Mr. Justice Minton-Hoosier Justice on the Supreme Court. Harry L. Wallace

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By virtue of the "special trust and confidence" placed in him by President Truman, Sherman Minton ascended to the bench of the Supreme Court of the United States on October 12, 1949. Seven years later he retired in ill health, voluntarily but reluctantly ending a career of a quarter-century of public service, the broad scope of which, coupled with his experience in private practice, had appeared to justify President Truman's trust. The decisions of the Court during this period reflect many important fragments of world history in the decade immediately following World War II. No one now knows for certain whether the events of this decade represented only an inconclusive continuation of an apparently unceasing international struggle for power, or whether they marked a decisive shift in direction—and if the latter, whether that shift was toward the beginnings of a better world of peace on earth or toward the end of a world well worth preserving despite its faults. Whatever the ultimate outcome, to many Americans the events of this decade appeared to create problems of almost unprecedented significance, calling for correspondingly unique solutions, the validity and scope of which reached the Court for consideration and resolution.

The mood during this period reflected the frustration of a nation, anxious to turn from total war to enjoy theretofore unknown prosperity, but forced to continue to wage a war which, whether hot or cold, intermittently carried it to the "brink" of world devastation. American soldiers were stationed all over the world, and on the whole behaved much as they had at home. Some got in one familiar kind of trouble with girls, while others, perhaps undertaking more permanent trouble, mar-

† This article appears in two parts. The second part will appear in the Spring issue.
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1. 338 U.S. xi (1949).
ried them and sought to bring them home. A few of the thousands of others who avoided these difficulties by taking their wives overseas with them were thereby brought to the end of all their earthly troubles. At home some men refused to fight at all, while other long-time residents were banished to foreign shores forever. As a result of televised crime hearings, the fifth amendment’s privilege against self-incrimination became a household phrase and in subsequent investigations of Communist activities was almost converted to an epithet by the late junior Senator from Wisconsin. While the federal government grappled with the complicated problems created by these events, the states too attempted to deal with threats to their institutions and to the safety and welfare of their citizens, sometimes seeing their efforts thwarted by the “supreme law of the land,” particularly when those efforts were directed against Negroes who sought to obtain the equality before the law for which another war had been fought many years before. Business at home continued much as usual, and criminal business was no exception. The police combatted it with most of their old methods and some new ones. The events of the period pitted one asserted absolute against another, and required the Court to weigh and choose between them. The purpose of this article is to examine Justice Minton’s role with respect to problems such as these, as well as some more prosaic, and to attempt to draw some conclusions with respect to his views of the functions of the Court and to the manner in which he executed them.

MINTON, SUPREME COURT JUSTICE

I. GOVERNMENTAL POWER TO RESTRICT INDIVIDUAL FREEDOM IN THE TWENTIETH CENTURY

While the Court is the final arbiter of a wide variety of problems of federal statutory interpretation which frequently have an important impact on the nation and its people, of more permanent significance are its constitutional decisions which remain the law of the land indefinitely in the absence of either constitutional amendment or a change of heart by the Court. The two most important and recurrent types of questions of constitutional power are those which involve restrictions on the power of the states to act under our federal system, and those which involve the power of government, state or federal, to restrict individual freedom. Of the latter some involve substantive restrictions while others relate to the procedures which may be employed in implementing such restrictions.

The curious combination of courage and fear born of involvement in war inevitably brings forth a wide variety of stringent measures by those directly responsible for the formulation and administration of government. Even, or perhaps especially, in a democracy there must be some restraints on the tyranny of the majority, for at least in the heat of the moment, majority action may be not only unwise but fundamentally unfair. The provisions of the Bill of Rights and the restrictions on state action achieved only after an agonizing Civil War would be empty indeed if Congress and the state legislatures were the sole arbiters of the validity of legislative restraints on individual freedom. On the other hand excessive protection of individual liberty would in the end ill serve the cause of freedom, for without some such restraints there is neither law nor liberty. As society becomes increasingly industrialized and complex, and as men's capacity for destroying each other reaches ever more awesome proportions, reconciliation of one man's freedom to act with another's freedom to be let alone becomes increasingly difficult. Collisions between the two presented the Court with some of its most difficult and controversial problems during Justice Minton's tenure on the Court.

A. REGULATION OF "SUBVERSIVES" DURING THE COLD WAR

1. Power to Outlaw Speech and Beliefs. In the eyes of some, the people and their Government were on trial with the "first string" of the American Communist Party in Dennis v. United States. Despite the

first amendment's admonition that "Congress shall make no law . . . abliding the freedom of speech, or of the press . . .," differences of opinion among members of the Court have turned primarily on when, rather than whether, speech may be restrained. Legislation aimed at internal subversion was not invented during the cold war, nor for that matter was it original when Justice Holmes formulated the "clear and present danger" test to sustain a conviction for conspiring to impede the draft laws by urging disobedience to them. Relying in large part on the presumption of constitutionality of all legislation, a majority of the Court subsequently rejected the applicability of this test to convictions under statutes expressly outlawing "advocacy" of governmental overthrow—speech itself—limiting the test to cases in which speech had constituted the violation of some particular type of proscribed conduct. But Justice Brandeis joined Justice Holmes in urging its applicability to statutes expressly prohibiting speech itself and sought to give some direction to the content of the formula embodied in this oversimplified label. Concurring in Whitney v. California, he urged that while fundamental rights such as speech are not absolute, interference with them is constitutional only when there is reasonable ground to fear that imminent danger of serious evil exists. Subsequent decisions indicated a shift toward the Holmes-Brandeis view and went on to question how much reliance should be placed on the legislative determination prohibiting particular types of speech which, along with certain other fundamental rights, was sometimes said to occupy a "preferred position."

In the Dennis case the evidence supported the conclusion that the defendants were engaged in a highly organized conspiracy to overthrow the Government by force whenever there appeared to be a reasonable chance of success. Chief Justice Vinson's plurality opinion sustaining the convictions, which Justice Minton joined, purported to adopt the Brandeis-Holmes formulation, avoiding any reference to the presumption of constitutionality, but holding that where the threatened evil is so serious, its success need not be imminent. Justice Frankfurter, concurring separately, placed greater reliance on the legislative judgment,

17. 274 U.S. 357, 372-80 (1927) (concurring opinion).
18. See, e.g., Kovacs v. Cooper, 336 U.S. 77, 88 (1949); cf. id. at 90-97 (concurring opinion).
while Justice Jackson urged that the clear and present danger formula should be applied only to isolated advocacy and not to an organized, continuing conspiracy. Justices Black and Douglas dissented, the former urging that the first amendment precludes any restraint on speech, and the latter on the ground that the defendants did no more than engage in a classroom exercise. On the surface there is considerable justification for the view that the Chief Justice's opinion waters down the requirement of imminency set forth by Justice Brandeis, thereby failing to observe the “preferred position” of free speech and ignoring Brandeis' admonition that “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” But facts, not slogans, decide lawsuits, and even a preferred position is not an impregnable one. Justice Brandeis' opinion in the Whitney case required that the Court itself consider the applicability of the clear and present danger test to the particular defendants before it, rather than relying solely on the legislative determination that all speech of a particular type should be punished. In the context of the cases in which Holmes and Brandeis dissented, they could quite reasonably protest against punishment of the defendants' “puny anonymities” without necessarily acquiescing in the organized conspiracy found by the majority in Dennis.

While Dennis represented an important milestone in the relationship between Americans and their Government, it did not, as some may have hoped and others feared, settle all similar problems for all time. Conditions constantly change, not only raising new problems, but also casting old ones in a new light. Moreover, the Court must necessarily stick to the case before it, leaving other factual situations for later determination when they arise. For example, the Party's “second string” recently fared far better than their superiors, although on narrow grounds relating to the construction of the statute and the instructions of the trial court.

A more striking contrast to the Dennis decision is embodied in Pennsylvania v. Nelson, holding unconstitutional a Pennsylvania statute punishing attempts to overthrow the state or federal government as applied to conduct aimed solely at the overthrow of the federal government.

The Court reasoned that by enactment of the Smith Act\textsuperscript{23} the federal government had occupied the field in this area and thereby precluded state legislation prohibiting the same conduct. Admitting that this state statute overlapped a federal act regulating the same conduct, this result was by no means clear, since there was neither any conflict between the state and federal legislation nor any express indication in the federal act that it was intended to be exclusive. In fact, a contrary expression appears in the criminal code, of which the Smith Act is a part, which provides in pertinent part that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."\textsuperscript{24} This problem of overlapping state and federal regulation of the same subject recurs more frequently in connection with governmental regulation of economic affairs. By joining the dissenters in the Nelson case, Justice Minton demonstrated his reluctance to upset such state legislation in the absence of a clear conflict with comparable federal enactments, a reluctance which reappears in his approach to state attempts to regulate local aspects of business also subject to federal control.

These two cases, then, illustrate in an explosive context the two recurring constitutional problems—the power of government to restrict individual freedom and the power of the states to act in areas of possible interest on both a local and national level. In the former, by joining Chief Justice Vinson's plurality opinion, Justice Minton clearly placed himself in support of the power of government to impose restrictions on the absolute freedom of individuals. In the latter, by joining Justice Reed's dissent, he revealed his preference for recognition of state power in the absence of its clear displacement by federal action. His votes in these two cases accurately reflect his position in a number of other cases, including several in which he himself wrote the Court's opinion.

2. Power to Deny "Privileges" to "Subversives." In addition to criminal punishment, another weapon in the governmental arsenal to combat the effectiveness of those who favor the violent overthrow of government lies in excluding such persons from positions of influence and importance. Frequently, this was sought to be accomplished through imposition of so-called "loyalty oaths" as a condition of obtaining governmental employment or other government-conferring positions. Although the power of the states to impose criminal punishment on supposed subversives was severely limited by the Nelson decision, their efforts to ex-

clude such persons from state employment were considerably more successful.

