, and William Douglas are included in some scholars' lists of the greatest Justices, but not in others. In a noteworthy effort, Robert C. Bradley[9] focused only on whether a Justice was great, not whether one was a failure, and broadened the base of respondents by including four different groups—judicial scholars, state judges, attorneys, and undergraduate and graduate students in law-related courses. The lists produced by each group had some similarities, but there were still significant differences.[10] Further, each group used different criteria for its rankings.[11] Despite Bradley's effort to be more systematic in developing his list of "great" Justices, his research suffers from the same methodological problems as the work by Blaustein and Mersky. As White notes, "The evaluative criteria applied by respondents remained elusive, and the tendency of evaluators to equate prominence in a Justice with familiarity with that Justice's career resurfaced."[12]

B. Bias of Rankings Against Minton

In 1997, Bernard Schwartz, in his *Book of Legal Lists*, included Minton as among the "ten worst Supreme Court [J]ustices."[13] According to Schwartz, Minton's shortcomings stemmed from his tendency to defer to the legislative branch of government and to read

8. Roy M. Mersky & Gary R. Hartman, *Rankings of the Justices*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 707, 707–08 (Kermit L. Hall ed., 1992).

9. Robert C. Bradley, *Selecting and Ranking Great Justices: Poll Results*, *in* LEADERS OF THE PACK: POLLS AND CASE STUDIES OF GREAT SUPREME COURT JUSTICES 1, 2–4 (William D. Pederson & Norman W. Provizer eds., 2003).

10. *Id.* at 6.

11. *Id.* at 4–6.

12. White, *supra* note 5, at 343.

13. SCHWARTZ, *supra* note 1, at 29.

statutes too literally at the expense of individual rights. Among the cases cited as evidence of Minton's failures are his rulings in *United States ex rel. Knauff v. Shaughnessy*, in which he upheld a government decision to preclude entry of a German-born wife of a military veteran into the United States without a hearing;[14] and *Adler v. Board of Education*, in which he upheld the constitutionality of a New York state law that barred members of subversive organizations from employment as teachers in public schools.[15] Also frequently cited is *United States v. Rabinowitz*, a case in which Minton upheld as "reasonable" a search incident to arrest of a stamp collector's offices without a search warrant.[16] These cases invariably are cited as reasons for Minton's failure as a Justice.

In truth, Minton's decisions, which are treated in depth below, may be hard to defend by today's standards, but they can be explained in a more objective way than his critics have considered them. Most of his criticized decisions came during the Cold War era and have to be evaluated against the backdrop of the time. To evaluate Minton on the basis of a few cases would be the equivalent of judging Oliver Wendell Holmes, who is always ranked among the greatest Justices, on the basis of his opinion in *Buck v. Bell*, which upheld a Virginia law that permitted the sterilization of individuals, including the "feebleminded."[17] It might also be like evaluating Hugo Black, also considered to be among the greatest Justices, for his support of the Court's unanimous opinion that the U.S. government had the power to relocate thousands of Japanese-Americans to internment camps during World War II because they were deemed to be a threat to the United States' war effort.[18]

Robert W. Langran[19] argues that some of the Justices who are considered "failures" have been treated more harshly than they deserve because of the biases of some evaluators. While Langran attempts to rectify the unjust ratings of several of the Justices, he concludes that Minton's status as a failure might have more merit. He claims that Minton authored only one major opinion: *Adler*, which was overturned fifteen years later.[20] Langran, ignoring his own advice for a more careful examination of a Justice's record, indicts Minton on

14. 338 U.S. 537, 546–47 (1950).

15. 342 U.S. 485, 496 (1952).

16. 339 U.S. 56, 66 (1950).

17. 274 U.S. 200, 207–08 (1927).

18. Korematsu v. United States, 323 U.S. 214, 219–20 (1944).

19. Robert W. Langran, *Why Are Some Supreme Court Justices Rated as 'Failures'?*, *in* 1985 Y.B. SUP. CT. HIST. SOC. 8–14.

20. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

various grounds: "[He] did little during his time on the Court, and he seemed to like practical politics more than he liked his time on the Court (he basically took the job as a favor to Truman, much like Byrnes and Roosevelt)."[21]

Langran's condemnation is easy to refute, especially as concerns the criticism that Minton did little on the Court. Minton was a hard worker who wrote his fair share of majority opinions that covered every category of law. During Minton's tenure on the Court, all of the Justices together wrote 590 majority opinions, including sixty per curiam opinions. The mean number of majority opinions for each Justice was 65.5. Minton wrote a total of sixty-four.[22] Further, he took on the task of writing some of the less glamorous opinions. For example, he wrote every opinion on tax lien cases heard during his time on the Court, sparing his colleagues this less-than-desirable task. He was praised in various scholarly publications for the quality of some of his opinions, including *Barrows v. Jackson*[23] and *Phillips Petroleum Co. v. Wisconsin*.[24] Those who have studied his judicial record in depth have reached conclusions about Minton's achievements on the Court that are far different from Langran's impressionistic assessment.[25]

Eschewing previous approaches to evaluating judicial performance, White offers another more positive and thoughtful approach to identifying "great" Justices in *The Great American Judicial Tradition*.[26] White constructs profiles of Justices spanning from John Marshall to each member of the Rehnquist Court and provides an in-depth discussion of their judicial philosophies and illustrative opinions. He identifies three minimum requirements of competent judging that transcend all great appellate opinions, thus offering the reader some standards to distinguish great Justices from lesser ones. White argues that these characteristics, "analytical

21. *Id.* at 14.

22. David N. Atkinson, *Opinion Writing on the Supreme Court, 1949–1956: The Views of Justice Sherman Minton*, 49 TEMP. L.Q. 105, 116 (1975).

23. 346 U.S. 249 (1953).

24. 347 U.S. 672 (1954).

25. LINDA C. GUGIN & JAMES E. ST. CLAIR, SHERMAN MINTON: NEW DEAL SENATOR, COLD WAR JUSTICE 277–82 (1997); Harry L. Wallace, *Mr. Justice Minton—Hoosier Justice on the Supreme Court*, 34 IND. L.J. 145, 145–46 (1959); David Neal Atkinson, Mr. Justice Minton and the Supreme Court, 1949–1956, at 351–59 (June 1969) (unpublished Ph.D. dissertation, University of Iowa) (on file with author); Elizabeth Ann Hull, Sherman Minton and the Cold War Court 304–11 (Nov. 1977) (unpublished Ph.D. dissertation, New School for Social Research) (on file with author).

26. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 473 (3d ed. 2007).

soundness, intelligibility, and rationality," transcend the great appellate opinions "in which judging has resembled high art and statecraft."[27] Without attempting to place Minton on the same plane as the Justices profiled by White, it is fair to say that he did achieve these characteristics at times in his opinion writing.

II. REASSESSING MINTON

A. Minton's Philosophy of Judicial Restraint

Any fair assessment of Minton's Supreme Court tenure first requires an explanation of his judicial philosophy of self-restraint. Perhaps more than any of the other Justices on the Court at the time or since, Minton was staunchly committed to a limited role for the Court. In this regard, he had much in common with Felix Frankfurter, with whom he served on the Vinson and Warren Courts, and John Marshall Harlan II, with whom he served one year on the Warren Court; however, Minton was less flexible in his approach to deciding cases than either Frankfurter or Harlan.

A brief exploration of the counter-majoritarian dilemma clarifies how Minton's self-restraint approach fits in the evolution of constitutional jurisprudence. The counter-majoritarian dilemma involves the question of whether judicial decisionmaking, insulated from public opinion, can be reconciled with democratic norms. The dilemma is most apparent when a small number of unelected judges invalidate laws made by elected representatives. As White points out, the counter-majoritarian dilemma has been cited as a justification for both judicial activism and judicial restraint. According to White, contemporary postures about the appropriateness of judicial intervention stem from the 1938 *Carolene Products* case,[28] which delineated the appropriate areas for activism or constraint. Under that framework, deference to legislatures was appropriate "when they sought to regulate the economy or redistribute benefits because legislatures are more accountable to the citizenry at large."[29] On the other hand, deference was not required "when legislatures specifically contravened enumerated constitutional rights, blocked the channels of political change by catering to established interest groups, or discriminated against powerless minorities."[30] The distinction lay in

27. *Id.*
28. United States v. Carolene Prods. Co., 304 U.S. 144, 151–54 (1938).
29. WHITE, *supra* note 26, at 461
30. *Id.*

the views about judicial competence: in the area of economic regulation, legislatures usually were presumed to be more competent than the Court, but when it came to issues of the Bill of Rights or equal protection under the Fourteenth Amendment, the Court was deemed to be more competent than legislatures. As a result, the Court applied stricter scrutiny to legislation that infringed on individual freedom or discriminated on the basis of race than to economic legislation, which required only a rational basis for the legislation in question.

