FROM NEW DEAL LIBERAL TO SUPREME COURT CONSERVATIVE: THE METAMORPHOSIS OF JUSTICE SHERMAN MINTON

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I. INTRODUCTION

Every Justice sitting on the United States Supreme Court is a full participant in the institution's decision-making process. Although each Justice's judicial behavior has direct effect during only a relatively short period in the history of the Court, the eventual impact of that behavior may be enduring. There is at least a possibility that any Justice, however minor in the panorama of Court history, may have some impact—be it functional or dysfunctional—on long-term constitutional development, the Supreme Court's status as an institution in the American political system, the Court's short-term determination of public policy, and the Court's ability to perform its day-to-day work.

Justice Sherman Minton served on the Supreme Court from 1949 to 1956. He was the eighty-seventh person to sit on the Court and the first from the state of Indiana. While Minton clearly was not a Justice of major stature, his development from politician to jurist deserves study. Much of the evidence presented in this Article points to the value of a theory of judicial role in offering plausible explanations of certain aspects of Minton's behavior as a Supreme Court Justice.[1] Thus an attempt, however limited, is made to explain as well as describe judicial behavior.

Judicial role in its most general formulation is "a consistent pattern of behavior on the part of an individual in response to his conception of the nature of his function in a system."[2] Very often, analyses based on judicial role have been self-fulfilling. That is, a behavior pattern

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1. This Article complements two other articles by the author on Justice Minton: Atkinson, *Justice Sherman Minton and the Balance of Liberty*, 50 IND. L.J. 34 (1974); Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 NW. U.L. REV. 716 (1974).

2. Grossman, *Role-Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter*, 11 J. PUB. LAW 285, 294 (1962).

is described and the actor's role is then defined with reference only to the behavior described. It is, for example, self-fulfilling to examine only a Supreme Court Justice's voting record and then attribute a role definition to him. Consequently, in order to explain the nature of Justice Minton's role on the Court, extrinsic data have been obtained from law clerks, Court papers, and other Justices.[3] These data indicate that Minton frequently voted in conformity with his role conception instead of his policy preferences, voting as he believed a Supreme Court Justice ought to vote rather than as he would have preferred to vote. A consideration of Minton's perception of his judicial role may be of value in understanding how one of the most "liberal" New Deal Senators could become one of the most "conservative" Justices in recent Court history.

C. Herman Pritchett's *Civil Liberties and the Vinson Court* is especially relevant, for it includes an analytic evaluation of the role perception, derived principally from the cases, of the Court members with whom Minton served. Pritchett isolated two factors he believed most influenced a Justice's voting behavior in civil liberties cases. One was "the direction and intensity of a justice's libertarian sympathies, which will vary according to his weighing of the relative claims of liberty and order in our society," and the second was "the conception which the justice holds of his judicial role and the obligations imposed on him by his judicial function."[4] Pritchett described the nature and importance of judicial role as follows:

> Every justice in deciding a case must give some thought to what is appropriate for him as a judge to do. The pressures which bear upon him are many, and they are mostly toward a pattern of conformity—con-

3. This Article is based upon personal interviews conducted by the author with Chief Justice Earl Warren, Justice Stanley Reed, Justice Hugo L. Black, Justice William O. Douglas, Justice Tom C. Clark, Justice John Marshall Harlan, and many of Justice Sherman Minton's law clerks and his secretary. Additional information was drawn from the Supreme Court papers of Justices Minton, Burton, and Felix Frankfurter as well as the latter's private correspondence. Justice Minton's papers are in the Harry S. Truman Library, Independence, Missouri, while those of Justices Burton and Frankfurter are on file in the Library of Congress.

The comments of Justice Minton's law clerks were taken from both questionnaire responses and personal interviews. This project was largely made possible through their cooperation. It was necessary, however, to assure anonymity in return for their openness and candor.

Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 NW. U.L. REV. 716 n.1 (1974).

4. C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 191 (1954).

formity with precedents, conformity with the traditions of the law, conformity with public expectations as to how a judge should act, conformity toward established divisions of authority in a federal system based on the principle of separation of powers. While no justice can be oblivious to these pressures, they are not self-enforcing, and he is free to make his own interpretations of their requirements in guiding his own judicial conduct. The attitude scale involved may be thought of as ranging from an expansionist to a contractionist judicial philosophy, from broad to narrow judicial review, from judicial activism to judicial restraint.[5]

II. THE VINSON COURT IN PERSPECTIVE

Without disputing Emerson's confident dictum: "There is properly no history; only biography,"[6] it is nonetheless likely that political events in the 1930's significantly influenced Sherman Minton's view of the judicial function. In his perception of the functions of the branches of government, Minton was fundamentally a product of the New Deal. Like other Justices who later comprised the Vinson Court (a term of convenience used here to designate the years of Minton's service), many of his ideas on the proper role of the Supreme Court within the American system of government had been forged in the rough-and-tumble arena of New Deal politics.[7] A good measure of the caution that characterized the Vinson Court's exercise of judicial review can be attributed to a pervasive fear by a majority of the Justices that the Court might inadvertently trespass on the constitutional domain of either the executive or legislative branches of government.

A. *The Legacy of the New Deal*

Beginning in 1933, Congress passed many reforms that President Roosevelt had initiated to rebuild a national economy weakened by depression. It soon became apparent that the federal regulatory measures comprising much of the President's program were essentially incompatible with the previously accepted theory and practice of laissez faire.[8] Certain members of the Court were, therefore, immediately alien-

5. *Id.* at 191-92. For a discussion of judicial role and related issues, see W. MURPHY & J. TANENHAUS, THE STUDY OF PUBLIC LAW 116-49 (1972).

6. R.W. EMERSON, *History*, in THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON 123, at 127 (Atkinson ed. 1940).

7. *See* notes 8-18 *infra* and accompanying text.

8. The basic tenets of laissez faire as they pertain to constitutional law are summarized in B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 8-9 (1942).

ated from the Administration's policies.[9] Others (particularly Justice Brandeis) had serious reservations, as a matter of principle, about the centralization of regulatory authority in the Federal Government.[10] A substantial number of the Justices believed that some of the legislation passed at the urging of the President had not been drafted with the necessary precision. Thus, for one reason or another, all of the Justices were dissatisfied with at least some aspects of the New Deal.[11] Between 1934 and 1936, the Court declared twelve major pieces of federal legislation unconstitutional,[12] and by the fall of 1936, had effectively blocked much of the New Deal.

As events led to a confrontation between Congress and the Court, Senator Sherman Minton was one of those who headed the attack on the Supreme Court. Colorful, aggressive, and articulate, he assailed the Court for having converted the doctrine of judicial review into a new doctrine of judicial supremacy. In the Senate he proclaimed:

> . . . [I]t became necessary after the Bill of Rights was adopted to set up some tribunal which should have the last word as to whether or not these fundamental rights had been invaded. In other words, if Congress should pass a law which would deny the right of someone to worship God according to the dictates of his own conscience there must be some tribunal to say "No." Where is the tribunal which is to say "No" if Congress passes a law which is perfectly within the Constitution and the Supreme Court strikes it down?[13]

The questions he repeatedly posed in the Senate were troublesome. How was the abuse of judicial prerogative to be restrained? Was it not a fatal omission in the American structure of government for the framers of the Constitution to have neglected to provide some kind of meaningful check on judicial decisions that ran contrary to the repeatedly expressed desires of the people as mirrored by Congress? When Minton was informed that the Court had only invalidated 73 of some 25,000

9. Justices Van Devanter, McReynolds, Sutherland, and Butler were ideological adversaries of the New Deal, and voted against the constitutionality of all New Deal programs presented to the Court for review. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935).

10. *See* Mason, *The Supreme Court: Temple and Forum*, 48 YALE REV. 524 (1959).

11. *Id.* at 527.

12. The voting alignments, the holdings, and the acts of Congress held unconstitutional during the 1931-1937 terms are summarized in Atkinson, *Mr. Justice Cardozo and the New Deal: An Appraisal*, 15 VILL. L. REV. 68, 71 (1969).

13. 80 CONG. REC. 9892 (1936).

Congressional acts passed prior to the New Deal, he responded before the Senate:

> Is it simply to the credit of the Supreme Court that only 73 laws passed by Congress have been declared unconstitutional, or is it somewhat to the credit of the Congress that it has been right in all of the other laws it has passed?
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> . . . .
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> I do not wish to appear as a critic of the Supreme Court, nor do I wish to appear as one who is opposed to the Supreme Court['s] declaring acts of Congress unconstitutional; but if this is a government of checks and balances . . . and I think it is—then, I am in favor of some check upon the Supreme Court.[14]

It became increasingly apparent to Minton that the missing check had to come from one of two sources. Either the Justices must discipline themselves and develop self-imposed restraint, or Congress must act to curb the Court's appellate jurisdiction. Both themes are evident in an address he made to the Senate in 1936.