In *American Communications Ass'n v. Douds* the Court sustained the "non-Communist oath" provision of the Taft-Hartley Act which withdrew the benefits of the Act from unions whose officers had failed to file an oath that they did not then believe in the violent overthrow of the Government and did not then belong to the Communist Party or any organization that so believed. In *Garner v. Board of Pub. Works* it sustained the Los Angeles loyalty oath which required each employee to file an affidavit with respect to his Communist Party membership and to swear that he did not now advocate, and had not within five years from enactment of the ordinance advocated, violent overthrow of the Government, and did not and had not within such period belonged to an organization which so advocated. Thus, this oath went farther than the Taft-Hartley oath in that it applied to past advocacy and membership, although the Court assumed it applied only to membership with knowledge of the organization's offending purposes. Similarly, in *Adler v. Board of Educ.* the Court sustained New York's Feinberg Law which prohibits employment of teachers who now advocate the violent overthrow of the Government or who are now members of organizations which they know so advocate, treating such membership as prima facie evidence of disqualification.

But subsequent decisions marked out limitations on the power of states to provide qualifications for state employment and other state-conferred privileges. Thus, in *Wieman v. Updegraff* it unanimously struck down the Oklahoma loyalty oath which the Oklahoma court had appeared to interpret as requiring automatic disqualification from public employment for even innocent membership in a proscribed organization. On somewhat the same reasoning the Court held in *Slochower v. Board of Higher Educ.* that a state may not constitutionally automatically discharge a teacher who had claimed the privilege against self-incrimination in a federal investigation since this amounted to a conclusive and arbitrary presumption of guilt from the claim of the privilege. However, the Court recently upheld such a discharge where the state treated the claim as a failure to cooperate in a reasonable inquiry into the employee's

In this case the employee had clearly been warned that failure to answer might result in his discharge which enabled the Court to distinguish it from *Konigsberg v. State Bar* in which the Court held that California could not refuse an applicant admission to the bar although the applicant, after stating that he did not believe in the violent overthrow of government, adamantly refused to answer questions concerning his alleged membership in the Communist Party.

The attacks on governmental action of this nature were placed on several grounds, many of which were raised in the *Adler* case in which Justice Minton wrote the Court's opinion sustaining New York's Feinberg Law. In both *Adler* and *Douds*, a principal contention was that the legislation violated the first amendment rights of those affected. Justice Minton brushed this contention aside, saying: "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. . . . His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice." As a practical matter, it seems doubtful that the choice is really quite as free as Justice Minton's reasoning would indicate. To one who has devoted his adult life to service in the public schools, the threat of discharge may often be as great a sanction as a criminal conviction, depending somewhat, of course, on the nature and extent of the criminal punishment. Chief Justice Vinson was more candid in the *Douds* case when he conceded that in enacting the non-Communist oath provision of the Taft-Hartley Act, "Congress has undeniably discouraged the lawful exercise of political freedoms as well. . . . Men who hold union offices often have little choice but to renounce Communism or give up their offices."

At least for Justice Black this concession, that such enactments to some extent do inhibit the exercise of rights of free speech and beliefs, is sufficient to render them unconstitutional. But for the majority of the Court, this was merely the statement of the problem and not of its solution. In Justice Minton's words, while "it is clear that such persons have the right under our law to assemble, speak, think and believe as they will . . . it is equally clear that they have no right to work for the State in

the school system on their own terms.”\textsuperscript{36} Of course, this does not mean that the privilege of government employment may be denied on an arbitrary basis, but rather that government, like any other employer, may prescribe reasonable qualifications for employment so that teachers may only “work for the school system upon the reasonable terms laid down by the proper authorities of New York.”\textsuperscript{37} Moreover, as Chief Justice Vinson pointed out in the \textit{Douds} case, the federal government has conferred considerable power on union officers (as do the states on lawyers, for example), and such power entails corresponding obligations and responsibility.\textsuperscript{38}

The decisive inquiry then is whether or not loyalty to the Government is a reasonable standard for government employment. Perhaps the answer depends in part on the nature of the employment. A subway conductor or a janitor in the Post Office may stand on a different footing from the Secretary of Defense, or for that matter, from a janitor in the latter’s office.\textsuperscript{39} In any event, with respect to teachers, Justice Minton delivered a ringing affirmative answer to which a majority of the present Court has since adhered:\textsuperscript{40}

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.\textsuperscript{41}

Even Justice Douglas, dissenting in the Adler case, conceded that “the school systems of the country need not become cells for Communist activities; and the classrooms need not become forums for propagandizing the Marxist creed.”\textsuperscript{42} But, he argued, “the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.”\textsuperscript{43} Obviously, Justice

\textsuperscript{37.} Ibid.
\textsuperscript{38.} See American Communications Ass’n v. Douds, 339 U.S. 382, 401-04 (1950).
\textsuperscript{42.} Id. at 511 (dissenting opinion).
\textsuperscript{43.} Ibid.
Douglas does not mean that everyone who stays out of jail is entitled to teach in the schools, for he does refer to "professional standards" which he apparently assumes do not include loyalty to the Government. But if the state can prevent its classrooms from becoming Communist propaganda platforms, it is hard to see why the state must wait for some overt act of disloyalty. The problem here is not to determine the teacher's guilt but to protect the schools and the pupils in them. The danger is not that some New York schoolmarm is going to lead a band of fourth-grade rebels in an attack on Washington, but rather that a person who advocates disloyalty, publicly or privately, may subtly poison the minds of impressionable youngsters. As Chief Justice Vinson pointed out in the Douds case, legislation such as this is not designed to prevent incitements to revolution but rather to forestall the havoc which persons who advocate disloyalty may cause if placed in positions of authority and responsibility. Because the government may not lock up an advocate of disloyalty if there is time to expose the fallacy of his ideas in the market place, it does not follow that it must necessarily employ him in the schools to expound those fallacious ideas to the children with whose care he would be entrusted.

Assuming that loyalty may be made a standard of government employment, the next question, and the principal one considered in the Adler case, is whether or not membership in a subversive organization may be treated as evidence of disloyalty. Again, Justice Minton answered with a loud and clear affirmative:

One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.

This conclusion has been vigorously attacked as determining "guilt by association." To me this is another slogan with an appealing ring which does not stand up under scrutiny. Certainly, people may join

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44. See American Communications Ass'n v. Douds, 339 U.S. 382, 396 (1950).
46. Id. at 508 (dissenting opinion); see O'Brian, New Encroachments on Individual Freedom, 66 HARV. L. REV. 1, 24 (1954).
organizations unaware of their purposes or perhaps even in hopes of changing them, or the purposes may change, so that automatic disqualification for any such membership, innocent or not, is fundamentally unfair, as Justice Minton recognized in joining the Court's unanimous decision in the *Wieman* case. But membership in a subversive organization with knowledge of its proscribed purposes is certainly some indication, although not conclusive, of sympathy with and adherence to such purposes. Not only was the Feinberg Law so limited, but in addition the employee was given a hearing at which the presumption of disqualification arising from such membership disappeared when met with substantial contrary evidence offered by the employee. In the context of the *Adler* case, it seems unfair to characterize the decision as approving "guilt by association."

Still a third attack leveled against such legislation when applied to past membership was that it constituted a bill of attainder. While this issue was not present in the *Adler* case, it was earlier rejected in the *Garner* decision in which Justice Minton joined, sustaining the Los Angeles oath and affidavit requirements. The Court concluded that the state may prescribe reasonable standards of employment and that "past conduct may well relate to present fitness; past loyalty may well have a reasonable relationship to present and future trust." Actually, this problem goes back to the question whether or not loyalty is a proper qualification for government employment. If so, it is likewise reasonable to exclude someone who has advocated disloyalty in the recent past. If not, then it is logical to assume that the legislation represents punishment for past acts. Again, this is a question of degree. As Justice Burton pointed out, the Los Angeles statute which applied to advocacy or membership within five years from enactment of the ordinance would eventually apply to anyone who had ever so advocated or belonged, however long and convincingly he might have since reformed. Perhaps this issue was not pertinent in that case because it did not appear that any party was so situated, but it arose again in *Schware v. Board of Bar Examiners* in which the Court unanimously struck down New Mexico's denial of admission of a bar applicant who admitted earlier Communist Party membership but persuasively demonstrated, not only that such membership was largely innocent of any evil purpose, but also that it had

49. Id. at 720.
50. Id. at 729 (dissenting opinion).
terminated 15 years earlier following which his conduct had been exemplary.

A somewhat different problem was presented in the Konigsberg case in which a California bar applicant presented considerable evidence of his good character, swore he did not believe in the violent overthrow of government, but although not relying on the privilege against self-incrimination, simply refused to answer questions concerning his alleged Communist Party membership. Despite this refusal to answer questions relevant to the inquiry, in sharp contrast to Schware's candid admissions, the Court held that it was a denial of due process for California to deny him admission to the bar. It is hard to understand why such an applicant, or any litigant for that matter, should be permitted to put in only his side of the case and refuse to discuss anything else which may be unfavorable to him.52

For the most part the Court was sharply divided in these cases. Of those cases in which Justice Minton participated, he voted with the majority in every case except Slowchower (denying state power to discharge a teacher who claimed the Fifth Amendment), and he voted to sustain the legislation challenged in each instance except in the Wieman case (denying state power to provide automatic disqualification for innocent membership in a subversive organization). While he did not participate in the Douds decision, he indicated his adherence to its upholding of the Taft-Hartley non-Communist oath in a subsequent case decided per curiam.53

Thus, with the single exception of the Wieman case in which the Court was unanimous in striking down "an assertion of arbitrary power,"54 in all of the cases of this nature in which he participated, Justice Minton consistently voted to sustain the power asserted by governments to deny government employment and other privileges to supposed subversives. Although this unquestionably had the effect of limiting the complete freedom of speech and beliefs of persons desiring to qualify for such positions, Justice Minton obviously believed that the interests of the public sought to be protected were sufficient to sustain the existence of governmental power to impose these limited and indirect restraints, whether or not the exercise of that power was wise or effective.