In *Carolene Products*, the Court upheld a statute that prohibited filled milk because it was an adulterated food that was "injurious" to the public health.[31] The Court's deference to Congress was based on its belief that such regulation clearly came within the purview of the Commerce Clause and thus did not invade a power reserved to the states.[32] Nor did it deprive the petitioners of their property without due process.[33] Justices who relied on the view that the primary limits on judicial powers were "the institutional constraints of democratic theory" thought deference was justified.[34] Those who subscribed to the "living Constitution" interpretive theory considered legislative action to be permissible because "modern legislatures could experiment with reform legislation that had hitherto been thought to trespass on individual rights because changing social conditions demanded that response; courts should, in most cases, allow legislatures to perform that function."[35]

Although Minton was not on the Court in 1938, he certainly would have subscribed to the majority view in *Carolene Products*. His justification would have been rooted in both the institutional restraint theory (based on majoritarian theory) as well as the "living Constitution" theory. Minton's philosophy of judicial restraint erred on the side of deferring to legislative prerogatives when it came to economic regulation, as in *Carolene Products*, but he was far more reticent than activists to hold that judicial intervention was necessary to protect democratic values or to guard individual rights. The one exception to that view was in the area of civil rights, where Minton usually supported judicial intervention to protect minority rights.[36]

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31. 304 U.S. at 146, 154.

32. *Id.* at 151.

33. *Id.* at 148.

34. WHITE, *supra* note 26, at 462

35. *Id.*

36. Illustrative of his views on equal rights are his strong and early support in *Brown v. Board of Education*, 347 U.S. 483 (1954), overturning the "separate but equal" doctrine in education, *id.* at 495, and his opinion in *Barrows v. Jackson*, 346 U.S. 249 (1953), ensuring that

Minton sought to avoid the counter-majoritarian dilemma of judicial discretion by admonishing Justices not to substitute their views for those of duly elected officials. In choosing among the multiple justifications for judicial restraint, Minton generally subscribed to the theory that the nature of the Court itself dictated a need for restraint. Minton found it difficult to square unbridled judicial discretion with his populist conception of democracy that extolled the centrality of the common man. Minton firmly believed that in a democratic society in which judges are not popularly elected and enjoy life tenure, some kind of restraint must be imposed on the power of jurists. To Minton, the Constitution laid out such a scheme through separation of powers, which allocates to each branch a specific set of responsibilities. Legislatures are supposed to legislate, executives are supposed to enforce and implement, and courts are supposed to adjudicate. Accordingly, Minton thought that courts must be deferential to the exercise of the constitutional powers assigned to the legislative and executive branches as long as there were no clearly prescribed legal limits to the exercise of power by the other branches.[37] The efforts of legislatures and executives, especially Presidents, to address the concerns, needs, and security of the people had to be respected by judges in most cases.[38]

Minton's attraction to judicial restraint was deeply rooted in his experience as a senator when he vociferously objected to the Supreme Court's frequent invalidations of critical pieces of Roosevelt's New Deal legislation. Minton was elected to the Senate in 1934, and in the following two years, the Supreme Court declared twelve major pieces of legislation unconstitutional, effectively neutralizing most of the New Deal. As a senator, Minton eagerly assumed a key role in attacking the Court, and he was one of the most vocal supporters of Roosevelt's ill-fated Court-packing scheme. In fact, before Roosevelt introduced his plan, Minton proposed one of his own. His measure would have required a majority of seven Justices, instead of five, to declare an act of Congress unconstitutional.[39] Minton first introduced

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plaintiffs could not sue for damages when racial restrictive covenants were violated, *id.* at 259–60.

37. For a good example of Minton's deferential policy of judicial review, see *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), discussed below.

38. *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 496 (1952) (upholding a New York law that barred anyone who supported the overthrow of the government by force from state employment). *Adler* is discussed at length below.

39. Dean Dinwoodey, *Congress Awaits Next Court Move: Any Attempt to Curb Tribunal May Depend on Labor and Security Act Rulings*, N.Y. TIMES, Jan. 24, 1937, at 65. There had been earlier calls for a similar restriction on the Court. Senator William E. Borah of Idaho had introduced a bill in 1923 that would have required a seven-vote majority to declare an act of

his plan in a speech before the Federal Bar Association, which consisted of attorneys employed by the federal government. He said that "such regulation by Congress is logical and consistent with the mechanics of checks and balances and the philosophy upon which our form of government is constructed." He questioned whether it was "wise to place in the hands of five of nine men that constitute the Court, the absolute power to veto an act of Congress."[40] He noted several examples in which the Constitution requires an extraordinary majority to take action, including veto overrides, impeachment, and treaty ratification.

Before Minton formally introduced his bill, Roosevelt submitted his Court-packing scheme. The President proposed to expand the size of the Supreme Court for every Justice over the age of seventy, thus giving himself an opportunity to appoint several new Justices who would be more receptive to his policies. Minton subsequently abandoned his plan and fell in line supporting the President's proposal. One of the diehards to defend the plan to the bitter end, Minton was convinced that the Court had to be reined in, and if the Court would not do so itself, then it was up to Congress. In fact, Minton scoffed at the label of "Court-packing." He argued that the Justices who refused to retire were the ones "packing" the Court.[41] Of course, the scheme met with vehement opposition from Congress and from the larger public, but the idea of a limited judiciary remained an article of faith to Minton. One of Minton's former law clerks on the U.S. Supreme Court, Abner Mikva, who later became Chief Judge on the U.S. Court of Appeals for the District of Columbia, maintains that Minton's legislative experiences "did more to mold [Minton's] judicial philosophy than anything else in his career."[42]

Shortly after Minton lost his Senate seat in 1940, he was appointed by Roosevelt to the Seventh Circuit Court of Appeals. There he had an opportunity to apply his philosophy of judicial restraint. After taking his seat in 1941, Minton devoted the next eight years to practicing judicial restraint. Given the nature of the cases before the Seventh Circuit, the most common way he practiced his philosophy of

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Congress unconstitutional, and the House of Representatives once passed a bill to require a two-thirds majority.

40. Sherman Minton, Speech to the Federal Bar Association at Their Sixteenth Annual Dinner at the Mayflower Hotel, Washington, D.C. 5 (Mar. 4, 1936) (on file with the Vanderbilt Law Review and original available at the Lilly Library, Indiana University, Bloomington, Indiana).

41. GUGIN & ST. CLAIR, *supra* note 25 at 109.

42. Abner J. Mikva, Lecture on the 100th Anniversary of Minton's Birth at Indiana Southeast University: Sherman Minton: The Supreme Court Years 1 (Oct. 14, 1990) (on file with the Vanderbilt Law Review).

judicial restraint was the manner in which he interpreted congressional statutes to determine how they should be implemented. In one case, he dissented from the majority opinion because he thought it had ignored the wording of the controlling statute. Minton said:

> [The law] is plain and unambiguous, and the words eliminated by the majority are purposeful and full of meaning. As I understand it, it is not the business of courts to seek conflicts or ambiguities in statutes in order that we may rewrite a statute to our liking. It is our business to apply the statute as written . . . .[43]

On occasion, his strict interpretation of legislative language led Minton to uphold the power of government over the claimed rights of individuals while he was on the Seventh Circuit. One such case involved a German enemy alien whose deportation had been ordered by Attorney General Tom C. Clark because he was a threat to the public peace and safety.[44] The individual claimed he had been denied due process of law, but he lost his case before the district court. When the case was appealed to the Seventh Circuit, Minton sided with the district court and the attorney general. He declared that the only question before the court was whether the petitioner was an enemy alien, and "if he is, that ends the proceeding."[45] Minton said it was not for the court to decide whether "the country from whence he came is still at war with the United States or is still in existence as a sovereign power; that is the political question to be answered only by . . . the executive and legislative branches."[46] Minton thought the executive branch not only was more competent to decide this issue but clearly had the power to decide this type of question. The circuit court opinion foreshadowed how Minton would handle questions of statutory construction on the Supreme Court—as a strict constructionist with a strong deference to legislative and executive power. While his steady adherence to judicial restraint sometimes came at the expense of individual rights, that was not always the case. Instead, "his consistent adherence to judicial restraint caused him to rule both for and against business, for and against labor, for and against the rights of individuals. His rulings were as likely to displease liberals as conservatives."[47] Whatever the shortcomings of judicial restraint might be, Minton applied it about as faithfully, and some might say as rigidly, as anyone on the Court at that time or since.

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43. Adler v. N. Hotel Co., 175 F.2d 619, 622–23 (7th Cir. 1942).

44. United States *ex rel.* Hack v. Clark, 159 F.2d 552 (7th Cir. 1947).

45. *Id.* at 554.

46. *Id.*

47. GUGIN & ST. CLAIR, *supra* note 25, at 209.

B. On the Court

Minton was nominated to the U.S. Supreme Court by President Truman in 1949, following the death of Wiley B. Rutledge. He was Truman's fourth and last appointment to the Court. Significantly, he was the last member of Congress as well as the last New Dealer to be seated on the Court. Although his appointment was seen by many as an act of cronyism driven by partisan politics, this view ignores Minton's qualifications. For eight years he had proven himself as an appellate court judge and earned a reputation for being a hard worker. The volume of his opinions matched that of his colleagues, and he was recognized by those both on and off the appellate court for his adeptness in distilling complex, technical issues into comprehensible dimensions. Further, at the time he was nominated, he had more formal training in the law than any sitting member of the Court, having obtained a Master's in Law from Yale University School of Law.