> They [the Supreme Court Justices] have . . . laid down . . . [a] rule of practice of their own making, that they will not declare an act of Congress to be unconstitutional until its unconstitutionality appears beyond all reasonable doubt. We put nine eminent distinguished lawyers upon the bench. Four of them say it is clearly within the Constitution and five of them say it is not within the Constitution. How can anyone say that when four of these eminent gentlemen out of nine say that an act of Congress is constitutional, that its unconstitutionality is clear beyond all reasonable doubt?
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> . . . .
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> . . . Congress . . . has [the power] . . . to lay down the rules and regulations for appellate procedure before the Supreme Court . . . .
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> . . . I should like to say here and now . . . my idea about what Congress can do now in order to maintain the balance of power between the judiciary, the executive, and the legislative. It can pass an act . . . [requiring] any litigant . . . who challenges the constitutionality of any act of Congress, to convince seven of the members of that Court that the act is unconstitutional before it can be so held.[15]

It would thus seem that long before his appointment to the Court in 1949, Minton's Jeffersonian populism[16] had conditioned his attitude

14. *Id.* at 9893.
15. *Id.* at 9894-98.
16. "Jeffersonian populism" is used to denote a commitment to representative-

toward the Court's role in American politics. Tolerance of judicial supremacy was inconsistent with democratic theory as he understood it, for in such a situation an unelected oligarchy was permitted to determine vital questions of public policy without regard for public sentiment.

Encouraged by his reelection in 1936, President Roosevelt offered a plan to reconstruct the Supreme Court. His proposal, announced on February 5, 1937, asked that Congress permit the President to appoint an additional Justice for each sitting Justice whose age exceeded an established retirement age of seventy, with the Court's total membership not to exceed fifteen.[17]

Although the Court-packing plan did not succeed, by the spring of 1937 there was a noticeable change in the Court's attitude toward Congress' use of the commerce power to regulate the economy. Thereafter no legislation that was a part of the New Deal program was held unconstitutional. Regardless of whether President Roosevelt's proposal to alter the Court's membership was alone instrumental in causing the change in attitude of the Court in 1937, it would at least seem that the plan contributed, if only indirectly, to the new doctrinal ethos which characterized the post-1937 Court.[18] No longer was the Court willing to defend an economic system at the risk of irreparable institutional injury to itself. The old order had abruptly ended and a new Court had

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ness in government, which would exclude judicial supremacy as Jefferson understood it. *See* Letter from Thomas Jefferson to Abigail Adams, in THE WRITINGS OF THOMAS JEFFERSON 50-51 (A. Lipscomb & A. Bergh eds. 1905); Letter from Thomas Jefferson to William C. Jarvis, in *id.* at 276-79.

17. *See generally* L. BAKER, BACK TO BACK: THE DUAL BETWEEN FDR AND THE SUPREME COURT (1967).

18. "I don't suppose," Justice Minton observed in later life, "there has ever been such an exhibition of judicial toe dancing as Hughes gave in his switch of the Court from *Carter v. Carter Coal Co.* and *United States v. Butler* to *Parrish* and *Jones & Laughlin.*" Letter from Sherman Minton to Felix Frankfurter, Jan. 18, 1960, in the Felix Frankfurter Papers (The Library of Congress). Carter v. Carter Coal Co., 298 U.S. 238 (1936), invalidated codes established for the coal industry in the Bituminous Coal Conservation Act of 1935, and United States v. Butler, 297 U.S. 1 (1936), struck down the Agricultural Adjustment Act of 1933. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), ushered in the constitutional revolution of 1937 by sustaining a state minimum wage law, and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), upheld the constitutionality of the National Labor Relations Act, which assured the right of employees to bargain collectively with their employers.

Justice Minton was apparently unaware that Justice Frankfurter had always emphatically denied that there had been a "switch in time that saved nine." *See* Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

emerged, soon to be confronted with different constitutional questions. But the memory of the old Court and its policies lingered in the minds of those who had opposed it.

B. *Freedom and Security Under Law*

The two most catastrophic domestic events in American history—the Civil War and the Depression—were transition points in the Court's history, for they rechanneled the Court's energy toward new or different issues by forcing resolutions of the questions that had brought the Court and the nation to a time of crisis. Even as the Civil War had resolved the question of federalism, the Depression had resolved the question of laissez faire.[19]

The constitutional revolution of 1937 and its aftermath witnessed a substantial reinterpretation of both substantive due process and the commerce clause. It was possible for Justice Black to write, years afterwards:

> The doctrine that prevailed in Lochner . . . and like cases—that due process authorized courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.[20]

Substantive due process was satisfied in regulatory cases after 1937 if the Court was able to conclude that there was a rational relationship between the legislative goal desired, which had to be one which the legislature could legitimately seek to accomplish, and the means used to attain it.[21] Similarly, in contrast to the limited definition previously given to interstate commerce, the meaning of commerce was expanded to include virtually all aspects of business, between and within the states.[22] The Court repeatedly declared that "no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress."[23]

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19. *See generally* R. McCLOSKEY, THE AMERICAN SUPREME COURT (1960).

20. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

21. *See, e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

22. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

23. Wickard v. Filburn, 317 U.S. 111, 124 (1942), *quoting* United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

These changes in the meaning of commerce and substantive due process were firmly reenforced by President Roosevelt's appointees to the Court. Although Roosevelt had no opportunity to appoint anyone to the Court until 1937, from 1937 to 1943 he was permitted to name eight Associate Justices and one Chief Justice. It was not long before several of the new Justices determined how they as individuals should act and how the Court collectively should exercise its authority within the structure of American government. A constitutional dialogue that was to last for over two decades was established between Justices Black and Frankfurter, both of whom pursued their divergent views with Wagnerian intensity.[24] Most significantly, however, the Justices who came to the Court after 1937 seemed to have learned from the experiences of their predecessors; they were more aware of the Court's strengths and weaknesses, its legitimate responsibilities and erstwhile liabilities.

The post-1937 Court generally maintained an activist stance, but the subject matter before the Court changed markedly. The definition of individual rights under the Constitution became a major concern. Justices Murphy and Rutledge joined with Justices Black and Douglas to form a coalition that was frequently successful in expanding the scope of constitutional rights of individuals. Cases involving blacks,[25] Jehovah's Witnesses,[26] and labor unions[27] were very often resolved in those groups' favor.

Although the Roosevelt Justices unanimously rejected the economic dogmatism endorsed by the Court during the early 1930's, they were far from unanimous in their approach to many cases, especially those that presented civil liberties claims. For whatever reasons—whether personal antagonisms or burgeoning ideological differences over increasingly difficult cases—strong dissenting opinions became increasingly common.[28] Moreover, stare decisis as an abstract principle in constitutional law held

24. *See* W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (2d ed. 1961).

25. *See, e.g.*, Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1945). *See generally* C. PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947, at 91-136 (1948).

26. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938). *But see* Cox v. New Hampshire, 312 U.S. 569 (1941); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

27. *See generally* C. PRITCHETT, *supra* note 25, at 198-238.

28. *See id.* at 23-45.

little attraction for some of the Justices.[29] Even Thomas Reed Powell, no apologist for the Court in prior years, felt compelled to issue a warning:

> The fact that judges exhibit readiness to undo the work of their predecessors in this field, whenever they would not have made the initial determination, has wide repercussions. Who can tell what other landmarks will be similarly obliterated? Where shall confidence be placed? How far will transactions become a mere gamble as to their legal results?[30]

For persons persuaded that institutional harmony contributes significantly to the work and well-being of the Supreme Court, the unpredicitability of the Roosevelt Court remained alarming.[31]

It was the particular responsibility of the Roosevelt Court to insist on the observance of individual freedoms during World War II. For the most part the Court did not abdicate this responsibility,[32] even though there were certain decisions that evoked controversy and extended discussion.[33]

During the period of international instability following World War II, the perceived need for national security occasionally dictated temporary restraints on individual freedoms. It was the Court's task to strike a balance between freedom and security. By 1949, President Truman had chosen three Associate Justices and one Chief Justice.[34] The preference accorded individual freedoms over national security considerations during the tenure of the Roosevelt Court noticeably declined with the commencement of the Vinson Court. In the early 1950's, the Court passively accepted many of the stringent security measures enacted by Congress and the states.[35] These decisions reflected the popular belief

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29. *See, e.g.*, Douglas, *Stare Decisis*, in THE SUPREME COURT: VIEWS FROM INSIDE 122 (A. Westin ed. 1961).

30. Powell, *Our High Court Analysed*, New York Times, June 18, 1944, § 6 (Magazine) 117, 144. *See generally* C. PRITCHETT, *supra* note 25, at 46-70.

31. On the desirability of institutional harmony, see Swisher, *Needed: A Rededicated Supreme Court*, THE JOHNS HOPKINS MAGAZINE, April, 1953.

32. *See* Cramer v. United States, 325 U.S. 1 (1945); Hartzel v. United States, 322 U.S. 680 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).

33. *E.g.*, Duncan v. Kahanamoku, 327 U.S. 304 (1946); Korematsu v. United States, 323 U.S. 214 (1944); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

34. The Truman appointees were: Chief Justice Vinson (1946), Justice Burton (1945), Justice Clark (1949), and Justice Minton (1949).

35. *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

that internal subversion and external aggression threatened the very existence of the nation.

In most cases the Vinson Court let the state legislatures and the Congress have their way.[36] In effect, the Court transposed the arguments that Justice Holmes had used earlier to assail the Court's attitude toward economic regulation to the dilemmas arising from the cold war. Thus, a full and elaborate theory of constitutional jurisprudence, with roots in the teaching of James Bradley Thayer[37] and, later, in the dissenting opinions of Justice Holmes, was pursued.