Fundamentally, the objections to the various types of regulation of Communists and so-called subversives revolved around the belief that advocacy of violent overthrow of the Government could not be outlawed

or discouraged by the majority any more than the activity of any unpopular political minority, a belief which was supplemented by the fear that innocent persons might be swept into the net supposedly reserved for true subversives since “when the witch hunt is on”

guilt by association runs riot. While it is undoubtedly true that in recent years, and probably throughout history, many people have attributed any form of unorthodoxy to subversive tendencies, the power to enact laws should not be judged by the views of their most extreme adherents. It would be no more foolish to ban Robin Hood as Communistic than to burn Huckleberry Finn as racially offensive.

B. Regulation Relating to Racial and Religious Minorities

Although the states encountered relatively few setbacks in their attempts to regulate subversives, they were far less successful in their attempts to regulate and discriminate against racial and religious minorities. In part at least this difference was attributable to differences in the nature of the public interests asserted in justification of the restrictions sought to be imposed. Regulation of so-called political minorities which urged the violent overthrow of government sometimes brought into play important considerations of security and ultimately of survival. Discriminatory denial of permission to hold a peaceful religious meeting obviously could not be justified by any such significant public interest. But discriminations based on race or religion fared little better even when asserted to be necessary to preserve peace and order and, ultimately, a way of life claimed to be preferred by the vast majority of all concerned. Such legislation generally ran afoul not of the due process clause, with its requirement of reasonableness, but of the more specific prohibition of denial of equal protection of the laws. But the problems relating to minorities did not end with attempts by the states to discriminate against them. Even more difficult were cases involving, at least primarily, discrimination by individuals, which raised questions of the circumstances under which a state may or must eliminate private discrimination.

In two cases Justice Minton joined unanimous decisions striking down convictions of Jehovah’s Witnesses for giving religious speeches in public parks which were permitted by the respective states to members of more orthodox religious sects. These state convictions were vulnerable in two respects. First, they interfered with the defendants’ re-

religious freedom. This interference might well have been justified by
the public interest in the parks, however, had it been evenly applied to all
religious groups. But arbitrary discrimination against an unpopular
religious group was sufficient to render the states' action unconstitu-
tional as a denial of equal protection of the laws. That this is true is
indicated by the Court's unanimous decisions striking down discrimina-
tory treatment of Negroes in cases in which no first amendment rights
were involved. Thus, Justice Minton joined in decisions based upon
equal protection grounds striking down Texas' refusal to admit a Negro
to its white law school, and Oklahoma's requirement that a Negro
graduate student sit at a separate desk and cafeteria table, discriminatory treatment which in each instance the Court found resulted in un-
equal educational opportunity for the Negro.

More difficult, of course, was the problem presented in the Segrega-
tion Cases in which Justice Minton joined the Court's unanimous deci-
sion holding segregation in primary and secondary schools unconstitutional although there was no inequality in terms of physical facilities, instruc-
tion and all the other more obvious ingredients of such an educa-
tion. No other issue during this period has stirred such widespread pub-
lic controversy, and many have pointed to the Court's decision as the ulti-
mate example of its interference in matters of strictly local concern. But
this case really had little or nothing to do with "states' rights," the tenth
amendment or federal control of primary education. The fourteenth
amendment expressly forbids the states to "deny to any person within
its jurisdiction the equal protection of the laws." In the absence of this
provision it might be arguable that the Southern states could justify
segregated schools as necessary to preserve peace and order and a "way
of life." But at best it is wishful thinking to talk about these cases in
terms of states' rights as if the Civil War had never been fought and the
fourteenth amendment never adopted. Conceding that the literal lan-
guage of the equal protection clause does not provide a ready answer to
the question presented in these cases, it is at least clear that this is the
kind of problem at which the amendment was aimed. Moreover, the

57. Cf. Zorach v. Clauson, 343 U.S. 306 (1952) (sustaining "released time" reli-
gious program during school hours).
61. Brown v. Board of Educ., 347 U.S. 483 (1954); see also Bolling v. Sharpe,
62. U.S. Const. amend. XIV.
63. See Bickel, The Original Understanding and the Segregation Decision, 69
Harv. L. Rev. 1 (1955); see also Leflar & Wylie, Segregation in the Public Schools—
decisions of the Court in the past twenty-five years interpreting this provision step by step led to its conclusion that a state may not constitutionally differentiate between persons on the basis of race, at least in the absence of very extraordinary circumstances not demonstrated in these cases.

A different set of problems are presented, however, when one minority turns on another. For example, in *Kunz v. New York*, Justice Minton joined the Court in reversing the conviction of a rabble-rouser for speaking in a public park without a required license which had been denied because several years earlier, when he had a license, he had delivered violent diatribes against Catholics and Jews. In *Beauharnais v. Illinois*, on the other hand, he joined in sustaining the defendant's conviction under Illinois' "group libel" statute for distribution of an anti-Negro pamphlet. The two decisions are not inconsistent, however. Kunz was convicted not for what he was saying at the time of his arrest, but for speaking at all, and the privilege of speaking was denied him under a broad statute conferring absolute and arbitrary powers on an administrative official. Beauharnais, on the other hand, was convicted because the content of his pamphlet violated a more narrowly drawn statute aimed at a serious and specific social problem. The *Beauharnais* case is interesting, and in some respects disturbing, however, for a number of reasons. Justice Frankfurter's opinion assumed that Beauharnais' derogatory remarks about Negroes as a group "are no essential part of an exposition of ideas, and are of . . . slight social value as a step to truth." He concluded, therefore, that the statute should be sustained if there was a reasonable basis for it, the same reasoning, it seems to me, which had earlier led temporarily to sustaining state legislation requiring Jehovah's Witnesses to salute the flag contrary to their religious convictions. However, as Justice Black, dissenting, pointed out, and as anyone who reads today's newspapers knows, charges such as Beauharnais' are matters of extensive public discussion and disagreement.

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68. Id. at 257.

beling such speech as "libel" does not automatically remove it from the area of public debate. Justice Frankfurter's appraisal of the value of this speech presupposes "truths" with which a sizeable minority, however erroneously, vehemently disagree. Thus, Justice Jackson urged that if Beauharnais is wrong, his false conclusions can be exposed by counter arguments, so that to the extent the first amendment applies equally to the states, Beauharnais should be permitted to speak unless there is a clear and present danger that his scurrilous charges will cause a breach of the peace or an injury to reputation—which the majority opinion points out "may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits." On the facts in this case, Beauharnais' conviction might well still stand on the ground that his pamphlet did create an imminent danger of serious breaches of the peace or wrongful injury to reputation, but certainly the standard would be different from that applied in the majority opinion. Also of interest was Justice Jackson's conclusion that greater freedom in restraining speech is accorded the states under the fourteenth amendment than to Congress under the first amendment. This argument stems from the Court's decisions holding that the fourteenth amendment does not make applicable to the states all of the provisions of the Bill of Rights, but only those fundamental rights "implicit in the concept of ordered liberty." Although freedom of speech is such a fundamental "liberty" protected against state action, it is arguable as an original matter that the scope of that protection is not co-extensive with the first amendment's protection against Congressional action. Thus, the real importance of the case lies not so much in the result as in the variety of routes suggested in the various opinions.

In *Feiner v. New York,* Justice Minton joined in dissenting from the Court's decision sustaining the defendant's conviction for a breach of the peace for continuing his sidewalk speech after the police had directed him to stop. His speech was not, like those of Kunz and Beauharnais, an exaggerated attack on some racial or religious group but rather an appeal to Negroes to assert their rights, and unlike Beauharnais

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71. See id. at 288-95 (dissenting opinion).
he was not punished under a specific statute proscribing the type of speech involved. No personal insults were directed at his audience, and while he did refer to both the mayor of Syracuse and President Truman as "bums," the latter at least, whether or not with justification, has probably been called worse by far more people than our jails have room for, and is capable of replying in kind. Moreover, as Justice Frankfurter pointed out in Beauharnais, "public men, are, as it were, public property." 75 Nor is the fact that he apparently urged the Negroes in his audience, a mixture of white and colored people, to "rise up in arms" 76 persuasive since there was clearly no imminent danger of armed revolt, nor was he arrested to prevent such an attempt. The real basis for his arrest lay not in what he said nor where he said it, but in the threat of violence from those white people in the audience who disagreed with what he said. Thus, the Court concluded that Feiner was "neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered." 77 As Justice Frankfurter put it, concurring: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker." 78 If the content of Feiner's speech did not justify his arrest, then apart from the crowd's reaction, it was constitutionally protected, just as, for example, under the Segregation Cases a Negro's right to attend state supported schools is constitutionally protected against denial solely on the basis of race. Justification of Feiner's conviction on the basis of the crowd's reaction lends support to the exclusion of Negroes from Little Rock's Central High in order to preserve law and order. But not even Governor Faubus appears to have been surprised by the Court's unanimous decision directing implementation of the school board's plan for integration of the school. 79 It is difficult to believe that constitutional rights should be lost by the law's own default in restraining unlawful mob action.

Still another variation arose in the Jaybird case 80 in which Justice Minton was the lone dissenter from the Court's decision that the Jaybird Party's pre-primary private elections from which Negroes were excluded violated the fifteenth amendment's command that "No state shall deny any person the right to vote on the basis of race, color or previous

77. Id. at 319-20.
condition of servitude.” It was long ago decided that private discrimination, however unworthy, is not forbidden by the fourteenth and fifteenth amendments which by their terms apply only to “state” action. While there is no question but that the Jaybird Party deprived Negroes of an effective voice in the selection of elective officials, it is extremely difficult to trace this result to any action by the state. For Justice Minton, the issue in the case was not the social desirability of the result but one of power. In one of his best opinions, he carefully analyzed all three opinions of the majority, distinguished the principal decisions relied upon by them, all in light of the facts in the record, and concluded that the activities of the Jaybird Party did not bring state action into play. In his words:

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

What the Jaybird Association did here was to conduct as individuals, separate and apart from the Democratic Party or the State, a straw vote as to who should receive the Association’s endorsement for county and precinct offices. It has been successful in seeing that those who receive its endorsement are nominated and elected. That is true of concerted action by any group. In numbers there is strength. In organization there is effectiveness.