The Court that Minton joined was made up mostly of New Dealers, including Hugo L. Black, Felix Frankfurter, Robert H. Jackson, Stanley F. Reed, William O. Douglas, Chief Justice Fred M. Vinson, and Tom Clark. The one exception was Harold H. Burton, a former Republican Senator who was Truman's first appointment to the Court. Despite the New Deal background of most of the Justices, they did not share a common judicial philosophy. Two factions existed on the Court. One was led by Black and Douglas, whose absolutist views of the First Amendment reflected the substantive due process theory; they favored judicial intervention to protect civil liberties and civil rights. The other faction included Frankfurter and Jackson, the Court's leading judicial-restraint philosophers. Frankfurter and Jackson promoted a balancing theory of rights that was consistent with the process theory of jurisprudence. That approach stressed the necessity of self-restraint on the part of Justices and relied on certain principles to limit and guide the Court in accepting and deciding cases. Among these principles was a requirement that the Court establish "preliminary classifications of controversies as unsuitable for 'judicial,' 'legislative,' 'executive' and 'administrative' decisions and their consequent allocation to the appropriate branches of government, with the judiciary recognizing its own limited jurisdiction."[48] Minton's views fit perfectly into this philosophical framework.

48. WHITE, *supra* note 26, at 273.

All of the Truman appointees were adherents of judicial restraint. Frequently joining this camp were Justices Jackson and Reed. Minton was closest to Chief Justice Vinson both philosophically and personally. His ascension to the Court assured Vinson of the majority he needed to move the Court away from its emerging role as a defender of individual rights over the government's interests in order and security, and toward a more process-oriented view of cases. Vinson's death in 1953 laid the foundation for a new direction for the Court, one that emphasized an "increasingly broad definition of rights attaching to American citizenship."[49] For Minton, this was a double-edged sword. To the extent that the Warren Court favored expanding rights for those disadvantaged by racial discrimination, Minton easily became a team player. However, when the expansion of rights came at the expense of governmental interests in the areas of public safety and security, Minton was increasingly at odds with the majority. Minton found himself more isolated as the Court became more activist. The situation was difficult for a Justice who was once described as having "elevated judicial restraint to a new high."[50]

The strain of fighting the tide of activism plus the toll taken by his poor health led Minton to retire from the Court. He wrote Truman a letter midway through his last Term on the Court explaining his decision to retire: "I am slipping fast," he said. "I find my work very difficult and I don't have the zest for the work I used to have."[51] He said that the pernicious anemia he had had for ten years "[had] sapped [his] vitality, especially mental."[52] Minton's replacement by William Brennan was highly symbolic of the tide of activism overtaking the Court. Brennan was instrumental in leading the Court toward a more activist approach on critical issues. One of the Court's most restrained Justices was replaced by one of the most activist, and the trend toward activism has continued ever since. The Warren Court, the Burger Court, and the Rehnquist Court all pushed the Court toward a more intrusive role in the political system.

The Rehnquist Court in particular was noted for asserting a more aggressive role for the Court in resolving critical constitutional issues. That Court was divided between those who espoused the "originalist approach" to constitutional interpretation and those who advocated the "living Constitution" approach. Although both of these

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49. *Id.* at 268.

50. GUGIN & ST. CLAIR, *supra* note 25, at 270.

51. Letter from Sherman Minton to Harry Truman (Dec. 27, 1955) (on file with the Vanderbilt Law Review).

52. *Id.*

approaches posit very different standards, neither view, as White notes, "is centered on the institutional considerations related to the counter-majoritarian difficulty. . . . [B]oth are capable of being radically activist. Neither is necessarily supportive of the canon of deference to other branch actors."[53]

This trend of judicial activism that has continued since Minton's departure from the Court makes him perhaps the last Justice to cling to judicial restraint despite the criticism it invited from a significant segment of the influential members of the scholarly community and even the mainstream media. It might be argued that John Marshall Harlan II, with whom Minton served briefly on the Warren Court, deserves the distinction as the last true advocate of judicial restraint. He clearly had a well-reasoned philosophy that led him to dissent against the excesses of the Warren Court's expansion of individual rights. But unlike Minton—who rarely could be accused of caring whether the outcome of a decision satisfied liberal or conservative values—Harlan's dissents bore an ideological tinge that was distinctly conservative. His disposition "represented a blending of standard caveats about the unrestricted exercise of judicial power that had characterized one strand of twentieth-century jurisprudence since Holmes, and his own personal suspicions of substantive liberalism."[54] Minton's lack of partisanship on the bench did little to increase the esteem in which judicial scholars held him or to affect their judgment that he was a failure as a Justice. Interestingly, other Justices with a more partisan bent than Minton—Douglas, for example—have not been relegated to the "failure" category.

III. A PRINCIPLED JUSTICE

Minton's nonideological approach to judicial decisionmaking was the result of three guiding principles: an almost unbending adherence to precedents, deference to the elected branches of government, and a literal interpretation of the Constitution and statutes. On occasion he might have deviated from these principles when he thought it necessary, but his overall record of decisionmaking and opinion writing was faithful to them.

53. WHITE, *supra* note 26, at xix.

54. *Id.* at 291.

A. A Commitment to Precedents

Minton attributed his reverence to precedents to the influence of William Howard Taft, one of his law professors at Yale who later became Chief Justice of the Supreme Court. Minton described Taft as being of the "bird dog" school regarding precedents. Taft's advice was to "find what the Court has said—get a 'hog' case and stick to it."[55] Minton acknowledged that perhaps his training was "too much in that school."[56] Minton's opinions indicate that he took Taft's advice to heart. One Minton biographer, David Atkinson, observed that "the degree of [Minton's] dependence on precedent . . . set him apart from most of his colleagues."[57]

Reliance on precedents is one of the hallmarks of Minton's opinions. This principle was not limited to one particular area of the law. He applied it in cases relating to national security, criminal procedure, minority rights, and interstate commerce. Minton's consistency in applying stare decisis was not related to any specific desired outcome that might have fit his personal ideological preferences. This consistency is very apparent in one of his most controversial cases, *United States ex rel. Knauff v. Shaughnessy*.[58] Ellen Knauff, a German war bride, was denied entry to the United States in 1948 because the Immigration and Naturalization Service considered her presence in the country to be "prejudicial to the interests of the United States."[59] She was given no notice nor afforded an opportunity for a hearing prior to being denied entry. The Immigration and Naturalization Service relied on an administrative regulation issued by the attorney general that allowed aliens to be excluded without a hearing. The attorney general acted pursuant to a congressional statute that authorized the President to establish "reasonable rules, regulations and orders" pertaining to the entrance of aliens during periods of national emergency.[60] Petitioning the Court, Knauff argued that the rule as applied in this case was not reasonable in view of the War Brides Act of 1945, by which Congress made it easier for wives of soldiers to enter the country as long as they

55. Letter from Sherman Minton to Felix Frankfurter (Jan. 18, 1960) (on file with the Vanderbilt Law Review).

56. *Id.*

57. David N. Atkinson, *From New Deal Liberal to Supreme Court Conservative: The Metamorphosis of Justice Sherman Minton*, 1975 WASH. U. L.Q. 361, 385–86.

58. 338 U.S. 537 (1950).

59. *Id.* at 540.

60. *Id.* at 541.

were "otherwise admissible under the immigration laws."[61] Knauff argued that the administrative regulations that barred her entry amounted to an unconstitutional delegation of congressional power and were therefore void.

Speaking for the Court's majority, Minton dismissed these claims. His opinion followed three of his most consistent practices—heavy reliance on precedents, deference to the authority of Congress and the executive branch, and emphasis on statutory interpretation—to resolve the issue. Minton duly noted precedents stipulating that aliens who seek admission to the United States may not do so under any claim of right. Rather, admission for aliens is a "privilege granted by the sovereign United States," he said, and it must be granted "in accordance with procedures that the United States provides."[62] Minton also used precedent to justify the delegation of power: "[T]here is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the United States."[63] This reasoning is consistent with Minton's intent to preserve the delineation of powers as laid out in the Constitution.

Having established the legitimacy of the executive to exclude an alien, Minton explained the necessity of judicial deference to legislative and executive authority. The ruling of the attorney general was "final and conclusive," he said, and "whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[64]

Knauff contended, and Minton rejected, that the War Brides Act required a hearing in her case because Congress intended that the special restrictions on the entry of aliens not be applied to war brides upon cessation of hostilities. She insisted that the President had, in fact, proclaimed an end to hostilities. Minton's construction of the War Brides Act was that the time frame in question was only for ascertaining the period in which the citizens must have served in the armed services for their spouses and children to be entitled to the benefits of the Act. Further, Minton cited precedent to confirm that a

61. *Id.* at 546

62. *Id.* at 542.

63. *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) and Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

64. *Id.* at 543.

state of war still existed at the time, and therefore the President's proclamation and the regulations were still valid under immigration law.

Minton dismissed the possibility of a conflict between the immigration statutes and the War Brides Act. He found nothing in the wording or history of the Act to indicate that Congress intended

> to relax the security provisions of the immigration laws . . . [nor] to permit members or former members of the armed forces to marry and bring into the United States aliens who the President [or his Attorney General] . . . found should be denied entry for security reasons.[65]

In his view, Congress was not compelled to spell out a specific formula to guide administrative decisionmaking in an area in which flexibility is needed. Drawing on two precedents, Minton said that "standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied . . . . Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[66]

Frankfurter wrote a strong dissenting opinion in which he chided Minton for his literal reading of the law. "The letter Killeth," he wrote, and "legislation should not be read in such a decimating spirit unless the letter of Congress is inexorable."[67] Rather than placing emphasis on the status of admission to the country as a "privilege," completely dependent upon the judgment of the executive, Frankfurter interpreted the intent of Congress as emphasizing the high regard that American society placed upon the family. He believed that the benefit was extended not so much to the alien but to the American husband, and having extended the benefit, Congress would not have allowed the privilege to be arbitrarily taken away. Minton would have required Congress actually to state such an intention. He would not read into the law a more desirable outcome to satisfy some personal preference.