The prime movers behind this transformation were, foremost, the cerebral and irrepressible Justice Frankfurter and an impressive array of judges and academicians who were persuaded that the exercise of judicial review was an undemocratic intrusion into the politically responsive sectors of the American democracy. For these jurists, only evidence of a clear mistake in the exercise of legislative discretion could justify judicial intervention.[38] They insisted that Justices, as guardians of the Constitution, also act as guardians of their judicial prerogatives. Frequent resort to the veto power of judicial review over the acts of legislatures, wrote Judge Learned Hand, "certainly does not accord with the underlying presuppositions of popular government."[39] In the absence of fundamental error, the Court was inclined to permit legislatures to make the appropriate adjustments themselves. As Minton told Frankfurter in 1951, a paramount lesson of the Court's recent history was that "today the states do a pretty good job of correcting their own errors."[40]

On the other hand, the Vinson Court did evidence concern about the rights of minorities, especially blacks.[41] This was, however, an area

36. *See, e.g.*, Ramspeck v. Federal Trial Examiners Conf., 345 U.S. 128 (1953); Buck v. California, 343 U.S. 99 (1952); Adler v. Board of Educ., 342 U.S. 485 (1952); Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951).

37. *See* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

38. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUREME COURT AT THE BAR OF POLITICS 35-46 (1962). *See generally* THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT (D. Forte ed. 1972).

39. L. HAND, THE BILL OF RIGHTS 73 (1964). *See also* W. MURPHY, CONGRESS AND THE COURT 73-78 (1962); C. PRITCHETT, *supra* note 4, at 227-37.

40. Letter from Sherman Minton to Felix Frankfurter, May 7, 1951, in the Felix Frankfurter Papers (The Library of Congress).

41. *See* Barrows v. Jackson, 346 U.S. 249 (1953); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); C. PRITCHETT, *supra* note 4.

While Brown v. Board of Educ., 349 U.S. 294 (1954), was decided after the death

where individual freedom was not in conflict with the alleged need for extensive national security regulation.

Only slightly less significant than questions of national security were issues involving aspects of the criminal law. The Vinson Court was somewhat less responsive to the rights of persons accused of crime than was the Roosevelt Court.[42] The Justices were not insensitive to their occasional disagreements about the purposes of criminal law. Once, when Minton had chided him about being "soft" on crime, Frankfurter responded:

> One of these days I will get you to listen to me on American criminal justice. I may be deluding myself but I do not think I am any "softer" about crime than you are. I think such differences as we have derive from our different experiences in regard to criminal justice.[43]

The Vinson Court seemed to attach less importance to procedural safeguards for accused criminals than the Roosevelt Court,[44] although the former remained concerned if an individual had been falsely accused of a criminal act.[45]

The Vinson Court restricted the role of the judge more than at almost any other time in constitutional history. Emphasis was placed less on individuals than on the continuity of the rule of law. Justice Frankfurter especially warned against "leading people to think the law is de-

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of Chief Justice Vinson and the appointment of Chief Justice Warren, the composition of the Court was otherwise that of the Vinson era. The unanimous *Brown* opinion can thus be taken as indicative of the Vinson Court's concern for minority rights.

42. *See* Bowman Dairy Co. v. United States, 341 U.S. 214 (1951); United States v. Rabinowitz, 339 U.S. 56 (1950); Bryan v. United States, 338 U.S. 552 (1950).

43. Letter from Felix Frankfurter to Sherman Minton, Oct. 8, 1953, in the Felix Frankfurter Papers (The Library of Congress).

44. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950).

45. The implications of this distinction were conveyed by Justice Minton to Justice Frankfurter, whose usual concern for procedural matters was also evidenced in his attitude toward the proper administration of criminal administration of criminal justice.

> The protest was not that the law has not been correctly applied but with the law itself. I may agree with that sort of protest—at least I understand it. I do get a bit impatient with our system which seeks to cheat the law by some specious plea that hasn't anything to do with his guilt or innocence but is only a plea that he wasn't tried according to the rules without even hinting that the application of the rules could have saved him. I still think even on a constitutional claim a defendant should be required to show that if he were granted a new trial he has a defense to make. Not just send him back for an exhibition of shadow boxing. I know you don't agree with this crude idea of mine. But if law is to be respected it must be considered as something other than a game.

Letter from Sherman Minton to Felix Frankfurter, July 15, 1955, in the Felix Frankfurter Papers (The Library of Congress).

pendent on the chance, for instance, whether I go off the Court tomorrow and the further chance of who might take my place."[46] Respect for stare decisis as an antidote to institutional instability, and a willingness to decide only the precise legal questions brought in issue before the Justices characterized the Vinson Court's majority.[47] The system of constitutional thought they implemented represented a synthesis of the constitutional experience of the twentieth century. The members of the Vinson Court had all observed the old Court before the Depression, and they all deplored what they had seen. It was perhaps this historical awareness that caused many of the Justices to articulate their expectations and ideals about the nature of the judicial function. They earnestly sought pragmatic answers to recurrent questions: What should be expected of them as individuals? What should be expected of the United States Supreme Court as an institution?

III. JUSTICE MINTON'S POLITICAL LIFE AND APPOINTMENT TO THE SUPREME COURT

Sherman Minton was born in a log cabin in the southern Indiana hill country in 1890.[48] At Indiana University he excelled in athletics, and upon completion of his undergraduate studies he attended the Indiana Law School, from which he was graduated summa cum laude, ranking first in his class. With the assistance of a scholarship, he then attended the Yale Law School, where he received the degree of Master of Laws in 1916, having been graduated cum laude. While at Yale, he was instrumental in establishing a legal aid society.

The law faculty at Yale included former President William Howard Taft,[49] whom Minton later described to Justice Frankfurter as one of the

46. Letter from Felix Frankfurter to Sherman Minton, Jan. 25, 1950, in the Felix Frankfurter Papers (The Library of Congress).

47. The importance of precedent is deemphasized in Douglas, *Stare Decisis, supra* note 29. For an eloquent defense of stare decisis, see Green v. United States, 356 U.S. 165, 189 (1958) (Frankfurter, J., dissenting).

Justices Burton, Clark, Minton, and Reed and Chief Justice Vinson usually voted together while on the Court. *See* Table in note 81 *infra.*

48. For biographical accounts of Sherman Minton's early years, see *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Minton,* 384 U.S. *v* (1966). *See also* 51 A.B.A.J. 663-64 (1965).

49. Also on the Yale law faculty were Senior Circuit Judge, Henry Wade Rogers, two judges of the Connecticut courts, and Gordon Sherman, the brother-in-law of Justice Mahlon Pitney of the United States Supreme Court. *See* files of the Senate Committee on the Judiciary on the nomination of Sherman Minton (The National Archives). The schedule of graduate law courses that Minton completed at Yale included courses in

"bird dog" school, that is, one who observed the maxim, "first find what the Court has said and stick to it." In his later years Minton regretted his early instruction under Taft. As Minton candidly acknowledged to Frankfurter, "I think my training and practice were too much in that school. I did believe a great deal in stability, which was a fetish with Taft."[50]

After serving as an Army captain during World War I, Minton continued his formal studies in international law, Roman law, civil law, and jurisprudence under the Faculte de Droit at the Sorbonne in Paris. At the time of his appointment to the Supreme Court, Minton had received more formal education than any other member of the Court. His educational credentials put him in good stead with his colleagues and enabled him to feel at ease with them and the able attorneys who argued cases before the Court.

Minton unsuccessfully ran for an Indiana congressional seat in 1920 and 1930, and was a successful trial lawyer in Miami, Florida, for three years during the middle 1920's. Not long after his second congressional defeat, Minton became closely allied with the political machine of Paul V. McNutt, who became Governor of Indiana in 1932. Minton achieved wide publicity as Governor McNutt's Public Counselor of the Public Service Commission, and through his efforts utility rates were substantially reduced in Indiana. Although known as one of the original "two-percenters" (state employees who gave two percent of their salaries to the Governor's Democratic political organization), Minton was elected to the United States Senate in 1934 with a plurality of sixty thousand votes.[51] His campaign slogan was an emphatic, "You can't offer a

international law, jurisprudence, Roman law, and comparative European governments.

Graduate study in constitutional law was taught by former President Taft. Once, Minton gave his opinion that the Supreme Court was wrong to uphold the confiscation of nets belonging to fisherman convicted for having seined in navigable waters. The former President responded, saying "I am afraid, Mr. Minton, that if you don't like the way this law is interpreted, you will have to get on the Supreme Court and change it." *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Minton*, 384 U.S. *v, vii* (1966).

50. Letter from Sherman Minton to Felix Frankfurter, Jan. 18, 1960 in the Felix Frankfurter Papers (The Library of Congress).

51. There were so many new Democratic senators elected to the Senate in 1934 that an additional bench was required on the Democratic side of the aisle. Quite by chance, Minton was seated next to Harry S Truman, who had been elected to the Senate from Missouri. Minton, Truman, Nathan Bachman of Tennessee, and Lewis Schwellenbach of Washington became close friends as the occupants of "freshman row" in the back of the Senate Chamber.

hungry man the Constitution!"[52]

Senator Minton soon established himself as one of the most enthusiastic New Dealers in Congress, and his dedication did not go unrewarded. He was made assistant Democratic Whip, and when Senator Lewis of Illinois died, Minton succeeded him as the Democratic Whip, an unusual position for a freshman Senator. Inasmuch as Minton was an intense advocate, his selection by his Democratic colleagues was provident, for he zealously defended some of the New Deal proposals even when he had personal reservations about their constitutionality.[53] His intense partisanship, however, was to become a prominent issue in the Senate Judiciary Committee hearings on his nomination to the Supreme Court.