I do not understand that concerted action of individuals which is successful somehow becomes state action.

. . . The propriety of these practices is something the courts sensibly have left to the good or bad judgment of the electorate. It must be recognized that elections and other public business are influenced by all sorts of pressures from carefully organized groups. We have pressure from labor unions, from the National Association of Manufacturers, from the Silver Shirts, from the National Association for the Advancement of Colored People, from the Ku Klux Klan and others. Far from the activities of these groups being properly labeled as

81. U.S. Const. amend. XV.
82. Civil Rights Cases, 109 U.S. 3 (1883).
state action, under either the Fourteenth or the Fifteenth Amendment, they are to be considered as attempts to influence or obtain state action.

The courts do not normally pass upon these pressure groups, whether their causes are good or bad, highly successful or only so-so. It is difficult for me to see how this Jaybird Association is anything but such a pressure group.

In this case the majority have found that this pressure group's work does constitute state action. The basis of this conclusion is rather difficult to ascertain. Apparently it derives mainly from a dislike of the goals of the Jaybird Association. I share that dislike. I fail to see how it makes state action. I would affirm.83

Justice Minton had taken a somewhat similar position the year before in Brotherhood of Railroad Trainmen v. Howard,84 dissenting from a decision sustaining an injunction against a railway labor contract obtained by a white brakemen's union which discriminated against Negro train porters who performed largely brakemen's duties but who had a separate bargaining representative because they were denied membership in the white union. It had been held earlier that a white union which was the collective bargaining representative for Negroes as well as its own members, vested by federal statute with great power, could not use that power to discriminate against Negroes excluded from union membership solely on racial grounds.85 But here, Justice Minton contended that whether the trainmen were required to represent the porters was by statute committed to the National Mediation Board for resolution. Again, for Justice Minton this was a question of power:

I do not understand that private parties such as the carrier and the Brotherhood may not discriminate on the ground of race. Neither a state government nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not. That is the whole problem underlying the proposed Federal Fair Employment Practices Code. Of course, this Court by sheer power can say this case is Steele, or even lay down a code of fair employment practices. But

84. 343 U.S. 768 (1952).
sheer power is not a substitute for legality. I do not have to agree with the discrimination here indulged in to question the legality of today's decision. 86

When the opportunity arose Justice Minton made clear his personal feelings with respect to racial discrimination. In an opinion holding unconstitutional a state court's award of contract damages for violation of a racially restrictive covenant, he replied to contentions that no state action was involved and that the white seller could not raise as a defense the rights of those discriminated against:

The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant, so universally condemned by the courts. 87

The difficulty of these cases can perhaps be illustrated by turning some of them over and looking at the other side. The white voters in the Jaybird case, for example, were denied the privilege of discriminating in quiet, orderly fashion, not as a result of a decision by those entrusted with making policy in the State of Texas, but by virtue of the Court's own interpretation of the Constitution, resulting in a decision which cuts sharply into the political "freedoms" of these white individuals. At the same time a strong minority would have required those in charge of making policy in Illinois to permit Beauharnais to organize support for his racial attacks against the same minority protected in the Jaybird case. Such cases illustrate with striking clarity the truth of the reminder by perhaps the most astute observer of the Court "of the difficulty of the constitutional problem and of efforts to slip judicial votes into the tidy categories of liberal and conservative." 88 Comparison of Justice Minton's opinion in the Jaybird case with his decision in the restrictive cove-

86. Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 778 (1952) (dissenting opinion).
88. FREUND, Mr. Justice Brandeis in Mr. Justice 97 (Dunham & Kurland eds. 1956).
nant case, written less than two months later, demonstrates clearly that in these matters Justice Minton made no attempt to be either "liberal" or "conservative." He, as much as any other member of the Court, approached these questions not in terms of their social consequences, but primarily as problems of power—the power of state and federal legislatures under the Constitution. If his resolution of some of these problems is open to question, this is not attributable to the absence of intellectual support for his conclusions but to the inherent difficulty of the problems.

II. PROCEDURAL PROTECTIONS IN CRIMINAL PROCEEDINGS

Often the ultimate outcome for an individual caught in the government's far-flung net depends not so much upon interpretative or constitutional niceties of the substantive law as upon his opportunity to present his own case and to keep out damaging portions of the government's, to have the facts and law determined by an impartial tribunal, and to obtain review to correct erroneous determinations. Questions of this nature made up an important part of the work of the Court during Justice Minton's tenure, and his votes and opinions made a significant contribution to the end product.

A. PROCEDURAL PROBLEMS IN FEDERAL CRIMINAL TRIALS

The principal function of a trial, criminal or otherwise, is to determine the whole truth legally relevant to the questions in dispute. Accordingly, in a criminal trial many of the procedural protections are designed to insure, as far as possible, that an innocent suspect is not wrongfully convicted. But sometimes the search for truth may conflict with other important policies, and some of the procedural problems in criminal cases require reconciliation of these conflicts. Still other procedural rules are unrelated either to the fairness of the trial or to any other important policy. Justice Minton was reluctant to upset convictions on grounds which had no relation to, or did not cast substantial doubt upon, the determination of the guilt of the accused. For example, he wrote the Court's opinion holding that an indictment charging false testimony before a Senate sub-committee need not contain the name or authority of the officer who administered the oath to the defendant, since this detail was not necessary fairly to advise the defendant of the nature of the charge. Similarly, he wrote the opinion of the Court sustaining a conviction in another case in which the U. S. District Attorney had pre-

sented the case to the grand jury without securing the approval of the Attorney-General, as required by an unpublished order, on the ground that this requirement was merely an internal housekeeping rule for the Department of Justice and was not for the protection of the defendant. Moreover, conceded errors in admission of evidence were not sufficient to justify reversal of a conviction if the evidence so admitted could not reasonably have affected the verdict, because in Justice Minton's words: "A defendant is entitled to a fair trial but not a perfect one."91 Much more common and more difficult than cases of this type were those which raised substantial questions as to the fairness of the manner in which the defendant was convicted or the means by which the evidence against him was obtained.

1. **Searches, Seizures and Wiretapping.** Some of the difficult questions which faced the Court required determination of the extent to which the truth should be suppressed to restrict police state methods which, once sanctioned, might be applied against the innocent as well as the guilty. A logical and often effective method of securing evidence of the guilt of a suspect is to search his home and office for incriminating articles or documents, and failing in that, to eavesdrop on his conversations in the hope of overhearing damaging statements. Obviously, however, widespread use of such police methods would result in serious invasions of the privacy of many innocent individuals, and even with respect to guilty persons, unwarranted disclosure of private affairs unrelated to their criminal activity. Centuries of experience so convinced the nation's founders of the great danger to a free people from unreasonable searches and seizures that they were forbidden by the fourth amendment which provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.92

The federal courts have enforced this prohibition by excluding evidence wrongfully obtained,93 though this rule of evidence was not inevitable

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92. U.S. Const. amend. IV.
and is not followed in most states which apparently rely on other means to enforce similar state prohibitions.  

In 1928 a closely divided Court held that wiretapping was not a search and seizure within the meaning of the fourth amendment.  

Subsequently, Congress made it unlawful to “intercept” and “divulge” any communication without the consent of the sender.  

In *On Lee v. United States* Justice Minton joined the Court in upholding a conviction based upon testimony of a federal agent of defendant’s incriminating conversation with a government “stool pigeon” who was “wired for sound” with a radio transmitter which broadcast to the agent standing outside.  

The dissenting justices thought this intrusion unconstitutional either as a conventional search or as wiretapping, and Justice Frankfurter, demonstrating his extreme revulsion for all such “dirty business,” attacked the action as exemplifying “lazy” police methods.  

It is difficult to see how use of modern electronic equipment can fairly be characterized as lazy, although its very ingenuity and proficiency may make it all the more dangerous a threat to individual privacy.  

The principal issue around which recent litigation involving the fourth amendment has revolved is the extent to which federal police may conduct a search without a warrant in connection with a valid arrest.  

Two cases decided shortly before Justice Minton joined the Court illustrate its difficulty with this problem. *Harris v. United States* upheld a search of an entire four-room apartment even though the articles seized were not what the officers were looking for. Justice Frankfurter’s dissent urged that read as a whole the amendment means that any search without a warrant is unreasonable, and in a painstaking review of the earlier cases, he rather persuasively argued that the right to search pursuant to an arrest had been limited to the area within the defendant’s immediate control to enable the arresting officer to protect himself against concealed weapons and to prevent the defendant from destroying evidence. For practical purposes the *Harris* decision was overruled the following year in *Trupiano v. United States* in which the Court held that no search beyond the immediate physical control of the defendant can be made without a search warrant if the arresting officers had

97. 343 U.S. 747 (1952).  
98. *Id.* at 758-62 (dissenting opinion).  
100. 334 U.S. 699 (1948).
time to procure one because the fourth amendment requires a warrant for any search except when an emergency exists.