Minton's reliance on stare decisis did not always result in the deprivation of rights. On one occasion, Minton artfully relied on a precedent to *create* other rights. *Barrows v. Jackson*[68] was in response to a loophole that resulted from the Court's 1948 decision in *Shelley v. Kraemer*, which held that state enforcement of racially restrictive covenants amounts to discrimination and thus violates the Fourteenth

65. *Id.* at 547.
66. *Id.* at 544.
67. *Id.* at 548 (Frankfurter, J., dissenting).
68. 346 U.S. 249 (1953).

Amendment.[69] Because the ruling limited only the enforcement by state courts, restrictive covenants were still legal, and those who entered into them could still sue violators for damages. *Barrows* involved such a suit. A white property owner sued another white property owner for violating the terms of the covenant by selling her property to a non-Caucasian. The first issue to be addressed was whether state courts could award damages in such cases. Minton concluded that they could not because it would constitute state action depriving non-Caucasians of equal protection of the law. The real crux of the case, however, was the issue of standing, since no non-Caucasian was directly before the Court claiming deprivation of a constitutional right. This question presented something of a dilemma for Minton because of precedents that "ordinarily preclude[d] a person from challenging the constitutionality of state action by invoking the rights of others."[70] Before a person could challenge the constitutionality of a statute, he had to show that "he himself is injured by its operation."[71] Minton, who generally was sympathetic to issues of racial discrimination, determined that the need to protect the fundamental rights of non-Caucasians outweighed the Court's traditional practice regarding standing.

The way out of the dilemma was another precedent that could be used to support standing in this case. The 1925 case of *Pierce v. Society of Sisters*[72] allowed private schools to challenge an Oregon law requiring all parents to send their children to public schools as a violation of the parents' constitutional rights. Although no parent affected by the statute sought redress from the Court, the schools were granted standing to assert their constitutional rights. Minton found *Pierce* to be analogous to *Barrows*. Minton thought that unless the litigant being sued was allowed to assert the rights of non-Caucasians who were not parties to the dispute, fundamental rights protected by the Constitution would be denied. However, concern about the possible expansiveness of his ruling led Minton to limit its application by reaffirming the Court's longstanding general practice of denying standing to those seeking to assert constitutional rights of third parties. What distinguished this case was its "unique situation," wherein the action of the state court might result in the denial of constitutional rights, making it impossible for third parties to assert their grievance before any court.

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69. Shelley v. Kraemer, 334 U.S. 1, 18–21 (1948).

70. *Barrows*, 346 U.S. at 255.

71. *Id.*

72. 268 U.S. 510 (1925).

Minton's skill in handling the issues in *Barrows* is almost never mentioned in the various contemporary assessments of his performance, but at the time, he was praised in law review articles and by his fellow Justices.[73] Burton called it a "difficult constructive job admirably done"; Black, who had assigned the opinion to him, called it a "firm, forthright opinion"; and Frankfurter wrote that it was a "true, lawyer-like job."[74]

Although Minton generally was not disposed to dissent, he did not hesitate to do so when he thought the majority had misread precedents. On occasion, he dissented from the majority's interpretation of precedent in antitrust cases. While on the Seventh Circuit, Minton developed a reputation for interpreting the Sherman Act and other antitrust legislation broadly, showing deference to congressional legislation, and upholding most forms of government regulation of business.[75] Monopolistic practices were especially suspect in his eyes. As an appellate judge, he wrote such a disproportionate number of opinions in this area that *United States Law Week* described antitrust legislation as the primary emphasis of his eight-year tenure on the circuit court.[76]

On the Supreme Court, Minton generally followed this pattern of broad application of antitrust regulations. He usually joined the majority in holding antitrust laws applicable to various business practices.[77] On occasion, however, he interpreted antitrust regulations narrowly. In 1922, in *Federal Baseball Club v. National League*,[78] the Court had ruled that baseball competitions were not commerce. Therefore they were purely a state matter and exempt from federal antitrust law. Minton, who shared a keen interest in baseball with other members of the Court, including Chief Justices Vinson and Warren, was in complete agreement when the Court reaffirmed, in a

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73. Comment, Barrows v. Jackson, *346 U.S. 249 (1953)*, 1953 WASH. U. L.Q. 439, 442; Recent Case, *Vendor May Defend Damage Action for Breach of Restrictive Covenant by Raising Constitutional Rights of Non-Caucasian Vendees*, 102 U. PA. L. REV. 134, 136 (1953).

74. Letter from Hugo Black to Sherman Minton (May 29, 1953) (on file with the Vanderbilt Law Review); Letter from Harold Burton to Sherman Minton (May 18, 1953) (on file with the Vanderbilt Law Review); Letter from Felix Frankfurter to Sherman Minton (May 16, 1953) (on file with the Vanderbilt Law Review).

75. For a discussion of Minton's opinions about economic regulation on the Seventh Circuit, see GUGIN & ST. CLAIR, *supra* note 25, at 185–98.

76. *Fourth Truman Appointee Confirmed*, 18 U.S. L. WK. 3097, 3097 (1949).

77. *See, e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115, 118–19 (1954) (applying antitrust regulations to a bread seller's practice of cutting prices in intrastate transactions but maintaining prices in interstate transactions); United States v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 485, 489–92 (1950) (holding that the Sherman Act applied to price fixing of real estate agent commission rates even where no interstate commerce was involved).

78. 259 U.S. 200, 208–09 (1922).

per curiam decision, baseball's exemption from interstate commerce in 1953.[79] However, two years later he disagreed when the Court refused to grant professional boxing the same exemption. He cited the two baseball precedents jn which the Court held that " 'personal effort,' not related to production, is not a subject of commerce . . . and since the baseball game was an exhibition wholly intrastate, there could be no trade or commerce among the states."[80] The travel from one state to another to play the game was considered to be incident to the exhibition. Minton did not see the factual difference between baseball and boxing. He said:

> When boxers travel from State to State, carrying their shorts and fancy dressing robes in a ditty bag in order to participate in a boxing bout, which is wholly intrastate, it is now held by this Court that the boxing bout becomes interstate commerce. What this Court held in the Federal Baseball case to be incident to the exhibition now becomes more important than the exhibition. This is as fine an example of the tail wagging the dog as can be conjured up.[81]

Minton also dissented in a case about practices of a local plasterers association that was charged by the federal government for restraint of trade.[82] The majority thought that the practices of the local association, which controlled about seventy percent of the contracting business for plastering in Chicago, were restraining trade because they prevented out-of-state contractors from doing business in the Chicago area. The Court's majority determined that the plasterers' activities affected interstate commerce because a significant proportion of the materials used by the plasterers came from other states. Minton, however, was not convinced. He attacked the precedents cited by the majority as not being analogous to the plasterers' case. To support his own opinion, he pointed to the rulings in *Federal Baseball* and *Toolson*: "Contracting to plaster a building in Chicago by an outstate contractor is not commerce, even if the contractor did intend to bring his men from outstate, any more than bringing men from one state to another to play baseball is commerce."[83] Minton agreed that the flow of materials into the state constituted commerce, but he reasoned that plastering a building was purely local and thus not subject to federal regulation.

Minton's heavy reliance on precedent was consistent with his conception of the limited role of the Court. To him, this had the virtue of guaranteeing certainty and predictability in the law. This

79. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 356–57 (1953).

80. United States v. Int'l Boxing Club of N.Y., Inc. 348 U.S. 236, 251 (1955)

81. *Id.*

82. United States v. Employing Plasterers Ass'n, 347 U.S. 186, 190–96 (1954).

83. *Id.* at 196.

commitment to prior decisions, of course, clashed with "judicial innovation."[84] Minton, however, did not think that it was the Court's role to bring about change. He clearly thought that these were the prerogatives of the elected branches of government.

B. Deference to Other Branches

Minton's penchant for hewing strictly to precedents paralleled his adamant deference to the legislative and executive branches. These two facets of his judicial approach are inextricably intertwined because deference to the other branches is a central tenet of judicial restraint. A former law clerk put it succinctly; he said that when it came to lines of authority regarding the legislative and executive branches, Minton "was inclined to feel that a court had no role to play other than to sustain the authority of the other two branches of government."[85] Minton's experience as a New Dealer had convinced him that his primary obligation as a judge was to sustain the elected branches of government as long as they had the power to act. It was not up to judges to question the wisdom of these decisions so long as they did not violate clearly stated legal limits on their power.

Perhaps no area of the law better illustrates his insistence on judicial deference than national security. During Minton's tenure, the Court was confronted with some of the most difficult challenges it ever has faced. Cases involving threats to national security were particularly vexing for the Court because of the ideological rifts among the Justices about the appropriate weight that should be given to the government's concern with order, security, and the rights of citizens. For "absolutists" like Black and Douglas, the answer was simple: the First Amendment freedoms of speech, press, and free association took precedence over any other considerations. The other camp, led by Frankfurter, rejected such a rigid stance and instead preferred to resolve the issues using a balancing test, which required a case-by-case weighing of the competing interests of the individual and the interests of the state in preserving order, security, and stability. This is the approach that Minton followed, although in most of his cases the balance weighed in favor of the government rather than the individual. This tendency was aptly illustrated in the *Knauff* opinion discussed above. To Minton, the procedures prescribed by Congress and the President outweighed the injustice to the war bride Knauff.