Senator Minton embraced all of the major reforms that comprised President Roosevelt's New Deal. Moreover, he was an ebullient and persistently outspoken critic of the status quo. He was, as Justice Frankfurter once called him, an "almost pathological Democrat."[54] His loyalty to President Roosevelt and the Democratic Party were exceptional even among dedicated New Dealers. Although the precise aims of the New Deal were sometimes unclear, Minton's voting record indicated full agreement with the general formulation of goals proposed by President Roosevelt.[55] Accordingly, Minton voted in favor of the Administration's labor and farm programs. In 1935, he vigorously supported the passage of the National Labor Relations Act, which he later described as the "greatest piece of legislation ever enacted for the benefit of the laborer."[56] When he advocated a federal antilynching bill, which some critics

52. TIME, Sept. 26, 1949, at 22.

53. *See Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Minton*, 384 U.S. *v*, *x* (1966) (discussing Minton's reservations about the Bituminous Coal Conservation Act).

54. Letter from Felix Frankfurter to Sherman Minton, Feb. 1, 1960, in the Felix Frankfurter Papers (The Library of Congress).

55. In his Annual Message to the Congress on January 4, 1935, the President told the nation that

> [t]he time had come to fulfill a bold new social mission and to subordinate profits and wealth to the general good. This he proposed to accomplish, first, by ending the dole; second, by putting the 3,500,000 able-bodied persons on relief rolls to work in new programs of slum clearance, rural housing, rural electrification, and expanded public works; and, third, by inaugurating a comprehensive social security program to reduce the hazards of unemployment and old age.

A. LINK & W. CATTON, AMERICAN EPOCH: A HISTORY OF THE UNITED STATES SINCE THE 1890's 412 (3d ed. 1967).

56. New York Times, April 14, 1939, at 4, col. 1.

considered a trespass on state prerogatives, he said, in response to criticism, "I am interested in State rights; but I am more interested in human rights."[57]

Senator Minton eventually became chairman of a committee formed to inquire into public utility holding companies. Legislation was subsequently enacted which provided for the dissolution of those holding companies that could not justify themselves economically.[58] Later, Minton's active participation in an extensive investigation of lobbying practices precipitated a confrontation with a large segment of the press, which neither side could thereafter really forget or forgive. His record as a Senate investigator indicated his strong inclination toward populism, which was reflected in his favorable votes on public policies proposed by the Administration.

In 1937, Senator Minton vigorously defended President Roosevelt's proposal to enlarge the membership of the Supreme Court. It has been suggested that President Roosevelt offered Minton an appointment to the Court, but Minton, because of the derogatory nature of his Senate criticism of the Court, had declined.[59] In truth, Minton had been considered for the nomination, but it was never offered to him.[60]

In the campaign year of 1940, Minton supported the politically popular Smith Act,[61] and indicated his concern with subversive influences in the country. But he also supported the unpopular—in Indiana—Selective Service Act[62] and advocated military preparedness. After a 13,000 mile inspection tour of military installations, he concluded that the country had no "army or the equipment to fit one out if we

57. *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Minton*, 384 U.S. *v*, *xx* (1966).

58. Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 (1970).

59. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra*.

60. When Justice Van Devanter retired in 1937, the Senate Majority Leader, Joseph T. Robinson of Arkansas, had been chosen for the Court by President Roosevelt. Interview with Justice Hugo L. Black, Jan. 2, 1968. But just before the nomination was announced, Senator Robinson unexpectedly died. Shortly thereafter, Senator Black was in the Senate cloakroom when Minton approached him and inquired, on behalf of Attorney General Homer Cummings, whether Black would be willing to accept an appointment to the Court. When Black said he would if the President should select him, Minton told him that he had reason to know that the President had narrowed the list of candidates to two persons; himself and Black. There is, then, strong evidence that Minton was considered for a Court position as early as 1937. *Id.*

61. Smith Act of 1940, 18 U.S.C. § 2385 (1970).

62. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885.

had."[63] Minton was unsuccessful in his bid for re-election against Raymond Willis, a small town newspaper publisher. Wendell Wilkie, the Republican Presidential nominee, who was a native of Indiana and attended Indiana Law School with Minton carried his home state. Willis was carried along on Wilkie's coattails and beat Minton by twenty-five thousand votes.[64]

After this senatorial defeat, President Roosevelt chose Minton to be one of his five special administrative assistants. In this capacity Minton was to maintain a close liaison between the White House and the Democratic leadership in the Senate. Although he publicly referred to the four months he spent on the Presidential staff as one of the "richest in my life,"[65] there is reason to believe his real feelings were otherwise.[66] Lines of authority were uncertain, and Minton never achieved the spontaneous rapport with Roosevelt that he always found in the companionship of Harry Truman.

The most important single act of Minton's political career occurred during the short interval he was working in the White House. When it became apparent that the Senate wished to investigate defense plants and related activies, it was important to decide which of several resolutions before the Senate should have the Administration's backing. The Senator who sponsored the resolution that was adopted by the Senate would probably serve as the chairman of the new investigative committee. Minton successfully urged that the Administration back Senator Truman's resolution and his appointment as chairman of the defense investigation committee,[67] a position which gave Truman sufficient

63. New York Times, May 13, 1940, at 7, col. 5.

On another occasion, while defending the need for extensive military training, Minton said, "If we are not willing to go ahead and meet our obligations as citizens, then we deserve what we'll get. I've got two boys and I would be ashamed if they turned their back on their country's flag." New York Times, July 6, 1940, at 8, col. 5.

64. Harold Ickes, Roosevelt's Secretary of the Interior, maintained that Roosevelt could have secured Minton's reelection had he gone to Indianapolis near the end of the campaign, as Ickes had urged. Ickes felt that Minton's Senate support of the President should have been rewarded with more campaign assistance than Minton received from the Administration during the election. 3 H. ICKES, THE SECRET DIARY OF HAROLD L. ICKES 362 (1954).

65. Lerner, *The Supreme Court*, HOLIDAY, Feb. 1950, at 122.

66. Interview with a Capitol Hill friend of Justice Sherman Minton who asked to remain anonymous, Jan. 24, 1968.

67. In a Memorandum to the President, Minton supported the resolution offered by Senator Truman:

national exposure to permit his subsequent selection as Vice President.[68]

During his fifth month of service to the President, Minton was nominated to a vacancy on the Court of Appeals for the Seventh Circuit. He remained on the court for eight years, writing over two hundred opinions, which tended to be concise, clear, and unadorned by rhetoric. The opinions usually focused on the precise issues in dispute, and they definitely gave no evidence of the liberal social commitments that had characterized Minton's Senate tenure.

When the Supreme Court recessed in the summer of 1949, there was no cause to believe that its composition would change before it met again. During the summer recess, however, Justice Murphy unexpectedly died in Detroit, and Justice Rutledge died suddenly in September.[69] It is the custom of Presidents to make no mention of Supreme Court appointments until the late incumbent is properly interred. Late in the day of the memorial service for Justice Rutledge, President Truman called Judge Minton and asked him to be Rutledge's successor.[70]

Memorandum for The President

I just talked with Jim Byrnes. Unless you disagree he will report at once for passage the Truman resolution to investigate defense activities. This is a matter of strategy to keep the investigation in friendly hands in the Senate and away from unfriendly House fellows like Cox.

Barkley agrees with Jim. I agree with them. The Truman resolution is the best out. What shall I tell Jim?

Memorandum from Sherman Minton to Franklin D. Roosevelt, Feb. 27, 1941, in the Sherman Minton Papers (The Truman Library).

When Minton received the Memorandum back from the President, pencilled in the lower right hand corner in the handwriting of the President was "S.M. OK FDR."

68. Minton later informed Senator Truman of what he had done in his behalf:

My dear Harry:

I enclose a little "scrap of paper" that I thought you might be interested in seeing; and if you would like to have it to add to your papers, I shall be glad to give it to you. You can see from a perusal of it that your old seat mate was batting for you when he was down at the White House. You will recognize the pencil memorandum at the bottom of the sheet as that of the Boss himself.

I hope everything goes well with you in this strenuous campaign, and I have every confidence that the result will be satisfactory on November 7. Then, I want to come down and see you inaugurated and strike a blow for liberty in the old familiar haunts!

Letter from Sherman Minton to Harry S Truman, Oct. 11, 1944, in the Sherman Minton Papers (The Truman Library).

Years later, Justice Minton delighted to relate this episode to his law clerks, ending with the observation, "That's how Vice Presidents are made." Then, after an appropriate pause, he would add, "And that's how Supreme Court Justices are made." Interview with one of Justice Sherman Minton's law clerks, *see* note 3 *supra.*

69. *See generally* F. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 335 (1965).

70. Minton was at his residence in New Albany, Indiana, when he received

President Truman never made his criteria for judicial appointments explicit, other than to state, "if he is qualified, that is the only thing I consider."[71] Truman's reasons for selecting Minton were never precisely expressed. Indeed, following the death of Rutledge there was some public sentiment for the appointment of a Catholic (there was then no Catholic on the Court). Attorney General J. Howard McGrath thus became a logical contender for the nomination. President Truman, however, quickly selected Minton, a personal friend, loyal Democrat, and experienced federal judge. Some commentators have maintained that Minton's friendship with the President was the decisive factor behind the nomination.[72] It has also been suggested that President Truman wanted to appoint someone whom he expected to vote with Justices Black and Douglas.[73] In the Senate, Black and Minton frequently had voted similarly, and Minton was known to have a high regard for Black's judicial abilities.[74]

President Truman's telephone call. Interview with Frances Kelley, Sherman Minton's longtime secretary, Jan. 30, 1968.

71. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 479 (1949). Minton once told Justice Frankfurter that

> [a]t the time Harold Burton was nominated for the Court I was in Truman's office and he was talking about the appointment and told me that he would have nominated Learned Hand but he was too old! And then he lived the span of years for retirement and then some.

Letter from Sherman Minton to Felix Frankfurter, Jan. 20, 1962, in the Sherman Minton Papers (The Truman Library).

72. *See, e.g.*, H. ABRAHAM, THE JUDICIAL PROCESS 61 (3d ed. 1975).

One Washington lawyer, who was an advisor to President Truman, stated that he believed the President's high personal regard for Minton was the major factor influencing the appointment, and he doubted whether the President had thought much about how Minton might vote as a member of the Court. Moreover, there is reason to believe, on the authority of one of his colleagues on the Court, that Minton had made the President aware that he was interested in a Court appointment.

73. This suggestion was commonly made in the political journals at the time of the appointment. *See, e.g.*, Ickes, *Justice Rutledge*, THE NEW REPUBLIC, Sept. 26, 1949, at 20:

> The nomination by President Truman of Sherman Minton of Indiana must mean that he was aware of the importance of filling the Rutledge vacancy with a man of the general type of Justice Rutledge, to which type Justices Black and Douglas also conform.

74. Just before his nomination, Minton had ostensibly accepted, in a book review, Justice Black's position that the Bill of Rights should be incorporated into the fourteenth amendment:

> The Court stands five to four, with Justice Black leading the minority. The majority admits Justice Black's position as to the First Amendment to the Federal Constitution and probably as to the Sixth Amendment in a capital case. Why the Court goes part of the way but not all the way with Justice Black is, to say the least, illogical.

Minton, Book Review, 24 IND. L.J. 299, 302 (1949). And yet, Minton's publicly stated

Although Minton's confirmation by the Senate was never in serious doubt, the Senate Judiciary Committee nonetheless thoroughly examined his political and judicial record. Two issues were of particular interest to the Committee: the state of Minton's health[75] and the public policies that he might be expected to favor on the Court.[76] The Commit-

approval of Justice Black's position and his frequent agreement with him in the Senate did not accurately suggest how Minton would vote on the Supreme Court, where he and Black frequently disagreed. *See* Table, note 80 *infra*. Justice Black attributed the cause of their later disagreement to Minton's experience on the court of appeals, where he "became a bit more hidebound on precedent and procedure than I would have liked." Interview with Justice Hugo L. Black, Jan. 22, 1968.

Another colleague, Justice Douglas, specifically discounted Minton's voting record in the Senate, and pointed out the futility of selecting any man for the Supreme Court on the basis of how he might be expected to vote. Justice Douglas also noted that the questions with which a Senator is concerned are entirely distinguishable from the kinds of questions upon which a Supreme Court Justice must rule, for example, the precise meaning of the fourth amendment as applied to a certain set of acts. Interview with Justice William O. Douglas, Jan. 30, 1968.

75. The Committee expressed concern whether Minton's health would permit him to perform at full capacity on the Court. In 1945 he had suffered a heart attack and had spent some time in Walter Reed Hospital. Minton had suffered from pernicious anemia since 1943. Senator Lucas of Illinois, Minton's principal defender in the public hearings, testified that in spite of his health, Minton had been "for the last 3 years . . . regularly attending his duties on the Circuit Court of Appeals." *Hearing Before the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess., at 3 (1949) [hereinafter cited as *Hearing*].

76. With regard to Minton's policy preferences, Senator Lucas told the Judiciary Committee, "[t]here cannot be any doubt about Senator Minton's belief in what we called the New Deal. He went all out for it when he came here as a Senator." *Hearing* at 5. Later in the proceedings, Senator Lucas said: "I think he has a liberal viewpoint, and I think that he is progressive. There is no doubt about that." *Hearing* at 7.

When controversy arose over his nomination, Minton refused to testify before the Committee inasmuch as he was a sitting judge. *See* Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. LAW 371 (1969). Opposition to the Minton nomination gathered momentum within the Committee when, on September 17, 1949, Senator Homer Ferguson, a Republican from Michigan, indicated that he wanted additional time to study Minton's record. On September 27, the Committee voted five to four in favor of a motion by Senator Ferguson to summon Minton. Minton refused to appear and on October 1 addressed a letter to the Committee in which he stated why he chose not to appear:

> I have received your request to appear before the committee.
>
> I, of course, desire to cooperate fully with the committee at all times but I feel that personal participation by the nominee in the committee proceedings relating to his nomination presents a serious question of propriety, particularly when I might be required to express my views on highly controversial and litigious issues affecting the Court.
>
> I am informed that the principal question with which the committee is concerned is my position with regard to the bill presented in 1937 to increase the membership of the Supreme Court.
>
> You will recall that at the time the bill in question was under discussion I

tee vigorously inquired into allegations about Minton's senatorial intemperance, which might have been taken to indicate the absence of a

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was assistant majority whip and, understandably, I strongly supported those legislative measures recommended by the administration.

My record as a Senator is a public record and open to scrutiny by the Committee. It, of course, has no relationship to my record as a judge of the seventh circuit court of appeals. However, my judicial record is also available for examination. In my opinion, that record speaks for itself, as does my record as a Senator. The latter record was open to your committee and to the Senate in 1941 when I was unanimously confirmed by the Senate to the second highest court in the land.

As assistant majority whip of the Senate, I was a strong partisan and supported the administration. I do not deny this. The record was made and I stand upon it. I may have made mistakes. I likewise may have made mistakes as a judge, but I think no man can point to one of my more than 200 opinions in the past 8 years and truthfully say it was characterized by partisanship of any kind. When I was a young man playing baseball and football, I strongly supported my team. I was then a partisan. But later, when I refereed games, I had no team. I had no side. The same is true when I left the political arena and assumed the bench. Cases must be decided under applicable law and upon the record as to where the right lies. I have never approached a case except to try to find the answer in the law to the question presented on the record before me.

As Members of the Senate you will agree, I am sure, that the proper exercise of the duties of the senatorial office requires freedom of speech with which to express those convictions honestly arrived at and sincerely believed in. Under our representative system of government, the Members of both legislative bodies, the Senate and the House, are the channels through which local public opinion is brought to bear upon proposed legislation. To inhibit Members for any reason from the full expression of their views on any given measure would be to seriously hamper the effectiveness of our legislative structure.

As a Senator and an elected representative of the people, I considered it my duty and privilege to aid in the enactment of those proposals which I honestly believed to be of value to the country as a whole. That my belief in regard to some of these proposals was not shared by the majority of my colleagues, and that the measures failed of enactment, does not alter this fact. Nearly everything a Senator does is of a controversial nature. He must take a firm position on legislation, without regard to the possible unpopularity of his stand.

It might be pertinent at this point to invite the committee's attention to the fact that at least three nominees to the Court, who were confirmed in due course, had strongly advocated the Court plan. The committee did not see fit to query any of these gentlemen on this matter.

In conclusion I should like to refer to a statement submitted by Justice Frankfurter when he was asked to appear before the Senate Judiciary Committee in 1939 . . .

"I am very glad to accede to this committee's desire to have me appear before it. I, of course, do not wish to testify in support of my own nomination. * * * While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself.

"I should think it improper for a nominee no less than a member of the Court to express his personal views on controversial political issues affecting

judicial temperament.[77] Since Minton had made many public statements criticizing the Court's work, the Committee fully explored his attitudes toward the Court.[78] The Committee was also concerned with Minton's occasionally tempestuous relationship with the press.[79] Eventually, the

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the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations."

While it is my desire to comply with any reasonable request of the committee, I am constrained at this time to call to its attention the serious questions of propriety and policy which I have endeavored to outline in this letter.

95 CONG. REC. 13803 (1949).

On October 3, the Committee reconsidered and voted against calling Minton to testify. The vote in favor of confirmation was nine to two.

77. Senator Wiley of Wisconsin inquired of Senator Lucas whether he had

> . . . observed in him this change that has occurred in men even on the Supreme Court, who went on as radicals and excessive liberals, and have gotten around to the point where they believe that there is apparently something else besides this radical philosophy of life? Have you noticed this change in him? He apparently was a great New Dealer, and his philosophy was the philosophy of the excessive liberal. Have you noticed that he has with the years matured in the sense that he is more judicial and more reflective, you might say? Do you see what I am getting at?

Hearing at 9.

Senator Lucas replied:

> I think that I know what the Senator is driving at, and I do not think that there is any doubt about the fact that he has been on the bench a great number of years and that it has sobered the gentleman in his judgment, and that no one has ever complained about his judicial temperament in comparison with his senatorial temperament.
>
> I am now discussing primarily what he did when he was on the floor of the United States Senate. There were some outbursts of unusual language which he used to make a point.

Id. at 9-10.

Senator Wiley interrupted to inquire: "He never broke desks, anyway, did he?" *Id.* at 10. To which Senator Lucas responded: "I don't know whether he ever did or not. I have nothing against a Senator who wants to break a desk now and then. I think a man is interested in his cause when he breaks his desk." *Id.*

78. When the Court had declared the Agricultural Adjustment Act unconstitutional, United States v. Butler, 297 U.S. 1 (1936), Minton had risen on the Senate floor and emotionally castigated the decision:

> I disagree with the majority emphatically, and I think that their opinion is the most strained and forced construction of the Constitution and the most highly flavored political opinion to come from the Court since the Dred Scott decision. . . . The cold hand of that Court should not be permitted to contaminate the bloodstream of the Nation and destroy the right of the people to live and prosper. . . . Although the Court has gone out of its way to wreck a system that works, it has not gone so far, in my humble opinion, as to make our condition hopeless.