In *United States v. Rabinowitz*\(^{101}\) Justice Minton wrote one of his first important opinions. In this case a forger of overprinted stamps was arrested in his small one-room office, whereupon the arresting officers conducted a thorough search of the premises without a search warrant and turned up 573 forged stamps which were used in evidence against the defendant. Reversing the court of appeals and overruling *Trupiano*, the Court sustained the conviction on the ground that the search was reasonable because it was incident to a valid arrest, took place in a small business room to which the public was invited, and uncovered articles the possession of which constitutes a crime. Justice Frankfurter rewrote his *Harris* dissent, adding a bitter and petulant protest against instability in the law resulting from "unexpected changes in the Court's composition and the contingencies in the choice of successors."\(^{102}\)

Justice Frankfurter's interpretation of the fourth amendment requires making certain unexpressed exceptions to an otherwise absolute express prohibition, although he himself has sharply criticized a similar interpretation of the first amendment.\(^{103}\) Once it is conceded that there are exceptional circumstances which permit a search without a warrant, then it seems clear that Justice Minton is correct in asserting that the fourth amendment means just what it says—that only *unreasonable* searches and seizures are prohibited. "That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case,"\(^{104}\) however "appealing from the vantage point of easy administration [may be a] rule of thumb requiring that a search warrant always be procured whenever practicable."\(^{105}\) Justice Minton carefully based his opinion on the combination of a number of factors all of which do have some bearing on the seriousness of the police invasion of *this defendant's* privacy. However fortuitous may be a suspect's location when he is arrested, conducting a search entirely in his presence following a lawful entry to arrest him is not as outrageous as unlawfully breaking down the door to conduct a general search for evidence or sneaking in surreptitiously to search in his absence.\(^{106}\) Moreover, a man's home may be his castle, but his of-

\(^{101}\) 339 U.S. 56 (1950).

\(^{102}\) Id. at 86 (dissenting opinion).

\(^{103}\) See Dennis v. United States, 341 U.S. 494, 524-25 (1951) (concurring opinion). In fairness it should be noted that the "gloss of history" provides Justice Frankfurter with a unifying principle.


\(^{105}\) Id. at 65.

fice to which he invites the public is certainly not so sacrosanct. Finally, it is significant that this search was not a general search for evidence of any crime, and the resulting seizure was limited to particular articles possession of which constituted the crime for which the defendant was lawfully arrested.\(^{107}\) The Rabinowitz dissenters would impose a different standard of reasonableness which may well be justified by the possibility of police abuse of this authorization by using an arrest on a trumped-up charge to justify rummaging through private papers for evidence of other crimes or indiscretions. On the other hand such were not the facts of this case, the result of which was not to sanction police interference with an innocent person, but rather to protect all law-abiding citizens from the threat of another guilty criminal. To secure this protection for all of us, in Justice Minton's words: "Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential."\(^{108}\)

2. Privilege Against Self-Incrimination. Perhaps the most logical way for a government to secure information about any problem is to interrogate those people most familiar with it. Accordingly, during the post-war period many witnesses were called to testify before grand juries and congressional committees conducting various investigations, the most publicized of which were those inquiring into gambling and Communism. A witness who refuses to answer pertinent\(^{109}\) questions in such an interrogation is ordinarily subject to conviction for contempt unless the answer would incriminate him, in which case his refusal is permissible under the provision of the fifth amendment that no person "shall be compelled in any criminal case to be a witness against himself."\(^{110}\) Since the witness cannot be compelled to disclose his guilt to justify his refusal to answer, the witness himself is the principal judge of the validity of his claim, which should be sustained if the general information available makes it probable that the answer could be incriminating.\(^{111}\)

During this period the Court reviewed a number of contempt convictions of witnesses who refused to answer questions concerning their Communist activities and associations. The Court reversed the conviction of a witness who claimed that she would incriminate herself by answering questions concerning the Communist Party and her participa-

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tion in it, since the answers sought might tend to establish Smith Act violations.\(^\text{112}\) On the other hand it sustained a similar conviction of a witness who admitted her association with the Party but refused to answer subsequent questions concerning her acquaintances in it.\(^\text{113}\) The Court reasoned that having admitted her association with the Party, the answers to the subsequent questions could no longer incriminate her. Justice Minton joined in both opinions, but he dissented in two subsequent decisions upsetting convictions of witnesses who had based their refusal to answer in part at least on the ground that the first amendment prohibited inquiries into associations and beliefs, and one of whom had at one point expressly denied that his answer would incriminate him.\(^\text{114}\)

These decisions undoubtedly made it more difficult to secure information and criminal convictions relating to Communist activities, and resulted in widespread misunderstanding and criticism of the privilege against self-incrimination and the Court's application of it. The obstacles to investigative committees could be and were surmounted by enactment of an "Immunity Statute,"\(^\text{115}\) authorizing the Attorney-General to confer immunity from criminal prosecution on witnesses who testified, so that their testimony would no longer incriminate them. Justice Minton joined in the Court's decision sustaining a contempt conviction following granting of such immunity.\(^\text{116}\)

A corollary to this problem of the scope of the protection of the privilege is the question of the inferences which may be drawn from a claim of the privilege and the action which a government may take with respect to a person making such a claim.\(^\text{117}\) In *Slowchoower v. Board of Higher Educ.*\(^\text{118}\) the Court held that New York could not automatically discharge a teacher who claimed the privilege since to do so amounted to a conclusive presumption that exercise of the privilege constituted either an admission of guilt or commission of perjury. While the Court refused to concede that any inference could be drawn with respect to the conduct to which the question related from a claim of the privilege,\(^\text{119}\) a successful route for the state was suggested by the dissenters in *Slowchoower*, of whom Justice Minton was one, who urged that the discharge

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118. 350 U.S. 551 (1956).
119. Id. at 557-59; see Grunewald v. United States, 353 U.S. 391, 421 (1957).
was justified by the teacher’s refusal to cooperate with appropriate public bodies.\textsuperscript{120} When New York subsequently adopted this suggestion, following Justice Minton’s retirement a majority of the Court sustained the discharge of a subway employee who claimed the privilege in refusing to answer questions concerning his Communist affiliations.\textsuperscript{121}

One outgrowth of the investigation of gambling was the enactment of legislation requiring gamblers to register and pay a stamp tax.\textsuperscript{122} After this statute had been upheld with respect to a Pennsylvania gambler,\textsuperscript{123} Justice Minton wrote the opinion for the Court sustaining it as applied to a gambler in the District of Columbia.\textsuperscript{124} Justices Black and Douglas would have extended the protection of the privilege against self-incrimination to this registration requirement, but Justice Minton correctly reasoned that since the act required registration \textit{before} accepting wagers, there was no \textit{compulsion} on gamblers to give evidence against themselves, and at the outset the gamblers were free to give up gambling rather than registering.

3. \textit{Testimony of Informers.} Not all criminals and ex-Communists were as reluctant to talk about their experiences and associations as those who pleaded the “Fifth Amendment.” Some, influenced by a desire to rectify past wrongs, to secure favorable treatment, or by other reasons best known to themselves, willingly divulged everything they knew to the authorities and, in some cases, to anyone who would listen or read. Occasionally, as in \textit{On Lee}, the Government went to considerable and questionable lengths to avoid relying on the testimony of informers, but because they were often in the best position to have obtained first-hand observations, in many proceedings important parts of the Government’s case consisted of such testimony. Unfortunately, but not surprisingly, such witnesses were not always wholly reliable. The most notorious of these was Harvey Matusow who publicly recanted his testimony, making it difficult to determine which of his conflicting statements were true and which false. Allegations of perjury by him and two others resulted in remand to the Subversive Activities Control Board for further consideration of an order determining the Communist Party to be a subversive organization.\textsuperscript{125} In a later decision which Justice Minton joined, but which was rendered shortly after his retirement, the discovery of the un-
reliability of another such witness resulted in a new trial for another
alleged Communist convicted under the Smith Act. 126

Suspecting or hoping that the evidence of such a witness might be
discredited, defense counsel naturally sought evidence of his prior state-
ments in conflict with his testimony. An obvious source of such con-
flicting statements was the witness' earlier reports and statements to the
Government. In a unanimous decision in Gordon v. United States 127 the
Court unanimously reversed the conviction of an alleged thief because the
Government's principal witness admitted that he had made prior conflict-
ing statements to the authorities which the trial court refused to direct
the Government to produce. After Justice Minton's retirement, the
Court rendered a similar decision in Jencks v. United States 128 directing
a new trial for an alleged Communist labor official because his counsel
had not been permitted to inspect FBI reports by Harvey Matusow and
another witness which defense counsel hoped were in conflict with their
testimony. Although in this case the witness had not admitted that the
FBI reports were conflicting, he had publicly disavowed his testimony,
so the decision directing the Government to produce these reports is a
reasonable application of the Gordon decision despite the extravagant as-
sertion by Justice Clark that the decision gave defendants a "Roman
holiday" 129 with FBI files.

The Jencks and Gordon decisions illustrate that an approach favor-
ing maximum development of the truth can operate in favor of the ac-
cused as well as against him. If at times the Court has gone too far in
protecting guilty defendants by excluding the truth, the remedy is cer-
tainly not to give the Government a corresponding power to hide a por-
tion of the truth which may be favorable to the accused.

In Bowman Dairy Co. v. United States 130 reversing the contempt
conviction of a Government attorney who had refused to obey an order
to produce certain materials, Justice Minton again indicated his prefer-
eence for production and admission of all relevant evidence. Justice Min-
ton's opinion held that one portion of the order was so broad that it con-
stituted an unwarranted "fishing expedition," but he went on to hold
that the subpoena was largely good, saying: "However, the plain words
of the Rule are not to be ignored. They must be given their ordinary
meaning to carry out the purposes of establishing a more liberal policy
for the production, inspection and use of materials at the trial. . . .

127. 344 U.S. 414 (1953).
129. Id. at 681 (dissenting opinion).
short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena."

4. *Testimony of Spouses.* Some exclusionary rules of evidence are designed to carry out some public policy which, although not founded on important constitutional protections, is thought to be sufficiently important to justify impeding the development of the truth. Such a rule is the one that prohibits spouses from testifying against each other in order to preserve their happy home. Much of the evidence in *Lutwak v. United States,* the facts of which resemble a Hollywood bedroom comedy script, consisted of testimony by so-called spouses against each other. Munio Knoll, his wife Maria, and his brother Leopold, were aliens who secured entry into this country under the War Brides Act by going through the form of marriage ceremonies with three veterans of the appropriate sexes, apparently following a divorce between Munio and Maria. Justice Minton held the testimony admissible on the grounds that at least in this case the reason for the rule did not exist because there were no happy homes to protect, whether or not the parties were technically married. Since there was no criminal violation at all if the parties were "spouses" within the meaning of the War Brides Act, this decision also presented a classic example of the puzzling problem which arises when the evidentiary question coincides with the ultimate question on the merits. Although the dissent urged that a conviction based upon such testimony was pulled up by its own bootstraps, it seems clear that the trial court must ordinarily make a separate determination with respect to the admission of the evidence, whatever the ultimate determination of the same question on the merits.