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84. WHITE, *supra* note 26, at 471.

85. David N. Atkinson, *Justice Sherman Minton and the Balance of Liberty*, 50 IND. L.J. 34, 34 (1974).

Two cases that illustrate Minton's deferential posture on issues of national security involved Eugene Dennis and other leaders of the U.S. Communist Party who were accused of conspiracy against the U.S. government. Minton wrote the first *Dennis* opinion,[86] and Chief Justice Vinson wrote the second and more famous opinion of the two.[87] The first case concerned an appeal by Dennis of a conviction for failing to respond to a subpoena from the House Un-American Activities Committee ("HUAC"), which investigated Communist activities. Dennis challenged his conviction because seven members of the jury were government employees, and as such, were subject to government loyalty programs under which they could be discharged for disloyalty to the government. Therefore, Dennis argued, they were biased against him.

Minton, writing for the majority, concluded that government loyalty programs were not sufficient grounds for disqualifying jurors in a trial. He based his opinion squarely on both his interpretation of a 1935 congressional statute that stipulated government employees generally were eligible for jury duty except for "certain cases," and two precedents that had sustained the constitutionality of that law. Refusing to look beyond the record of the case, Minton said that the Court was being asked to exempt jurors because of "implied," rather than "actual," bias. His literal reading of the statute was that Congress made no exception for such circumstances when it declared that all persons, regardless of government employment, "shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from service."[88] Minton acknowledged that a defendant belonging to an unpopular minority group "must be accorded that solicitude which properly accompanies an accused person, [but] he is not entitled to unusual protection."[89] Although he was unwilling to look beyond the record in the case, he acknowledged in his private correspondence that "Dennis was really being tried for being a communist"[90] and not for refusing to appear, but even so, Minton was not persuaded to treat the defendants differently. There was no question in Minton's mind that the statute was "within the power of Congress," and consequently, federal employees could not be challenged solely because of their employment.

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86. Dennis v. United States, 339 U.S. 162 (1950).

87. Dennis v. United States, 341 U.S. 494 (1951).

88. *Dennis*, 339 U.S. at 171–72.

89. *Id.* at 168.

90. Atkinson, *supra* note 25, at 288 (citing Sherman Minton's file on *Dennis v. United States*).

The two dissents in the case were by Black and Frankfurter, both of whom challenged Minton's reliance on precedent—Black because he thought Minton had misapplied the precedent and Frankfurter because he thought Minton had enlarged the meaning of it. Both Justices noted that the two precedents dealt with entirely different types of cases, neither having to do with government loyalty programs in times fraught with fear and paranoia.

The second *Dennis* case, the most noted of the Communist conspiracy cases, followed quickly on the heels of the first one. In 1951, the Court heard Communist Party leaders' appeal of their convictions under the Smith Act for advocating the violent overthrow of the government. They challenged the government action on two grounds: that their freedom of speech had been violated and that the conspiracy provisions of the Smith Act were unconstitutional. Chief Justice Vinson's majority opinion relied on his interpretation of the "clear and present danger" test adopted by the Court in *Schenck v. United States*.[91] The Court rendered a new interpretation of the test based on the "gravity of evil" standard enunciated by Judge Learned Hand in his circuit court opinion that upheld the convictions of the Communist Party leaders.[92] Vinson appropriated Hand's language in his own opinion when he wrote that courts must weigh "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech."[93] Vinson believed that that order was the primary value to be protected, for without that there could be no freedom. He wrote that "if a society cannot protect its very structure from armed attack, it must follow that no subordinate value can be protected. [Government need not] wait until the *putsch* is about to be executed, the plans have been laid, and the signal awaited."[94] Minton concurred completely with Vinson's reasoning, and his legislative background was no doubt a factor. As a senator he had voted for the Smith Act, which outlawed advocating, abetting, advising, or teaching the violent overthrow of the government, as well as organizing or knowingly joining an organization that conspired to overthrow the government. His support for the Smith Act in 1940 indicated that he thought national security concerns had to take precedence over individual rights when the country was faced with the possibility of war. By 1951, in the face of a perceived Communist threat, Minton had not changed his mind.

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91. 249 U.S. 47, 52–53 (1919).

92. Dennis v. United States 183 F.2d 201, 211-212 (2d Cir. 1950)

93. Dennis v. United States, 341 U.S. 494 , 510 (1951).

94. *Id.* at 509.

National security was also a prime concern of state governments, and Minton accorded their policies the same deference that he afforded Congress. Loyalty oaths similar to the one promulgated by the federal government commonly were used by states under their police powers. In *Adler v. Board of Education of the City of New York*, Minton wrote for the majority of the Court in upholding the constitutionality of a New York state law that barred from employment persons belonging to subversive organizations.[95] Under the state's Feinberg Law, membership in any organization listed as subversive by the state was prima facie evidence of unsuitability for any position within the public school system. Petitioners challenged the law as a violation of their First Amendment rights of free speech and association as well as their Fourteenth Amendment guarantee of due process. Minton summarily dismissed these claims by asserting that the state had not deprived the petitioners of any constitutional right. They remained free to advocate and to associate. They did not, however, have a guaranteed right to "work for the State in the school system on their own terms."[96] Rather, Minton reasoned that the state had a "vital concern . . . to preserve the integrity of the schools," particularly because of the unique nature of education.[97] "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live . . . and [therefore] the state may very properly inquire into the company they keep."[98]

Issues of deference in cases of national security were not always as clear-cut, however. The landmark case of *Youngstown Sheet and Tube v. Sawyer* is an example.[99] In response to a threatened strike by steel workers in 1950 in the midst of the Korean War, President Truman ordered Secretary of Commerce Charles Sawyer to seize the nation's steel mills to keep them operating. Truman based his order on his "inherent powers" as commander-in-chief. He specifically rejected utilizing another possible source of power—legislative authority under the Taft-Hartley law that granted the President the power to issue an injunction stopping the strike and forcing the steel workers back to work. The steel companies sued to prevent the takeover, and in fairly short order, the case reached the Supreme Court. The Court was called upon to address the significant

95. 342 U.S. 485, 496 (1952).
96. *Id.* at 492.
97. *Id.*
98. *Id.* at 493.
99. 343 U.S. 579 (1952).

constitutional question of whether the President has inherent power to seize private property for the purpose of defending the security of the country in wartime.

Normally, Minton could have resolved such an issue by relying on the separation-of-powers doctrine, but in this case it was not so simple. The lines of authority regarding the President's war powers were not delineated so clearly. Minton, who had a strong bent for simplifying complex issues, resolved the dilemma by taking a pragmatic approach. He was concerned about the practical consequences of not supporting the President in the midst of a war, so he, along with Vinson and Reed, voted to uphold the President's authority. He was adamant during the conference discussion that "there [be] no vacant spot in power when the security of the nation is at stake . . . the power is the power of defense and it rests with the President."[100]

The Justices in the majority cited legislative power and specific acts of Congress as limits on the President's authority. Black, who wrote the majority opinion, took the absolutist position that, under the separation of powers, the authority to seize private property is a legislative power, and in the absence of legislative action delegating such authority to the President, he lacked the power. Every member of the six-man majority wrote a separate opinion, each with varying views about the extent of the President's power to act in such situations. Each found a legislative limit on Truman's authority to order the seizure of the steel mills.

Arriving at his decision to support the President required that Minton reject the arguments of the majority regarding legislative limits on the President's power to seize private property for reasons of national security. He readily subscribed to Chief Justice Vinson's dissenting argument that the President was required to act to prevent the "disastrous effect" that would result from interruption of steel production. There is no evidence that Minton ever had second thoughts about siding with the President and against Congress, the institution in which he had served. Years later, he defended his vote in *Youngstown* because he "believed that the government had the right to defend itself in an emergency."[101] He said, "The Korean War was on and I could not think of anything worse than the men on the

100. William O. Douglas, Conference Notes: Youngstown Sheet & Tube Co. v. Sawyer (May 16, 1952) (unpublished notes, on file with the Vanderbilt Law Review).

101. Howard Bray, *Justice Is Proud of School Ruling*, LOUISVILLE TIMES, Nov. 13, 1956, at 1 (on file with the Vanderbilt Law Review).

firing line reaching back for munitions that weren't there."[102] When Minton's principle of judicial deference was put to the test, he chose the President over Congress, at least in the circumstances presented in *Youngstown*. Whether he would have been inclined to do so in other circumstances is impossible to answer.

Deference to other branches of government was the cornerstone of Minton's judicial restraint philosophy. He was averse to invalidating legislative and executive decisions unless there was a clear prohibition in the Constitution. This deferential stance was especially noticeable in cases involving national security issues, and this bent meant, more often than not, upholding government over individual rights.