Hearing at 8.

79. In the Senate Minton had proposed legislation that would levy fines between the

Committee favorably reported the nomination to the Senate, where it was approved by a vote of forty-eight to sixteen.

IV. THE NEW DEALER AS JUSTICE

How a Justice views the Supreme Court's institutional role within the political system is likely to affect significantly his judicial behavior. Justice Minton had strong opinions about the institutional limitations of the Supreme Court vis-a-vis the representative branches of government and, also, about the nature of the decisional process itself. It was here—on the theory of judging and the interrelation of law and politics—where he found common cause with Justice Frankfurter. With constant cajolery and an endless charm, Frankfurter quickly drew Minton into the Court's dominant decision-making coalition.[80]

Supreme Court decision-making was, Minton believed, circumscribed by the separation of powers doctrine. The division of respon-

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amounts of $1,000 and $10,000 against any publication convicted of having printed a "known untruth." S. 3928, 75th Cong., 3d Sess. (1938). At the hearing Senator Lucas testified on this issue: "I do not know why he introduced the bill. He would have to tell you that. Probably some newspaper got after him pretty strong, and he decided he would retaliate. *Hearing* at 10. A veteran Capitol Hill reporter, who was close to Minton, said that Minton did not believe in this bill, and suggested that he may have introduced the "gag law" at the instigation of someone in the Administration. Interview with a friend of Justice Sherman Minton who asked to remain anonymous, Jan. 24, 1968.

In a speech before the American Press Society in New York late in 1938, Minton had spoken against certain practices of newspapermen. An editorial in the *St. Louis Globe-Democrat* on September 16, 1938, denounced Minton in strong terms. Another editorial accused Minton of

> rudeness to witnesses, extravagent remarks on the floor of the Senate, and unbridled and often pointless loquacity, a blind follower of all the dreams for the more abundant life, and a total lack of that splendid quality known as judicial temperament.

Hearing at 5, *quoting New York Herald Tribune*, April 30, 1938.

Even in retirement, Justice Minton could reciprocate in kind to Justice Frankfurter: "It makes me boil to think of the protestations of the so-called free press. They have some stalwarts, but they are for the most part just a mouthpiece for money." Letter from Sherman Minton to Felix Frankfurter, Feb. 26, 1958, in the Felix Frankfurter Papers (The Library of Congress).

80. Table 1 shows the number of nonunanimous cases decided by signed opinion in which each of the other Justices joined with Justice Minton in either a majority or dissenting vote during each term and the percentage relationship of those cases to the total number of signed non-unanimous decisions each term.

While Frankfurter's influence on Minton cannot be overestimated, the figures in Table 1 tentatively suggest that the core of the Vinson Court majority was composed of Chief Justice Vinson and Justices Reed, Burton, Clark, and Minton. Justice Jackson was an only slightly less consistent member of the majority.

80. (cont.)

TABLE 1—Dispositional Agreement with Justice Minton, *1949-1955* Terms*

	1949		1950		1951		1952		1953		1954		1955	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
Vinson	63	80.8	62	76.5	54	74.0	74	74.7						
Warren									28	51.9	32	66.7	31	49.2
Black	34	43.6	31	38.3	22	30.1	42	42.4	19	35.2	24	50.0	29	46.0
Reed	60	76.9	57	70.4	45	61.6	77	77.8	32	59.3	33	68.8	52	82.5
Frankfurter	38	48.7	45	55.6	23	31.5	45	45.5	31	57.4	25	52.1	30	47.6
Douglas	7	9.0	27	33.3	24	32.9	34	34.3	22	40.7	15	31.3	21	33.3
Jackson	43	55.1	48	59.3	37	50.7	56	56.6	27	50.0				
Burton	60	76.9	57	70.4	39	53.4	81	81.8	35	64.8	27	56.3	51	81.0
Clark	55	70.5	47	58.0	40	54.8	75	75.8	26	48.1	32	66.7	43	68.3
Harlan											5	10.4	26	41.3

* The data used in this Table were made available by the Inter-University Consortium for Political Research. The data were originally collected by Glendon A. Schubert. Neither Schubert nor the Consortium bear any responsibility for the analyses or interpretations presented here.

sibilities among the legislative, judicial, and executive branches of government was taken as a matter of fact and not merely one of constitutional form. He did not acknowledge that in practice the separation of powers is more accurately described in terms of the sharing of powers. With this perspective in mind, he drew an intransigent line between legislating, executing, and adjudicating. Consequently, he proved readily amenable to arguments urging judicial restraint when executive or legislative activities were challenged. Consistent with his Senate positions in defense of the New Deal, he continued to believe that if Congress had the power to act it was beyond the Court's constitutional prerogative to question the wisdom of the challenged legislation. This conclusion was modified only in those relatively infrequent situations where there existed explicit constitutional limitations clearly applicable to either the legislative or executive branch. Unlike his former Senate colleague, Justice Black, Minton perceived the Bill of Rights as imposing constitutional limitations only in the instance of a clear legislative or executive mistake.[81] Since a plausible rationale could be developed for nearly any legislative or executive action, he deferred repeatedly to nonjudicial judgments.[82]

Minton's theory of judging was based upon his acceptance of the declaratory theory of law. That theory, in its most undiluted form, holds that judges merely declare what the existing law is and then apply it to the factual situation before them for decision.[83] When applied to Supreme Court decision-making, the declaratory theory is consistent with the theory of separation of powers endorsed by Minton and many other New Dealers insofar as it denies any significant policy-making discretion to the Justices. Simply put, the responsibilty of the legislature is to make the laws, while the responsibility of the judiciary is to interpret them. Deference to the legislature and stare decisis thus become limitations on judicial policy-making, and these limitations must be respected unless they are patently contrary to the Constitution.

To the extent that the Supreme Court is a political as well as a legal institution, Minton was "perhaps less well suited than some for a position on a court that is less affected by stare decisis than it is by

81. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952), where Justice Minton joined in the majority opinion. For a helpful discussion of *Wieman*, see A. BICKEL, *supra* note 38.

82. *See, e.g.*, Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953); Schwartz v. Texas, 344 U.S. 199 (1952); Adler v. Board of Educ., 342 U.S. 485 (1952).

83. *See* J. FRANK, COURTS ON TRIAL 14-36 (1963).

arguments of policy."[84] His theory of judging had crystallized following the judicial activism in the economic regulation cases that he had witnessed and deplored during the era of the New Deal, and it was a theory not altogether inappropriate for a federal judge sitting on a court of appeals.[85] But his theory of judging was more vulnerable when applied in the context of the Supreme Court, for as the Court became increasingly concerned with novel constitutional claims involving civil liberties, it was in some cases "difficult for him to think of the Constitution as a living document or law-giving as a source of change or progress."[86] Minton's general commitment to the notion that Justices should declare rather than make law led a former clerk to offer the following evaluation:

> If he had any limitation as a judge—and he certainly had none as a human being—it might perhaps be that his reverence for the law as it stood when a case was under consideration would tend to make him less flexible than others in grasping the implications of some humanistic value that called for a distinction or a new concept.[87]

Although his opinions suggest that Minton was sometimes unimaginative, yet he was at least methodical and thorough;[88] although he was usually prosaic,[89] his opinions were clear and to the point;[90] and although he was a literalist in construing legislation,[91] he applied this method consistently, regardless of the identity of the parties. If he sometimes oversimplified complex questions,[92] he never complicated simple ones, nor did he create ambiguities where none existed.[93] It was, however, the degree of his dependence on precedent that set him apart

84. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra.*

85. *See generally* M. SCHICK, LEARNED HAND'S COURT (1970).

86. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra. See also* text accompanying note 98 *infra.*

87. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra.*

88. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950).

89. *See, e.g.*, Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953); United States v. United States Smelting & Ref. Co., 339 U.S. 186 (1950). *But cf.* Bell v. United States, 349 U.S. 81, 84 (1955) (dissenting opinion); McAllister v. United States, 348 U.S. 19 (1954).

90. *See, e.g.*, Doud v. Hodge, 350 U.S. 485 (1956); United States v. Anderson, Clayton & Co., 350 U.S. 55 (1955); United States v. Scovil, 348 U.S. 218 (1955).

91. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

92. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 484 (1953) (dissenting opinion); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 775 (1952) (dissenting opinion).

93. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953).

from most of his colleagues. He was once to say, in a case involving the Secretary of Labor, that:

> [The Secretary's] change in mind should not change the law. This Court, which may change the law, seems to have changed its mind about the same time and without saying why it does so, except that the foregoing cases are of a different vintage. I am unable to distinguish the cases on the vintage test.[94]

Nor was he ever able to abide a distinction based on the "vintage test." Lengthy citations of past authority accompanied most of his opinions.[95] He remained reluctant to depart from precedent even when the way had been partly charted. It was, therefore, commonly his predisposition to depend on existing precedents, a practice which was characterized by an insistent search for analogous decisions and a steadfast refusal to mitigate seemingly harsh applications of statutory law in the absence of significant ambiguity.[96] When he confronted a case of first impression involving legislation, he was inclined to make the most literal reading of the statute possible.[97]

Although he held to the declaratory theory of law with regard to prior Supreme Court decisions and legislation, Minton did not entirely accept the theory in issues involving the Constitution. In constitutional law he was not an absolutist. He did not believe that the provisions of the Constitution were self-executing.[98] Like Justice Frankfurter, he knew that the task of constitutional interpretation inevitably involved a Justice in constitutional lawmaking. As Frankfurter insisted:

> The problem is not whether the judges made the law, but when and how much. Holmes put it in his highbrow way, that "they can do so only interstitially; they are confined from molar to molecular motions." I used to say to my students that legislatures make law wholesale, judges retail. In other words they cannot decide things by invoking a new major premise out of whole cloth; they must make the law that they do make out of the existing materials and with due reference to the presuppositions of the legal system of which they have been made a part. Of course I know these are not mechanical devices, and therefore not sus-

94. Mitchell v. C.W. Vollmer & Co., 349 U.S. 427, 434 (1954) (dissenting opinion).

95. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953); Lutwak v. United States, 344 U.S. 604 (1953); Bryan v. United States, 338 U.S. 552 (1950).

96. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

97. *See, e.g.*, United States v. Halseth, 342 U.S. 277 (1952); Fogarty v. United States, 340 U.S. 8 (1950). *But see* United States v. Alpers, 338 U.S. 680 (1950).

98. *See* Barrows v. Jackson, 346 U.S. 249 (1953).

> ceptible of producing automatic results. But they sufficiently indicate the limits within which judges are to move.[99]

Because of Minton's respect for past decisions and his willingness to declare them applicable to present situations, it followed that he narrowly defined the limits of his lawmaking discretion.[100]

Moreover, Minton further restricted the range of his lawmaking discretion by insisting on a rigorous regard for the rules of procedure and jurisdictional access to the Court. He considered the requirements of procedural forms and time limitations to be important, and he assumed they had been established for good reasons. Like Frankfurter, he was always jealous of the Court's jurisdictional prerogatives.[101] "A private litigant," said one clerk, "probably had a heavier burden to sustain with Justice Minton to get in Court than perhaps with any other justice on the Court at that time."[102]

Consequently, Minton's approach to the work of the Supreme Court was characterized by those themes inherent in his conception of the judicial role: a strong presumption of constitutionality in favor of actions taken by the legislative and executive branches of government, respect for stare decisis, a cautious attitude toward judicial policy-making, and a careful regard for the prerequisites of procedure and jurisdiction. These views were shared, at least as general formulations, by Frankfurter and a majority of the other Justices during the seven terms Minton remained on the Court.

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99. Letter from Felix Frankfurter to Hugo L. Black, Dec. 15, 1939, in the Felix Frankfurter Papers (The Library of Congress).

100. Organized athletics and the antitrust laws illustrate Justice Minton's approach to policy-making. It is apparent that he enthusiastically favored the per curiam decision in Toolson v. New York, 346 U.S. 356 (1953), which sustained a 1922 ruling that baseball is beyond the scope of the antitrust laws. When in the following term the Court did not extend the *Toolson* ruling to boxing contests, Justice Minton joined Justice Frankfurter's dissent in which there was an appeal to stare decisis, and he also filed his own dissent where he expressed his belief that:

> [w]hen 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.

United States v. International Boxing Club, 348 U.S. 236, 251 (1951). Both stare decisis and a strong set of personal values converged in these cases; Justice Minton was very enthusiastic about sports and was inclined to protect them.

101. *See* Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 NW. U.L. REV. 716, 734-35 (1974).

102. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra*.

Unlike Justices Black or Frankfurter, Minton was not consciously a legal theorist. In his conversation with his law clerks or the other Justices, and in his opinions, he usually did not discuss abstract ideas or a coherent theory of constitutional law. As one of his law clerks concluded, "I think his views were entirely ad hoc, a case-by-case reliance on precedent and the facts and logic of the matter at hand."[103] Another clerk substantially agreed: "He was a great pragmatist, and I think fairly consistent, but he was often guided by common sense and fairness as he saw it, and so in the last analysis he may not have had a real theory of constitutional adjudication."[104] Nonetheless, there was an overall pattern in his Supreme Court behavior. His commitment to judicial restraint required him to minimize his policy-making discretion and prevented him from translating the political and social ideals he had once held in the Senate into constitutional law.

After his appointment in 1949, Minton generally conformed to the prevailing mood within the Court, which mirrored a widespread and continuing reaction against the willingness of the pre-Roosevelt Court to invoke the power of judicial review against the acts of the representative branches of government. Thus, Minton consistently joined Court majorities that enforced stringent measures against internal threats to national security. On a few occasions, however, he was prepared to acknowledge the need for far-reaching judicial policy-making in the absence of congressional action, as when he agreed with a unanimous Court in *Brown v. Board of Education.*[105]

Although Sherman Minton was one of the most zealous legislative activists in recent political history, by the time he joined the Court the intensity of his populist idealism had waned, perhaps because eight years on a court of appeals had inculcated a self-restrictive sense of judicial role.[106] One of his colleagues remembered without enthusiasm that

103. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra.*

104. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra.*

105. 347 U.S. 483 (1954). Justice Minton's vote was never in doubt. *See* Ulmer, *Earl Warren and the Brown Decision,* 33 J. POL. 689 (1971).

106. Justice Harlan succinctly summarized this transition by noting that Justice Minton started as a politician but became a jurist. He attributed the transition to Justice Minton's service on the court of appeals, where he believed Justice Minton was able to develop a judicial temperament. Interview with Justice John Marshall Harlan, Jan. 30, 1968.

as a Supreme Court Justice, Minton was "Mr. Mainstreet."[107]

V. CONCLUSIONS

In American constitutional history there are few individual contrasts more striking than Sherman Minton's impassioned advocacy of populist reform in the United States Senate and his cautious, self-denying performance on the Supreme Court. The evidence points toward an explanation of his behavior based upon his conception of the judicial role, which he shared—most prominently—with Felix Frankfurter. Consequently, any general evaluation of Justice Minton's contribution to the development of constitutional law cannot be divorced from consideration of the desirability of self-restraint as a standard for decision-making on the Court.[108]

Minton's attitudes toward judicial role were nurtured by his legislative and prior judicial experiences and his intra-court relationships. Similar views were held by many elected officials. Presidents, both Democrat and Republican, historically have tended to favor a Supreme Court with a low profile. As President Truman told his first Court appointee, Harold Burton, "I want someone who will do a thorough judicial job and not legislate. I know you will do that because we have talked about it."[109] This sentiment was fully shared by Minton when President Truman sent him to the Court.

Minton's reputation as a Supreme Court Justice can further be assessed in terms of the impact of both his work on the Court as an institution and his substantive contributions to constitutional development. First, the immediate impact of Minton's tenure on constitutional development was substantial. He joined with Justices Frankfurter and Reed, and three other Truman appointees, Chief Justice Vinson, and Justices Burton and Clark, in many decisions affecting the nation's public policies. As Justice Douglas remembered, Minton "had a Court" in the great majority of the cases in which he participated.[110] He sel-

107. Interview with a Supreme Court Justice, Jan. 1968.

108. *See, e.g.*, A. BICKEL, *supra* note 38; C.L. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT (D. Forte ed. 1972).

109. Justice Harold H. Burton's Diary, Sept. 17, 1945, in the Harold H. Burton Papers (The Library of Congress).

110. Interview with Justice William O. Douglas, Jan. 30, 1968. *See also* Atkinson, *Justice Sherman Minton and the Balance of Liberty*, 50 IND. L.J. 34 (1974).

dom found himself isolated, except in his last years, and he accurately reflected the majority sentiment within the Vinson Court.

Minton was, therefore, a member of the Court's dominant decision-making coalition, which often looked to Justice Frankfurter for intellectual leadership. "Minton was no match for Frankfurter," Justice Douglas recalled, but it was not necessary that he be, for they seldom disagreed—at least on major questions.[111] Minton was in one sense a disciple, won by Frankfurter's lavish praise and pleasant blandishments. But Minton was receptive to Frankfurter's overtures in large part because the two Justices were in basic agreement on the proper role of the Supreme Court in the American system of government. The relationship was bound by mutual respect, which was somewhat unusual, since Frankfurter was frequently drawn to the extremes of condescension or obsequiousness in his relations with persons in public life.[112] The relationship was not premised on the kind of intellectual kindredship that existed between Holmes and Brandeis; but it was based upon a general agreement on many of the issues confronting the Court, and it was aided by Minton's respect for Frankfurter and Frankfurter's delight in Minton's willingness to accept his teaching. As his own partisanship had furnished Minton with a standard of behavior while he was in the Senate, so Justice Frankfurter's constitutional jurisprudence furnished him with a standard while he was on the Court.

Minton's expressed political ideals and his partisan affiliation with the Democratic party suggested at the time of his appointment that he might vote frequently with Justices Black and Douglas. His case is a classic illustration of a Justice whose behavior on the Court did not conform to the behavior which had been commonly, and perhaps too hastily, predicted on the basis of his prior political activities.[113] Careful scrutiny of Minton's behavior prior to his nomination might have indicated his developing judicial conservatism. Indeed, when Minton was nominated,

111. Interview with Justice William O. Douglas, Jan. 30, 1968. *See also* Atkinson, *supra* note 101.

112. *See generally* FROM THE DIARIES OF FELIX FRANKFURTER (J. Lash ed. 1975).