The issue in another case was whether a witness could refuse to answer questions as to his wife's whereabouts on the ground that his knowledge was obtained through a confidential communication from his wife. On the facts of this case, in light of prior authority, the Court appears to have been correct in holding that the witness was privileged to refuse to answer the question because the Government offered no proof to rebut the usual presumption that communications between spouses are privileged, particularly since in this case it appeared that the wife was

131. *Id.* at 220-21.
133. 344 U.S. 604 (1953).
137. See 8 WIGMORE, *EVIDENCE* § 2336 (3d ed. 1940).
hiding out from the authorities. Dissenting, Justice Minton again revealed his preference for developing the truth to competing policies, reasoning that: "The general rule of evidence is competency, incompetency is the exception and to bring one within the exception, one must come within the reason for the exception."  

5. Joint Trials. Prosecutors frequently resort to the expedient of joint trials, particularly for conspiracy defendants. Justice Minton's opinion in the Lutvak case demonstrates the difficult evidentiary and procedural problems inherent in such trials. Evidence at this trial for conspiracy to defraud the United States by securing wrongful entry into the United States under the War Brides Act included testimony by various participants of both acts performed and statements made before and after the conclusion of the conspiracy. Justice Minton carefully distinguished between acts and declarations, pointing out that the former presented no hearsay problem and hence were admissible against all defendants even though performed after the conspiracy had ended. Statements made during the course of the conspiracy were admissible against all of the defendants under a well-accepted exception to the hearsay rule for statements of a party on the theory that each co-conspirator is an agent of the others. But statements made after the termination of the conspiracy were admissible only against the defendant who made them since the agency was then terminated. Although the trial court carefully instructed the jury with respect to the particular defendant against whom such testimony was admissible, it is obviously difficult for the jury to keep these nice distinctions in mind. Nevertheless the Court, adhering to earlier decisions, sustained the convictions, refusing to hold that this procedure is unfair as long as the jury is properly instructed. The Court subsequently relied heavily on this opinion in a recent 5-4 decision upholding similar convictions obtained at a joint trial. The Lutvak decision again illustrates Justice Minton's preference for full development of the truth since, as had previously been pointed out by Judge Learned Hand, "In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this probably excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury

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139. 4 WIGMORE, EVIDENCE § 1079 (3d ed. 1940).  
of a mental gymnastic which is beyond, not only their powers, but anybody’s else.”

6. Biased Juries and Judges. No evidentiary rules or constitutional protections are sufficient to insure a defendant a fair trial if the tribunal judging his case is prejudiced against him. To assure an impartial jury, a potential juror should be excluded not only if he is actually biased but also if his relationship to the case is such as to make it difficult or unlikely that he could be disinterested. The Court had earlier decided that federal government employees were not inherently disqualified from acting as jurors in federal criminal cases. In the Dennis case, on appeal from a contempt conviction, a notorious Communist urged that the situation was different with respect to him, particularly in light of Government loyalty and security orders which would be likely to make Government employees fearful of their jobs if they should find in his favor. He offered no proof of his conclusion, and in fact, when questioned, the jurors indicated they felt no fear for their jobs. Justice Minton’s opinion for the Court sustained the conviction, refusing to assume without proof that all Government employees were so likely to fear for their jobs that they should automatically be excluded. He conceded that the right of a member of an unpopular minority to an impartial trial must be scrupulously protected to the same extent as any other defendant. In his words:

In exercising its discretion, the trial court must be zealous to protect the rights of an accused. And we agree that this the court must do without reference to an accused’s political or religious beliefs, however such beliefs may be received by a predominant segment of our population. Ideological status is not an appropriate gauge of the high standard of justice toward which our courts may not be content only to strive. But while one of an unpopular minority group must be accorded that solicitude which properly accompanies an accused person, he is not entitled to unusual protection or exception.

But he concluded with a ringing affirmation of his faith in the fundamental fairness and integrity of the men and women of whom juries are composed:

In this case, no more than the trial court can we without injustice take judicial notice of a miasma of fear to which

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142. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).
Government employees are claimed to be peculiarly vulnerable—and from which other citizens are by implication immune. Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them. There is no disclosure in this record that these jurors did not bring to bear, as is particularly the custom when personal liberty hinges on the determination, the sense of responsibility and individual integrity by which men judge men.\(^{145}\)

Where, however, the circumstances demonstrated that a juror was in fact subject to pressure which would make disinterested consideration difficult, Justice Minton was insistent that fairness required exclusion of the juror. In the \textit{Remmer} case he wrote the Court's opinion vacating the defendant's conviction so the district court could determine whether an alleged FBI investigation of a juror who had reported a bribery attempt had prejudiced the defendant's right to a fair trial, saying:

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . .

. . . The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions . . . .\(^{146}\)

After the district court decided that the defendant had not been prejudiced, Justice Minton once more wrote for a unanimous Court, reversing the conviction and reiterating his previous views in the following words:

We think this evidence, covering the total picture, reveals such a state of facts that neither Mr. Smith nor anyone could say he was not affected in his freedom of action as a juror. . . . He had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as

\(^{145}\) \textit{Id.} at 172.

possible from outside unauthorized intrusions purposefully made.  

He was not so insistent on the disinterestedness of a judge holding a lawyer in contempt for conduct committed before him. In *Sacher v. United States*\(^{148}\) the Court sustained such a conviction of one of the attorneys who represented the defendants in the trial in the *Dennis* case. However, in a similar case two years later the Court reversed a contempt conviction by an obviously prejudiced judge so that the charge could be heard by another judge.\(^{149}\) Justice Minton dissented on the ground that the lawyer was obviously guilty and the two day punishment was not unfair. He subsequently joined in a dissent to a decision upsetting a similar state court conviction.\(^{160}\) Justices Black and Douglas insisted in the first two cases that the defendant was not only entitled to have this judge disqualified but was also entitled to a jury trial, a contention which they have continued to maintain and which came close to prevailing last term despite the unswerving authority to the contrary.\(^{151}\) Conceding the importance of empowering a judge to maintain order in his court, it is difficult to agree with Justice Minton's refusal to apply the same standards of fairness and freedom from bias to a judge in such a case as he applied to the juror in the *Remmer* case. However apparent the guilt of the accused, fundamental fairness and the integrity of the judicial system require that he be tried and sentenced by an impartial tribunal.

The foregoing cases demonstrate clearly that in approaching evidentiary problems, Justice Minton's general preference was for the production and admission of all relevant evidence. At least in the absence of competing considerations, few except guilty defendants and their attorneys can quarrel with a policy of encouraging the development of the entire relevant truth. The same cannot be said, however, with respect to his refusal to accord to contempt defendants the same right to have the truth determined by an impartial tribunal as he insisted upon for defendants in a jury trial.

7. *Courts-Martial Jurisdiction and Review.* American servicemen, thousands of whom have been joined by their wives and other dependents, are stationed in over 60 countries throughout the world.\(^{152}\) Both the power and the necessity to permit the military to deal with violations

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\(^{148}\) 343 U.S. 1 (1952).


by armed services personnel in a manner different from ordinary criminal violations is unquestioned. Recently the Court has had to consider whether some civilians can also be tried before some such special type of tribunal.

In one case Justice Minton joined the opinion of the Court holding that United States occupation courts in Germany created by presidential order had concurrent jurisdiction with military courts-martial to try an Army wife accused of murdering her soldier husband. But in a subsequent case the Court held that a discharged soldier could not constitutionally be tried by courts-martial for an offense committed while he was in the Army. Justice Minton joined in a dissent based on the ground that power to provide for such a trial was conferred on Congress by virtue of its power with respect to "the land and naval forces." Cases of this type are excepted from at least some of the procedural requirements of the fifth and sixth amendments. Justice Minton added his own dissent on the further ground that in view of the fact that the defendant's discharge was subject to the provisions of the statute expressly permitting such a court-martial, to that limited extent he was not a full-fledged civilian.

A few months later Justice Minton was again with the majority when the Court held that a military court-martial could constitutionally try two Army wives accused of murdering their husbands in England and Japan. But in the term following Justice Minton's retirement, the Court granted rehearing and reversed itself, holding that at least in capital cases, courts-martial could not exercise jurisdiction over such civilians.

In Hiatt v. Brown, relying on much earlier decisions, the Court held that review of courts-martial convictions by habeas corpus was limited to determining whether the military tribunal had jurisdiction and did not extend to the correction of errors. The Court subsequently relied on this decision in Burns v. Wilson, while at the same time apparently broadening the scope of review, holding that where a court-martial gave full consideration to the defendants' constitutional contentions, review by federal courts on habeas corpus does not extend to the correctness of the court-martial's conclusions. Justice Minton concurred on the ground that review was limited solely to the question of jurisdiction and that:

155. See U.S. Const. art. I, § 8 and amend. V and VI.
"Due process of law for military personnel is what Congress has provided for them in the military hierarchy in courts established according to law."\(^{160}\) Justices Black and Douglas dissented on the ground that the defendants had established a prima facie case that their convictions were based on coerced confessions, a claim which they regarded as reviewable as "jurisdictional." As Justice Frankfurter pointed out in urging that the case be reargued, similar expansion of the meaning of "jurisdiction" had earlier been utilized to permit broad review in habeas corpus proceedings involving civilian criminal convictions.\(^{161}\)

Underlying all of these decisions is the question of the extent to which military personnel and persons closely associated with them are constitutionally entitled to certain of the procedural protections clearly available to most criminal defendants. In the court-martial cases, Justice Minton voted to sustain the power of the Government to subject to military jurisdiction civilians closely related to the military, and to limit review of such convictions solely to such questions of jurisdiction on the ground that judicial power to deal with defendants properly subjected to courts-martial jurisdiction is conferred elsewhere than the federal civilian courts.