C. Reliance on Strict Interpretation

Some of the thorniest questions confronting the Court during Minton's tenure were those involving individual rights, especially the rights of defendants in both federal and state trials and the Fourteenth Amendment requirement that states guarantee equal protection of the law to all citizens. Minton relied on a literal interpretation of the Constitution and narrowly interpreted constitutional guarantees for defendants, giving more leeway to law enforcement officials. This tendency was a continuation of the stance he took when interpreting defendants' rights on the Seventh Circuit. Minton's disposition on rights of defendants in criminal proceedings corresponded to the concept of "fair-trial jurisprudence," which determines a defendant's rights on a case-by-case basis rather than extending rights across the board.[103] As he explained in one opinion, the requirements of due process were not a fixed concept: "As in all cases involving what is and is not due process," he said, "no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case."[104] In adhering to fair-trial jurisprudence, Minton did not think it was necessary to read into due process requirements additional rights just because they might produce a different result for the defendant. If he determined that the challenged piece of evidence or procedure did not materially affect the outcome of the trial, Minton would uphold the trial results, despite the claim. In one opinion, he argued that the record shrieked of the

102. *Id.*

103. *See* DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 99 (Kermit L. Hall ed., 1992) ("[T]he fair trial test meant that the Court would decide case by case which rights of the accused enjoyed constitutional protection.").

104. Brock v. North Carolina, 344 U.S. 424, 427–28 (1953).

defendant's guilt and that it was inconceivable that "this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one."[105]

Minton's opinion in *United States v. Rabinowitz*[106] is illustrative of his approach in criminal cases. The petitioner, a stamp dealer who forged overprints of postage stamps, claimed that his Fourth Amendment protection against unreasonable searches and seizures was violated when he was convicted on the basis of evidence taken from his office without a search warrant. The search was conducted incident to his arrest, and Minton argued in his opinion that it was undisputed that searches without a warrant but incident to a valid arrest were permissible. "[S]uch searches," he wrote, "turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."[107] Among the circumstances that Minton thought relevant were that the office was small and the search was confined to the room in the office that was used for unlawful purposes. He claimed that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[108] In Minton's mind, *Rabinowitz* applied a strict interpretation of the Constitution, which "does not define what are 'unreasonable searches' and, regrettably, in our discipline we have no ready litmus-paper test."[109] In the absence of a clear definition of what makes a search reasonable, Minton erred on the side of practicality. He thought it was "fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant . . . . Some flexibility will be accorded law officers engaged in daily battle with criminals."[110] He did not think the Constitution could be read to require more. Minton's position on the reasonableness of obtaining a warrant subject to arrest prevailed until 1969, when it was overturned in *Chimel v. California*.[111]

Although the *Rabinowitz* ruling drew its share of critics, there were those who also found merit in the opinion. One law review article cited *Rabinowitz* as an example of Minton's ability to write an excellent, informative opinion. "This is honest, good opinion writing,"

105. Lutwak v. United States, 344 U.S. 604, 619 (1953).
106. 339 U.S. 56 (1950).
107. *Id.* at 65–66.
108. *Id.* at 66.
109. *Id.* at 63.
110. *Id.* at 65.
111. 395 U.S. 752, 768 (1969).

one wrote.[112] Another said that even though the opinion overruled an earlier opinion on searches and seizures, it did so "with great care and precision."[113]

Another example of Minton's strict interpretation of the Constitution is reflected in his views of what constituted "state action" under the Fourteenth and Fifteenth Amendments. When Minton was convinced that discrimination resulted from state action, he did not hesitate to rule against it. Out of the sixteen cases involving racial discrimination while Minton was on the Court, he ruled in favor of the minority claimant thirteen times.[114] His opinion in *Barrows* demonstrates his determination that state courts could not be used to allow suits against those who violated restrictive housing covenants. There certainly was never any doubt in Minton's mind that the Equal Protection Clause did not permit states to maintain segregated schools. When the case of *Brown v. Board of Education*[115] first reached the Supreme Court in 1952, he unhesitatingly joined with Black, Douglas, and Burton after the first round of oral arguments in calling for an end to segregation.[116] Minton argued adamantly in conference that "classification by race is not reasonable [and] segregation [is] per se unconstitutional."[117] Minton maintained that position throughout the Court's two-year consideration of the *Brown* case. After retiring he described his participation in the Brown case as his single most important contribution to the Court.[118]

Even though Minton was an ardent advocate of equal rights, his strict interpretation of the Constitution sometimes landed him on the other side of the issue. Despite his strong opposition to discrimination based on race, Minton could not bring himself to read the Constitution as prohibiting private discrimination. This view was vividly illustrated by his dissent in the Jaybird case, in which the Court invalidated a preprimary election by the Jaybird Association, an all-white organization whose winners were placed on the Democratic Party ballot in the regular primary. Even though the Jaybird

112. George D. Braden, *Mr. Justice Minton and the Truman Bloc*, 26 IND. L.J. 153, 155 (1951).

113. John P. Frank, *The United States Supreme Court: 1949-50*, 18 U. CHI. L. REV. 1, 52 (1950).

114. Hull, *supra* note 25, at 196.

115. 347 U.S. 483 (1954).

116. RICHARD KLUGER, SIMPLE JUSTICE: A HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 613 (1976).

117. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 287 (1993).

118. *See* Bray, *supra* note 101, at 1 (quoting Minton that *Brown v. Board of Education* was "the most important decision of the century because of its impact on our whole way of life").

Association was a private organization, a majority of the Court held that its actions constituted state action under the Fifteenth Amendment, which prohibits a state from denying voting rights on the basis of race. Minton's dissent vehemently challenged the Court's opinion that actions by the Jaybird Association were the equivalent of state action. He wrote:

> I am not concerned in the least as to what happens to the Jaybirds or their unworthy scheme. I am concerned about what this Court says is state action within the meaning of the Fifteenth Amendment to the Constitution. For, after all, this Court has power to redress a wrong under that Amendment only if the wrong is done by the State.[119]

The strength of Minton's conviction on this issue was revealed in a later exchange with Justice Jackson, who had sent Minton a bar association article speculating that the Supreme Court might be following election returns. In an uncharacteristically sharp response, Minton told Jackson that "[w]hen the Jaybird opinion comes down, there may be some question as to which election returns the Court follows! It will be damn clear they are not following on law."[120]

The Jaybird case illustrates a characteristic observed by virtually all who have studied Minton's opinions in depth: he never changed his views to suit others or to bring about results that he personally might have preferred. After Minton retired from the Court, Justice Black wrote to him about his tenacity in the Jaybird case. Black said that Minton never was afraid "to follow that hard course if your honest judgment told you that was right." Further, Black said he could not recall a single case "where you lowered your flag because of any effect your decision might have on Shay Minton."[121]

Minton's dissent in *Brotherhood of Railroad Trainmen v. Howard*[122] further demonstrates the consistency in his interpretation of what constituted state action. The case involved an all-white union for brakemen and a railroad company that had contracted to eliminate positions held by black porters. The Brotherhood did not represent the black porters whom it had refused to admit for membership, even though they performed the same tasks as the brakemen. The porters always had bargained separately with the company. Although this was clearly racial discrimination, Minton considered it to be private

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119. Terry v. Adams, 345 U.S. 461, 484–85 (1953) (Minton, J., dissenting).

120. Letter from Sherman Minton to Robert Jackson (Mar. 28, 1953) (on file with the Vanderbilt Law Review and original available at the Lilly Library, Indiana University, Bloomington, Indiana).

121. Letter from Hugo Black to Sherman Minton (Dec. 22, 1959) (on file with the Vanderbilt Law Review and original available at the Lilly Library, Indiana University, Bloomington, Indiana).

122. 343 U.S. 768, 775 (1952) (Minton, J., dissenting).

action and, therefore, beyond the reach of the Constitution. Relying on precedent and an interpretation of the Railroad Labor Act, the Court invalidated the contract. Minton claimed the reason was not because the porters were entitled to be represented by the Brotherhood. Rather, he thought the only reason the Court invalidated the contract was because the porters were black. Minton accused the majority of reading more into the precedent and the statute than was justified and converting "state action" into an open-ended concept. He acknowledged that the Court had the "sheer power" to annul the contract, but that was not "a substitute for legality."[123] Minton indicated his personal disapproval of the discrimination being carried out, but he was unable to conclude that it constituted state action.

Minton's commitment to strictly interpreting the Constitution carried over to legislative statutes. He sought to follow the language and intent of Congress as closely as possible. Cases dealing with the power of administrative agencies are illustrative of his strict interpretation of statutes. Minton did not approve of reviewing agency rulings unless Congress specifically provided for it. Although he generally was disposed to show deference to administrative agencies, his deference was conditioned upon his interpretation of the authorizing statute. Thus, his strict interpretation of statutes was closely intertwined with his deference to the will of Congress. If his reading of the statute convinced him that Congress had intended to authorize the disputed power, Minton inevitably would uphold the agency's discretion. On the other hand, if the authorizing statute was not clear, Minton would not defer to an agency's interpretation of the statute because he thought that such interpretation was exclusively the responsibility of the courts. Judicial competence trumped administrative discretion.

Cases involving the regulation of natural gas are good indicators of Minton's disposition toward the power of administrative agencies. In the 1954 case of *Phillips Petroleum Co. v. Wisconsin*, Minton wrote the majority opinion upholding a broader jurisdiction for the power of the Federal Power Commission ("FPC") than the Commission wanted.[124] The case revolved around the interpretation of the Natural Gas Act, which was passed in 1938 while Minton was still in the Senate. The Act exempted from FPC jurisdiction the production or gathering of natural gas. Phillips Petroleum produced, transmitted, and subsequently sold natural gas to interstate pipeline companies that then transmitted and resold the gas to consumers and local

123. *Id.* at 778.

124. 347 U.S. 672, 679 (1954).

distributors. At issue in the *Phillips* case was whether the sales to the interstate pipeline were subject to regulation by the FPC. Both the Commission and Phillips claimed that they were not. The FPC specifically asserted that it had no power to regulate the wholesale price of natural gas. Wisconsin officials argued that the FPC did have jurisdiction because the regulation of wholesale rates was a national, not local, power.