113. *See generally* Lardner, *Judges as Students of American Society*, 24 IND. L.J. 386 (1949). Lardner notes that

> [j]udicial biographies of recent years—particularly those written by political scientists—are based on two assumptions: that the social philosophy of the judge will be reflected in his judicial opinions; and that his early life and experiences had a controlling effect on the molding of the philosophy which he read into the law as a judge.

Id. at 386.

Professor Fred Rodell offered a prediction which, however overstated, was not wholly inaccurate:

> Minton's slant is less the product of profound or original thinking than of enthusiastic party regularity. A political radical, he is nevertheless an intellectual conservative. And that essential conservatism, that yen for the regular, may yet, unhappily, prove responsive to the little blandishments which Justice Frankfurter has already started lavishing on Minton to try to draw him into the camp of the Court's now clearly conservative majority.[114]

Second, Minton had an important functional impact on the day-to-day activities of the Court. Within the Court he acted as a kind of harmonizer, where he was probably better liked personally than anyone else.[115] His gregariousness and lack of pretension permitted him to maintain continuous social relationships with all of the Justices. Thus, his role as a mediating influence on the Court was complex and significant, even if the immensity of the undertaking drove him into occasional despair.[116]

Third, Minton had a significant functional impact on the Supreme Court's status within the political system. His voting behavior tended to support institutional stability which added to the Court's popular image as an *ex cathedra* arbiter of merely legal disputes. Even as his behavior within the Court was aimed at minimizing conflict, his voting behavior was motivated by a belief that external evdence of internal conflict had to be minimized. Minton's conception of the Supreme Court's proper restrained role within the political system may have been particularly suited to the enhancement of the Court's popularity among the general public. It may be that an activist Court, whatever its values, eventually loses esteem in the public mind, whereas a relatively passive Court, not in conflict with the representative branches of government, may receive a somewhat higher level of popular support.

Finally, when Sherman Minton's work on the Supreme Court is examined for its impact on long-term constitutional development, most

114. Rodell, *The Supreme Court is Standing Pat*, THE NEW REPUBLIC, Dec. 19, 1949, at 12.

115. Believe me, my experience through the first term on the Court has been enriched by my association with you and the cordial manner in which you received me into the circle I shall always remember. Maybe I did disappoint some of my colleagues—if you were among them you concealed it with gracious tolerance.

Letter from Sherman Minton to Felix Frankfurter, June 17, 1950, in the Felix Frankfurter Papers (The Library of Congress).

116. *See generally* Atkinson, *supra* note 101.

students of the Court would conclude that it was, if viewed against the full history of the Court, of little lasting significance. Judicial accomplishment usually is a relative and intangible concept, meaningful only in intra-Court comparisons. But even when legitimate variations in judgment are considered, it is possible to distinguish between those Justices who achieved distinction and the majority, including Minton, whose accomplishments were more modest.

The circumstances of history did not directly favor Justice Minton's work. One of his law clerks, who had affectionate regard for him, compared the history of Minton's service on the Court to "the history of a dinosaur or a mastodon."[117] The clerk continued:

> If this is true [that President Roosevelt tendered a nomination to Minton in 1937], it is probably regrettable for purposes of his place in history [that he was not appointed], because his ideas were very appropriate for the 30's. Then he would have voted right down the line with those who felt that it was not the Court's business to impose its personal views upon the Congress or the people. He could have been remembered with the magic names of Hughes, Holmes, Stone, Brandeis, Cardozo. By the time he did come to the Court the swing had gone back to the activists. Although the personal views of a Black or Douglas are considerably different from those of a McReynolds or Butler, they are still imposed under the same legal theory, ascribed to Justice Field, of "substantive due process." Minton thought basically in the political philosophy of the minority of previous years, Holmes, Stone, Hughes, "don't interfere with political decisions," or, "due process has only a procedural meaning."[118]

But as it was,

> [m]ost of the law clerks [working for the other Justices] regarded him as a proud political reactionary, definitely heartless on civil rights and the rights of criminals. Through the years, most of the law clerks regarded him as some sort of ogre and felt that we who worked for him were pitiful victims straight out of Dickens.[119]

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117. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra.*

118. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra.*

119. Questionnaire reply from one of Justice Sherman Minton's law clerks, *see* note 3 *supra.* A candid assessment was offered by one of Justice Burton's law clerks:

> If you wanted to think of a fellow to open the clams and have a drink with, you couldn't have a finer person. Why he was qualified to sit on the Supreme Court of the United States is totally beyond me. Totally.

Interview with one of Justice Harold H. Burton's law clerks, June 24, 1970.

The lasting significance of Minton's work is further diminished by the simplicity of his approach to the judicial process.[120] He was without the apparent intellectual complexity that characterized some of his predecessors and contemporaries. Frankfurter may have had this very much in mind when he wrote to Minton: "For once, you will note, a case seems to be less complicated to me than it is to you."[121]

An examination of Minton's opinions discloses certain other judicial limitations. First, he sometimes was given to stating the issue in a way that assured the result he intended to reach.[122] He wrote opinions as an advocate for the view he had adopted. Second, few Justices in recent times have been as concerned about precedent as Minton.[123] A danger raised by unwavering adherence to precedent is that the current social or economic implications of an issue may be neglected. A reluctance to stray from precedent may cause the stagnation of desirable constitutional development. Third, Minton's preference for a literal interpretation of statutes may have caused him to give insufficient attention to the public policy demands that necessitated the legislation.[124] Where others on the Court found ambiguities in statutory language he frequently found none.[125] Minton's literal approach to statutory construction was apt to

120. For a balanced evaluation of Justice Minton's work by one of his law clerks, see Wallace, *Mr. Justice Minton—Hoosier Justice on the Supreme Court*, 34 IND. L.J. 146, 377 (1959). Justice Frankfurter was pleased with the articles and conveyed his reaction to Justice Minton:

July 7, 1959

Dear Shay:
Now that I have read the two articles on a Hoosier Justice I should like to tell you how fortunate you were to have a fellow who is evidently greatly devoted to you not to offend your critical sense by saying foolish or gushy things about you. He did a very serviceable thing to systematize your opinions and to make clear the sturdy philosophy which binds them together.

Letter from Felix Frankfurter to Sherman Minton, July 7, 1959, in the Felix Frankfurter Papers (The Library of Congress).

Justice Minton's response was: "I would have been greatly embarrassed if he had written a lot of guff to make me appear as something I am not." Letter from Sherman Minton to Felix Frankfurter, July 21, 1959, in the Felix Frankfurter Papers (The Library of Congress).

121. Letter from Felix Frankfurter to Sherman Minton, May 19, 1954, in the Felix Frankfurter Papers (The Library of Congress).

122. For a critical review of Justice Minton's first term on the Supreme Court by one of his law clerks on the court of appeals, see Braden, *Mr. Justice Minton and the Truman Bloc*, 26 IND. L.J. 153 (1951).

123. *See, e.g.*, United States v. Beacon Brass Co., 344 U.S. 43 (1952); Buck v. California, 343 U.S. 99 (1952); United States v. Halseth, 342 U.S. 277 (1952).

124. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1949). *But see* United States v. Alpers, 338 U.S. 680 (1950).

125. Schwartz v. Texas, 344 U.S. 199 (1952); Adler v. Board of Educ., 342 U.S. 485 (1952).

hinder the implementation of public policies adopted by the legislature, and his strong adherence to precedent tended to conceal the policy-making actually undertaken by the Court.

On the other hand, his opinions demonstrated his penchant for concise organization. He was able to get immediately to the essential issue in each case. As Justice Black put it: "In his opinions, Shay went for the jugular."[126] He would state the issue, his conclusion, and then give quite simply the reasons for his conclusions.[127] One might not always agree with his reasons, but he made no effort to conceal them in studied verbiage. He put them on display; they could seldom be misunderstood.

Moreover, Minton's Supreme Court opinions, like those written when he was on the court of appeals, were competent and, at their best, even gave evidence of technical adroitness, as when in one case Frankfurter told him he had done "a true lawyer-like job. Greater praise is not in my vocabulary."[128] This praise was to be remembered by Minton after he had gone into retirement, when he reminded Frankfurter:

> I tried to act on the bench like a lawyer and not a superman from Capitol Hill! Maybe I was neither—I think you said one time I acted lawyer-like which was to me a great compliment.[129]

However Sherman Minton's judicial performance is assessed, there can be no doubt that he was a significant participant in our nation's political history. Upon leaving the Court, he returned to Indiana, and on the occasion of his 70th birthday reporters asked him what had been the most exciting period of his life. Not unexpectedly, he replied that it had been the New Deal. "It was part of the remaking of the country," he said. And then he added, with an awareness of his own place, "We were in a revolution and I was close to the throne."[130]

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126. Interview with Justice Hugo L. Black, Jan. 22, 1968.

127. In his opinions, Justice Minton developed no style that distinguished his work, or especially contributed to the Court's status, partly because he believed the real work of the Court was in deciding cases, not writing opinions. He seldom strayed from the narrow facts of any case and his opinions were often rather colorless. As a jurist he was not eloquent, but some of his clerks have suggested that his opinions might have been better fashioned if he had invested more time in them.

128. Letter from Felix Frankfurter to Sherman Minton, regarding Barrows v. Jackson, 346 U.S. 249 (1953), in the Sherman Minton Papers (The Truman Library).

129. Letter from Sherman Minton to Felix Frankfurter, Jan. 18, 1960, in the Felix Frankfurter Papers (The Library of Congress).

130. Associated Press release, Oct. 20, 1960.