B. Federal Limitations on State Criminal Procedures

In the exercise of its general supervisory powers over federal courts and law enforcement officials, the Supreme Court has considerable discretion in fashioning rules of procedure for the protection of an accused in a federal criminal trial.\(^ {162}\) But in reviewing state criminal convictions, its function is ordinarily limited to determining whether the conviction was obtained by state procedures so fundamentally unfair as to constitute a denial of due process, or occasionally of some other constitutionally protected right. Due process is by its nature a flexible concept dependent to a large extent upon the facts of each particular case. Most of the principal disputes, however, fall into one or more of a very few familiar patterns.

1. Right to Counsel. In many cases most criminal defendants are incapable of dealing with the complex legal questions which their defense may entail without the aid of counsel. The Court has held that all federal criminal defendants are entitled to representation by counsel by virtue of the sixth amendment which provides in part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance

\(^{160}\) Id. at 147 (concurring opinion).


\(^{162}\) See, e.g., McNabb v. United States, 318 U.S. 332 (1943).
of Counsel for his defence." However, it has refused to lay down a universal rule that the due process clause of the fourteenth amendment requires appointment of counsel in all state criminal proceedings, a great many of which involve relatively minor violations of which the defendant is admittedly guilty. Hence, the Court has required appointment of counsel only in capital cases and cases in which special circumstances, such as the extreme youth of the defendant, renders fundamentally unfair a conviction obtained without representation by counsel.

While the Court has usually been in general agreement in applying this principle, occasional differences have arisen, as is illustrated by the 5-4 decision in Palmer v. Ashe in which Justice Minton wrote the minority's dissent. In this case the petitioner did not raise his claim until more than eighteen years after having been sentenced, and following his parole and subsequent incarceration for parole violation. The special circumstances alleged included his youth, irresponsibility and mental incompetency, but rested primarily on his claim that he had been deliberately misinformed as to the crime with which he was charged and to which he had pleaded guilty. The dissenting opinion pointed out that he was 21 when he was sentenced, and that his claim of incompetency was based on his confinement in a mental institution more than ten years before that. Justice Minton reasoned that the state could reasonably conclude "that his contention, made eighteen years late, that he had pleaded guilty to crimes other than he thought he was pleading to was a bit hard to believe, especially in the absence of an allegation that he did not commit the offenses charged in the indictments to which he pleaded guilty."

Justice Minton's dual reliance on the length of time until the claim was made and the uncontested guilt of the petitioner was crystallized in his dissent in a subsequent 5-4 decision granting post-conviction relief for lack of counsel to a federal prisoner whose trial had taken place twelve years earlier and who still made no claim of innocence. In Justice Minton's words, in part characteristically understandable to the litigant:

(N) or does he suggest how a lawyer might have helped him unless he picked the lock on the jailhouse door.

163. U.S. Const. amend. VI.
The important principle that means for redressing deprivations of constitutional rights should be available often clashes with the also important principle that at some point a judgment should become final—that litigation must eventually come to an end. 169

Due process imposes very few limits on the broad discretion of a state trial judge in sentencing a criminal defendant. For example, the judge can rely on confidential information outside the record in imposing sentence. 170 Nevertheless, the special circumstances which render unfair a conviction without counsel may arise by virtue of mistaken assumptions or patent injudiciousness by the trial judge in imposing sentence. 171 This is illustrated by the Court's per curiam reversal in Foulke v. Burke 172 of a Pennsylvania decision upholding facetious sentencing by a Pennsylvania trial judge. Justice Minton alone dissented, arguing that there was no denial of due process so long as the sentence was within authorized limits. He urged that:

These cases only illuminate the error of this Court in Townsend v. Burke, 334 U.S. 736. I would not compound the error. I would overrule Townsend rather than send these petitioners back to be proceeded against nicely. Their guilt is not questioned. They say, 'If we had only had a lawyer, maybe we would not have received such long sentences.' Yet, the sentencing judge gave two of the petitioners much shorter terms than the maximum provided by statute. They complain not so much of the sentences they received but the manner in which they received them.

Admit the sentencing judge was facetious, even that he bulldozed the petitioners—he sentenced them all within the limits authorized by law. Maybe the judge's conduct called for a curtain lecture. At most, that was a matter for the Pennsylvania Supreme Court, and that court did not see even an error of state law in the judge's conduct, let alone a federal constitutional question. We sit only to determine federal constitutional questions, not to scold state trial judges. It is utterly incomprehensible to me how a judge can commit a denial of federal due process by being facetious in the sentencing of defendants

169. Id. at 516-17, 520 (dissenting opinion).
where the sentences he imposes are within the limits prescribed by statute. I would affirm.\textsuperscript{173}

This short memorandum opinion illustrates again three aspects of Justice Minton's approach to review of state criminal proceedings: (1) his general reluctance to interfere with the exercise of state power, consistent, for example, with his opinion in a subsequent case sustaining a state conviction based on wiretapped evidence;\textsuperscript{174} (2) his hesitancy to upset state convictions for lack of counsel in the absence of a claim of innocence, revealed also, for example, in his dissent in \textit{Palmer v. Ashe}, which upset an 18 year old state conviction; and (3) his reluctance to interfere with the discretion of a trial court, manifested elsewhere, for example, in his dissent in \textit{Offutt v. United States},\textsuperscript{175} which reversed an attorney's contempt conviction by an obviously prejudiced judge. While most would agree in principle with Justice Minton's unwillingness to interfere with the broad discretion properly conferred upon trial judges, or to inquire into the judge's mental processes in exercising that discretion, nevertheless fundamental fairness would seem to require that the sentencing court act with apparent dispassion.

2. Coerced Confessions. Just as for federal officers and investigators, one of the simplest and most effective methods for state and local police to secure evidence against a criminal suspect is to question him intensively. Frequently, a confession is obtained after such prolonged interrogation that it is questionable whether or not the confession was made voluntarily. Often the defendant will subsequently repudiate his confession claiming that it was psychologically coerced, or occasionally that it was secured through actual physical brutality. Admission of such a confession is subject to attack on several grounds. In the first place it is secured without the suspect having had the opportunity to consult with counsel. Often it is obtained while he is being illegally detained without having been brought before a magistrate and charged as required by local law. Moreover, forcing a suspect to give evidence against himself violates the principle underlying the privilege against self-incrimination. Most fundamental of all, a confession which is in fact coerced is at the same time so damaging and yet so unreliable that it is prejudicially unfair to admit it in evidence against him. The Court has held that the privilege against self-incrimination is not one of the fundamental rights.

\textsuperscript{173} \textit{Id.} at 881 (dissenting opinion).
\textsuperscript{175} 348 U.S. 11 (1954).
“implicit in the concept of ordered liberty” made applicable to the States by the fourteenth amendment, although the contrary position was continued in dissent in other cases. In another decision in which Justice Minton joined, the Court likewise sustained a conviction based upon a confession obtained while the defendant was being illegally detained, where there was no evidence that it was involuntary. Perhaps the dissenting view of Justices Black and Douglas would result in better, more efficient, state police methods, but this is a question for the states, not the Court, to decide. The only question for the Court in such a case is whether this defendant’s conviction was obtained without due process of law, and there is nothing fundamentally unfair in convicting an admittedly guilty man on the basis of his own voluntary confession.

Even the defendant’s claim that his confession was actually coerced does not end the matter, for this claim will usually be disputed by the police, thus giving rise to a difficult factual issue. The Court has exercised considerable latitude in making an independent judgment with respect to the voluntary nature of the confession. In the case of Leyra v. Denno, the Court held involuntary as a matter of law three confessions obtained within a space of a few hours after a confession admittedly coerced by a psychiatrist. Justice Minton dissented on the ground that there was enough evidence to support the voluntary nature of these confessions that it could not be concluded as a matter of law that they were involuntary.

Perhaps the key to the Court’s opinion in the Leyra case lies in its emphasis on the fact that the challenged confessions were obtained “from a lone defendant unprotected by counsel.” It is certainly true that a defendant may often have more need for counsel immediately after his arrest and when interrogation is commenced than at any other time. But as long as there is no coercion, physical or mental, a conviction based upon a voluntary confession hardly seems a denial of due process, even though with a lawyer’s counsel at the outset many guilty criminals might be able to avoid conviction. Thus, in two decisions following Justice Minton’s retirement, a closely divided Court refused to upset convictions

181. Id. at 561.
solely because confessions were obtained after the suspect was refused his request for counsel.  

3. Illegally Obtained Evidence. Like federal officers, state and local police faced with the difficult task of solving a multitude of crimes occasionally resort to searching the premises of a suspect in the hope, often realized, of finding evidence against him. Although such evidence may have been obtained by means which would constitute an unlawful search and seizure if conducted by federal officers, it was held in *Wolf v. Colorado*\(^{183}\) that there is ordinarily no constitutional bar to its admission as evidence in a state court. Unlike coerced confessions there is no cloud upon its trustworthiness, and while its admission may encourage lawless action by state law enforcement officers, this problem, like that of illegal detention, is committed to the states and not to the federal courts.