Writing for the majority, Minton determined that Phillips's sales to the pipeline companies were separate from its production and gathering and therefore not exempt from FPC regulation. In so doing, he helped to fill a loophole in the Natural Gas Act that would have prevented the federal government from regulating wholesale prices of gas. After carefully dissecting the history of the Act and numerous Court rulings regarding regulation of natural gas, Minton concluded that Congress intended to give the FPC jurisdiction over the wholesale of natural gas in interstate commerce, regardless of whether the wholesale occurred "before, during or after transmission by an interstate pipeline company."[125] There was no doubt that the primary legislative purpose of the Act was to "plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business."[126] The ultimate aim of the legislation was the "[p]rotection of consumers against exploitation at the hands of natural-gas companies."[127] Therefore, the Court could not permit efforts to weaken this protection by "amendatory legislation" exempting independent natural gas producers from federal regulation. One might argue that the *Phillips* case is one in which Minton's New Deal liberalism influenced his decision to favor consumers over businesses, but even so, it is hard to see how Minton could have concluded otherwise. Having voted for the Natural Gas Act in 1938, he had first-hand knowledge of the congressional intent behind the Act. Deciding in favor of Phillips would have thwarted that intent.

Minton generally favored national regulation of business activity, but unless Congress had preempted a power specifically, Minton was willing to defer to state regulation. In *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, Minton explained how Congress had allocated regulatory power under the

125. *Id.* at 682.
126. *Id.* at 682–83.
127. *Id.* at 685.

Natural Gas Act.[128] The point of contention was whether the Michigan Public Service Commission could require a natural gas pipeline company to obtain a certificate of public convenience and necessity before it could sell gas that was transported through an interstate pipeline directly to industrial companies that already were being served by the municipal public utility. Panhandle attempted to secure for itself large industrial accounts that already were served by the public utility. It argued that its direct sales were beyond the reach of local government because they constituted interstate commerce, which only Congress could regulate.

Minton disagreed. He said that Congress intended to leave to the states sales that were "primarily of local interest."[129] As in *Phillips*, Minton argued that the primary aim of the regulation was to protect consumers against exploitation by natural gas companies. To that end, he said Congress "meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority."[130] He thought that cooperative action was required if the protective scheme of the legislation was to be served. That could not be accomplished if interstate suppliers of natural gas could divert the bulk of their business to unregulated purchases by industrial users.

In other areas of economic regulation, Minton had one of the strongest records on the Court of ruling for government agencies. To close observers who were knowledgeable about his opinions on the Seventh Circuit, this came as no surprise, for he regularly ruled in favor of government regulation of business. On the Supreme Court, Minton continued his pro-government voting record. In the twenty non-unanimous cases involving decisions of the National Labor Relations Board, Minton sided with the agency in all but five, a record second only to Burton's.[131] In the twelve non-unanimous cases involving the Interstate Commerce Commission, Minton supported the agency ten times, the most of any Justice.[132] His opinions in economic regulation cases were the result of his deference to legislative intent and based on his interpretation of the authorizing statutes. He was willing to let agencies exercise broad discretion, but only if it was based on an explicit grant of authority from Congress. Determining whether this was the case required Minton to interpret the statutes as

128. 341 U.S. 329, 334–36 (1951).

129. *Id.* at 333.

130. *Id.* at 335.

131. Atkinson, *supra* note 25, at 327–28.

132. *Id.* at 334.

they were written without adding any additional meaning. No doubt his own legislative experience helped him in this regard, as he often had participated in the legislative process when the economic regulation was adopted.

VI. THE CASE FOR MINTON

The consistency of Minton's commitment to a philosophy of judicial restraint is amply supported by his voting record in virtually every area of the law. His was a philosophy based on his conception of the Court's role in a democratic system with a separation of powers. He remained loyal to the notion of a limited judiciary, and he was ever loyal to the institution itself. He was particularly conscious of the need to protect the Court's reputation in the eyes of the public, and he sought to protect it as best he could.

Minton was very concerned about the legitimacy of the Court and the respect accorded to its decisions. White argues that the legitimacy of a judicial decision rests on the degree to which it is perceived as being grounded in "legal criteria," which judges are deemed to be competent to judge, rather than on "the whims of the public."[133] Minton's approach to decisionmaking and opinion writing placed a strong emphasis on the legitimacy of Court rulings. For example, Minton was troubled by the large number of concurring and dissenting opinions written in high profile cases. Minton wrote only three concurring opinions and relatively few dissenting opinions. One reason he gave a former law clerk for retiring from the bench was the increasing frequency with which he dissented in cases.[134] Minton thought that Court opinions should reflect the collective judgment of the Court rather than multiple individual opinions because multiple opinions undermine the integrity of the decision. When assigned an opinion, he would go out of his way to accommodate the views of other Justices where possible in order to gain support for the opinion. No other Justice was known as much as Minton for his considerate efforts.

Minton also thought it was important that decisions be seen as reflecting legal criteria and not political considerations. Even though he was highly partisan before donning his judicial robes, most observers of Minton's Court performance acknowledge that he generally rose above partisanship in writing his opinions. In one of his

133. WHITE, *supra* note 26, at 468.

134. GUGIN & ST. CLAIR, *supra* note 25, at 269 (citing Letter from Sherman Minton to Harry L. Wallace (July 6, 1955)).

many exchanges with Frankfurter, he said that "if the law is to be respected it must be considered as something other than a game."[135] His exchange with former law clerk George Braden reveals Minton's position. Braden criticized the *Adler* opinion and said it "leaves the impression that you not only believed the law to be Constitutional, you also think it is a good law."[136] Minton replied:

> I don't see why you think I approved the policy of that law. As you well know one may have a view on policy that may not agree with the Constitutional question involved. In my own experience I hotly opposed while a Senator the Hatch Act as a matter of policy. I never questioned its Constitutionality.[137]

Attorney Nicholas Katzenbach, eulogizing Minton in 1965, referred to his ability to transcend partisanship: "He was at pains to separate predispositions from the decision-making process; indeed on occasion he noted his personal distaste for the actions of parties in whose favor he felt constrained to decide."[138]

Minton did not believe in lengthy opinions. Intelligibility was of utmost importance to him. To that end, his opinions were brief and to the point. He thought of opinions merely as vehicles for conveying the Court's decision. He once told a friend he did not consider that he was "writing for the ages."[139] His observation about the opinions in the *Rabinowitz* decision illustrates the contrast between Minton and some of the other Justices. He noted that Frankfurter's dissent from the bench in *Rabinowitz* took thirty-five or forty minutes, while it took Minton "less than 10 minutes to announce the opinion of the [C]ourt."[140] Regarding the *Rabinowitz* decision, Braden, Minton's former law clerk, told him, "You write in the style of Roberts and Sutherland. That is, you assume the answer then ask how anyone can decide contrary to the assumed answers."[141] Minton responded:

> [M]aybe my opinion writing does smack of Roberts and Sutherland. Frankly . . . while I never agreed with what Sutherland had to say as a general rule, I remember that he

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135. Letter from Sherman Minton to Felix Frankfurter (July 10, 1955) (on file with the Vanderbilt Law Review).

136. Letter from George Braden to Sherman Minton (Mar. 19, 1952) (on file with the Vanderbilt Law Review).

137. Letter from Sherman Minton to George Braden (Mar. 20, 1952) (on file with the Vanderbilt Law Review).

138. *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Minton*, 384 U.S. v, xxi (1966) [hereinafter *Proceedings*].

139. Letter from Sherman Minton to George Braden (Mar. 20, 1950) (on file with the Vanderbilt Law Review).

140. *Id.*

141. Letter from George Braden to Sherman Minton (Sept. 12, 1950) (on file with the Vanderbilt Law Review).

> was the easiest fellow in the books for me to read. When I finished his opinions, I at least understood them.[142]

While not all viewed Minton's approach to opinion writing in positive terms, even some of his critics acknowledge that his opinions were "very much to the point, and leave no doubt . . . as to what they are supposed to do."[143] Lower court judges in particular approve of his style. For example, a federal district court judge in Arkansas wrote to thank Minton for "his common sense and direct approach" to the law.[144] He said, "It is refreshing for a 'Country Lawyer' or a 'Country Judge' to read an opinion of the highest court in our land which clearly and succinctly states the problem and then answers in plain everyday language that cannot be constructed three or four different ways."[145] Chief Justice Earl Warren, describing Minton's opinions at a memorial service, said he was "totally without guile and with absolute honesty of expression, he wrote for the Court or in dissent so that no one could be misled by what he said."[146]

Minton's letter to an old friend probably provides the most astute explanation of his judicial approach:

> Since I have been here . . . I have tried to call them as I saw them and in doing so I seem to have earned the designation of a conservative. Maybe I am. I certainly consider a job on this Court to be vastly different than that of a United States Senator. In the Senate you fight for policy. Here, while there must inevitably be some policy-making in some of the decisions involving the construction of the Constitution, policy-making, in my opinion, should be kept at a very minimum and avoided in all cases not absolutely necessary. Consequently I have upheld Government rather consistently, and have felt bound, in most instances, to follow the law as it had been laid down. At least I have tried to do what I thought was right in each case that came here, as it appeared to me on the record, uninfluenced by all extraneous matters.[147]

Minton's rulings on the Court often disappointed those who expected him to side with the "liberal" Justices. New Deal liberals had disparaged an activist Court that invalidated New Deal policies, but once in control, they found no problem with an activist judiciary on issues of civil liberties and civil rights. In this regard, they subscribed to the rule established in *Carolene Products*, which gave greater

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142. Letter from Sherman Minton to George Braden (Sept. 20, 1950) (on file with the Vanderbilt Law Review).

143. Frank, *supra* note 113, at 52.

144. Letter from John E. Miller to Sherman Minton (Feb. 11, 1950) (on file with the Vanderbilt Law Review and original available at the Lilly Library, Indiana University, Bloomington, Indiana).

145. *Id.*

146. *Proceedings*, *supra* note 138, at xxv.

147. Letter from Sherman Minton to Frank McHale (Sept. 19, 1956) (on file with the Vanderbilt Law Review and original available at the Lilly Library, Indiana University, Bloomington, Indiana).

judicial scrutiny when individual freedoms and equal rights were at stake. Minton was not willing to justify judicial activism for these issues. His aversion to judicial intervention was too deeply woven into the fabric of his jurisprudence to accept this kind of "double standard."

Minton's departure from the Court ushered in a new era on the Court. He was perhaps the last Justice to defend judicial restraint regardless of the type of issue at stake. The debates about restraint and activism did not end with Minton's departure, but the rationales for each disposition took on different hues. The Warren Court embraced the kind of activism that Minton abhorred. In the parlance of *Carolene Products*, the activists justified judicial intervention as necessary to promote democracy by defending the rights of minorities and the freedom of those whose views were not consistent with mainstream American thought. Minton would have agreed with critics of the Warren Court who thought "it had usurped legislative priorities in an area where democratic theory called for deference."[148] In particular, issues of legislative reapportionment, school prayer, and criminal procedure often are cited as examples of the Warren Court overstepping its bounds.

Minton espoused a majoritarian philosophy of judicial restraint that increasingly lost credibility with the Warren Court, and its demise continued through the Burger Court. He might have been somewhat more comfortable on the Burger Court, which was less doctrinaire, more moderate, and more ad hoc in its approach to resolving issues. It did, however, take a more activist stance in advancing the cause of gender equity by invalidating state statutes based on sex classifications. For example in *Reed v. Reed*[149] the Court found that an Idaho statute giving preference to males as administrators of estates when a person died without a will violated the equal protection clause of the Fourteenth Amendment. *Frontiero v. Richardson*[150] invalidated a congressional statute that allowed wives of male service members to be claimed as dependents, without proof of their dependency, making them eligible for medical and dental benefits. Husbands of female service members had to prove their dependency to be eligible for fringe benefits. In *Mississippi University for Women v. Hogan*[151] single-sex nursing schools at a state-supported institution were found to be unconstitutional. The Burger Court also carved out a new constitutional right to personal privacy through its

148. WHITE, *supra* note 26, at 462.

149. 404 U.S. 71 (1971).

150. 411 U.S. 677 (1973).

151. 458 U.S. 718 (1892).

most famous opinion—*Roe v. Wade*—in 1973.[152] These cases illustrate that the Burger Court was not necessarily inclined to defer to legislative prerogatives or to consider whether the Court was usurping the legitimate role of state legislatures in deciding such matters as gender discrimination, proper sexual relations, or the conditions under which abortion was permissible. Instead, White says that "any debates that existed in these cases were debates about the substantive strength of the constitutional rights being advanced . . . . [They] were about substance, not debates pitting substance against process," which characterized the debates of the Warren Court. To the extent that the Burger Court was unconcerned with whether a right "needs to be properly crafted or institutionally sensitive,"[153] Minton would not have found much common ground.

Without a doubt, Minton would have been completely out of place on the Rehnquist Court, where debates about the proper judicial role and appropriate constraints revolved around a completely different set of philosophies. Neither side granted much credence to democratic theory. Instead, the divisions were between those Justices whose decisions were premised on their interpretation of the "original meaning" of the Constitution and those who based judicial interpretation on the concept of the "living Constitution." As White notes, "[T]he center of jurisprudential debates on the Rehnquist Court moved from issues of democratic theory and comparative institutional competence to issues of history and theories of constitutional interpretation."[154] Both approaches increased judicial supremacy vis-à-vis the other branches of government, a development of which Minton would have disapproved.

Decisions on the Rehnquist Court in many instances appear to have been driven by political ideology more so than legal criteria. One easily can imagine the apoplexy that Minton would have expressed when learning that the Court in *Bush v. Gore* announced that its opinion stopping the vote recount in Florida was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[155] In effect, the Court was saying that its ruling had no precedential value. Minton would have chided the Court for such an assertion. To Minton, there was no such thing as a case without precedential value. Indeed, there has been scholarly speculation about the implications of *Bush v. Gore*

152. 410 U.S. 113, 153–54 (1973).

153. WHITE, *supra* note 26, at 402–03.

154. *Id.* at 463.

155. 531 U.S. 98, 109 (2000).

for future constitutional adjudication related to the electoral process,[156] and *Bush v. Gore* has been cited in subsequent decisions involving electoral disputes.[157]

It is interesting to speculate how Minton's philosophy of judicial restraint would have influenced his decision in *Bush v. Gore*. If he were consistent with that philosophy, which he usually was, he would have erred on the side of limiting the role of the Supreme Court. To that end, he most likely would have refused to accept the case for review, leaving the ruling of the Florida Supreme Court in place. On the circuit court, Minton insisted that federal courts should respect the jurisdiction of state courts. He once wrote that "Federal Courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own affairs . . . . We are not super-legislatures."[158] Although Minton was writing about a criminal appeal that sought to overturn a state court ruling, his response nonetheless is indicative of his general deference to states. Further, Minton probably would have had problems with the Court's interpretation of the Fourteenth Amendment's Equal Protection Clause, which he viewed almost exclusively as a prohibition against racial discrimination. Minton might have questioned whether interpreting the Equal Protection Clause to aid a candidate who stood to lose an election went too far beyond the original intent of the amendment as well as too far beyond the Court's own precedents.

The *Bush v. Gore* opinion stands as stark testimony to the activism of the Rehnquist Court and the degree to which partisanship influenced Court opinions. Lori Ringhand has provided a statistical analysis of the Rehnquist Court that assesses the extent of its activism and the degree to which partisanship influenced its decisionmaking. Ringhand used three criteria to measure activism: overturning laws of Congress, overturning state statutes, and overturning precedents.[159] While the analysis of the three criteria reveals mixed results, several findings do attest to an activist bent

156. Thomas D. Kotulak, Bush v. Gore*: Two Competing Conceptions of Democracy*, 11 J. IND. ACAD. SOC. SCI. 71–86 (2007).

157. For examples of scholarly works that discuss the use of *Bush v. Gore* as precedent in subsequent cases, see Christopher P. Banks, *The Politics of Constitutional Choices in Light of* Bush v. Gore, *in* THE FINAL ARBITER: THE CONSEQUENCES OF *BUSH V. GORE* FOR LAW AND POLITICS 29 (Christopher P. Banks, David B. Cohen & John C. Green eds., 2005) [hereinafter THE FINAL ARBITER]; Joyce A. Baugh, Bush v. Gore *and Equal Protection: A Unique Case?*, *in* THE FINAL ARBITER, *supra*, at 87; Tracy A. Thomas, Bush v. Gore *and the Distortion of Common Law Remedies*, *in* THE FINAL ARBITER, *supra*, at 71.

158. United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 981 (7th Cir. 1948).

159. Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033, 1034 (2007).

that favored conservative outcomes, especially as concerned the invalidations of federal statutes across a broad range of issues.[160] In fact, the Rehnquist Court invalidated congressional statutes far more often than the Warren or Burger Courts. Ringhand notes that the Rehnquist Court "not only invalidated more federal statutes than its predecessor courts, it also did so at a much faster rate."[161] Her analysis confirms that deference was not a strong value on the Rehnquist Court, but that ideology was a key factor in the Court's decisions. In a similar study, Ringhand found that the conservative Justices, collectively and individually, were more likely to invalidate federal laws and overturn precedents than their liberal counterparts,[162] while their liberal counterparts were more likely to invalidate state statutes. Both conservatives and liberals, Ringhand concludes, "have used their power . . . in ideologically predictable ways."[163] While Minton's rulings may have been predictable based on the principles of deference, precedent, and strict interpretation, his opinions were not predictable on the basis of his political ideology. It is one of the main reasons that liberals often were disappointed in his rulings. It no doubt has been a primary factor in how Court scholars with a bias toward activism have assessed his record.

From today's vantage point, it appears that the Roberts Court has picked up where the Rehnquist Court left off, arguing mainly about original meaning and historical interpretation, with limited concern for the counter-majoritarian dilemma. The kind of judicial deference advocated by Minton continued its decline with his departure from the Court in 1956 and has not resurfaced in a consistent manner in successor Courts. His own words about his retirement seem more prophetic than ever. Responding to a reporter's questions on the day of his retirement, Minton said, "There will be more interest in who will succeed me than in my passing. I am an echo."[164]

160. *Id.*

161. *Id.* at 1036.

162. Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 48–49 (2007).

163. *Id.* at 45.

164. *A Moderate at Heart: Sherman Minton Aimed Bill at Newspapers*, N.Y. TIMES, Sept. 8, 1956, at 8.