However, as demonstrated by *Rochin v. California*,\(^ {184}\) in which Justice Minton did not participate, most rules have their limits. When police officers broke into his room, Rochin hastily snatched two capsules containing narcotics from a table and swallowed them. The capsules were recovered by administration of an emetic which forced him to vomit and entered in evidence at his trial. The Court held unanimously, Justices Black and Douglas each concurring separately, that Rochin’s conviction based upon such “stomach-pumped” evidence violated due process because such police methods “shock the conscience”\(^ {185}\) and “offend the community’s sense of fair play and decency.”\(^ {186}\) In light of two subsequent cases, the precise limits of this case are difficult to determine. A narrow majority, in which Justice Minton joined, refused to apply it in sustaining a conviction based on evidence obtained by “bugging” the defendant’s bedroom for an extended period.\(^ {187}\) Although this case can be distinguished from *Rochin* in that no physical assault was involved, Justice Frankfurter, the author of the *Rochin* opinion, appears correct in asserting in his dissent that the police conduct here was just as aggravated as in *Rochin*. Such deliberate and prolonged eavesdropping in many ways poses a far more serious threat to individual liberty and privacy than “stomach pumping” in unforeseen and unforeseeable circumstances. In still another case decided after Justice Minton retired, the Court sustained a drunken driving conviction based on a blood sample taken from

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185. *Id.* at 172.
186. *Id.* at 173.
the driver while unconscious.\textsuperscript{188} Although the physical assault involved in this case was less aggravated than in \textit{Rochin}, three justices thought this difference in degree was not great enough to distinguish it.

A closely related problem is that of evidence obtained by wiretapping, the disclosure of which is prohibited by federal statute, although wiretapping itself is not a search forbidden by the fourth amendment.\textsuperscript{189} Since under \textit{Wolf v. Colorado} evidence obtained by unconstitutional means is admissible in state courts, it is scarcely surprising that the Court, in an opinion by Justice Minton in \textit{Schwartz v. Texas},\textsuperscript{190} sustained a state court conviction based upon wiretapped evidence. The problem is not quite as simple as it appears on the surface, however, since the wiretapping statute, unlike the fourth amendment, does not prohibit the invasion by itself, but makes it unlawful to wiretap and disclose the contents of the intercepted message.\textsuperscript{191} In \textit{Nardone v. United States}\textsuperscript{192} wiretapped evidence was excluded in federal courts on the ground that testimony of wiretapped evidence in a federal court would constitute an unlawful disclosure, reasoning apparently applicable to state courts as well. But Justice Minton relegated \textit{Nardone} to a rule of evidence analogous to the \textit{Weeks v. United States}\textsuperscript{193} rule (excluding evidence obtained in violation of the fourth amendment from use in federal prosecutions), which by analogy to \textit{Wolf v. Colorado} was inapplicable in the Court's review of state proceedings.

The key to Justice Minton's position in these cases is revealed in the following passage from his opinion in the \textit{Schwartz} case:

Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.\textsuperscript{194}

\textsuperscript{188} Breithaupt v. Abram, 352 U.S. 432 (1957).
\textsuperscript{189} Olmstead v. United States, 277 U.S. 438 (1928).
\textsuperscript{190} 344 U.S. 195 (1952).
\textsuperscript{192} 302 U.S. 379 (1937); see Benanti v. United States, 355 U.S. 96 (1957).
\textsuperscript{193} 232 U.S. 383 (1914).
This language, strikingly similar to the views of the dissenters (including Justice Minton) in the *Nelson* case, who would have sustained Pennsylvania's sedition act, demonstrates quite clearly Justice Minton’s reluctance to interfere with the exercise of state power.

4. *Appeals.* In a unique extension of the requirements of due process and equal protection the Court held in *Griffin v. Illinois*\(^{195}\) that a state may not deny appellate review of a criminal conviction because of the defendant’s inability to pay for a trial transcript. The Court reasoned that although due process does not require providing any appeal at all, it is arbitrary to provide an appeal on terms not available to indigents. To the majority it was clear that: “In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”\(^{196}\) But to Justice Minton and Justice Burton, writing for themselves and two others, it was equally clear that:

It is one thing for Congress and this Court to prescribe such procedure for the federal courts. It is quite another for this Court to hold that the Constitution of the United States has prescribed it for all state courts. . . .

. . . . . .

. . . Illinois is not bound to make the defendants economically equal before its bar of justice. For a State to do so may be a desirable social policy, but what may be a good legislative policy for a State is not necessarily required by the Constitution of the United States. Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can’t make it?

The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws. . . . This is an interference with state power for what may be a desirable result, but which we believe to be within the field of local option.\(^{197}\)


\(^{197}\) *Id.* at 27-29 (dissenting opinion).
This case was more favorable for the petitioners than those involving illegally obtained evidence, for example, since the majority was not limited to the due process clause but could rely in part on the equal protection clause in light of the resulting discrimination between rich and poor. As Justice Harlan’s separate dissent points out, however, the law is full of differentiations based on wealth, not all of them weighted against the poor. But there is considerable appeal in the majority’s position that at least in criminal cases, the capacity to exercise the basic steps in one’s defense ought not to depend on his financial status, even though the effectiveness of that exercise may still necessarily depend on the amount of money he can expend in his defense. This case illustrates perhaps as clearly as any the difficulties inherent in the multitude of cases before the Court requiring it to reconcile the claimed procedural rights of criminal defendants with the power left to the states under the Constitution.

5. Double Jeopardy. In *Brock v. North Carolina* Justice Minton wrote the Court’s opinion holding that the defendant was not denied due process by a conviction at a second trial following the declaration of a mistrial at the first trial when two of the state’s principal witnesses, allegedly co-participants in the crime, refused to testify on grounds of self-incrimination. The following passage from his opinion illustrates Justice Minton’s approach to all these cases involving the requirements of due process in state criminal cases:

As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case. The pattern here, long in use in North Carolina, does not deny the fundamental essentials of a trial, ‘the very essence of a scheme of ordered justice,’ which is due process.

This decision was recently relied upon by the Court in holding there was no denial of due process in convicting a defendant of robbery although he had been acquitted at an earlier trial for allegedly robbing other persons at the same time.

The law of most states confers on an accused rights which, if he is fully aware of them and exercises them intelligently, make it virtually impossible for a state to obtain evidence of his guilt from perhaps the most fruitful source, the suspect himself. Several justices appear to have

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199. 344 U.S. 424 (1953).
200. Id. at 427-28.
taken the position that any conviction based upon information obtained from the defendant violates due process unless he knowingly waives these rights. This is consistent with the position of at least some of them that the privilege against self-incrimination is made applicable to the states by the due process clause.\textsuperscript{202} It is manifested in the position of a minority of the Court that a conviction, based on a confession obtained after the defendant had been denied his request to confer with counsel, violates due process.\textsuperscript{203}

Justice Minton, and in most instances a majority of the Court, attacked these problems differently. Fundamental to his approach to all such cases was his strong aversion to interfering with the states' administration of criminal justice, especially when the defendant made no claim to innocence. Justice Minton and the majority of the Court were I believe, correct in ordinarily refusing to interfere with state court procedures in the name of civil liberties. For example, to me there is nothing fundamentally abhorrent about convicting a guilty man at a fairly conducted trial on the basis of reliable evidence merely because that evidence was obtained in violation of state law. This would be a better world if all police officers behaved as they should, but so also would it be better if there were no criminals. The Constitution does not guarantee Utopia in either respect. \emph{Rochin}, one of the few cases decided in the defendant's favor, represents a rejection of the thought underlying Justice Stone's assertion that "a criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."\textsuperscript{204} If Rochin had been a gentleman he would have submitted docilely when caught with the goods. It was his refusal to abide by the rules which necessitated the drastic counter-action taken by the police in unforeseeable circumstances. Requiring a state, willing to rely on other devices to improve its police methods, to free Rochin from conviction for a crime of which he was so obviously guilty may well "shock the conscience" of a good many ordinary citizens subjected to further invasions by an admittedly guilty criminal set free to prey once more.

III. FEDERAL AND STATE REGULATION OF COMMERCE

Although decisions of the Court in the last twenty years broadly interpreting the constitutional power of Congress to regulate "Commerce

\textsuperscript{202} See Adamson v. California, 332 U.S. 46, 68-123 (1947) (dissenting opinion).
\textsuperscript{203} Cicenia v. LaGay, 357 U.S. 504 (1958); Cropper v. California, 357 U.S. 433 (1958).
\textsuperscript{204} McGuire v. United States, 273 U.S. 95, 99 (1927).
with foreign Nations, and among the several States\textsuperscript{205} have encouraged Congress to regulate important aspects of business in great detail, there remain many areas in which Congress has not acted to the full extent of its power. Thus, in recent years most of the cases in which the applicability of federal regulation has been challenged have not been constitutional decisions, but instead have involved interpretation of the scope of the regulatory legislation enacted by Congress. Similar state legislation designed to supplement such federal regulation is often challenged on the ground that Congress intended its regulation to be exclusive or that the state legislation conflicts with Congressional regulation. Determining the applicable limits of such federal and state regulation presented the Court with a number of difficult problems.

A. Regulation of Carriers

The Carmack Amendment to the Interstate Commerce Act imposes liability for damage to goods in transit upon a carrier "receiving property for transportation from a point in one state . . . to a point in another state."\textsuperscript{206} Justice Minton wrote the Court's opinion holding that the amendment applied to a shipment from New Orleans to Boston, even though the goods had first been shipped on an ocean bill of lading from Buenos Aires to New Orleans.\textsuperscript{207} Conceding the possibility that for some purposes the shipment from New Orleans to Boston might be viewed as part of "an organic transaction in [foreign] commerce,"\textsuperscript{208} Justice Minton pointed out that the original shipment ended at New Orleans under the terms of the initial bill of lading, and concluded, therefore, that for purposes of the Carmack Amendment the subsequent shipment was a separate one to which the literal language of the statute clearly applied. Justice Frankfurter dissented on the ground that this literal interpretation was contrary to the "illuminating context of the regulatory scheme."\textsuperscript{209}

Following a series of restrictive court decisions with respect to the scope of the Federal Employers' Liability Act, in 1939 Congress amended it to apply to "any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce. . . ."\textsuperscript{210} In two cases Justice Minton wrote the Court's opinion holding that by virtue of the amendment, the Act now applied to an em-

\begin{itemize}
  \item \textsuperscript{205} U.S. Const. art. I, § 8.
  \item \textsuperscript{207} Reed v. Thompson, 339 U.S. 113 (1950).
  \item \textsuperscript{208} \textit{Id.} at 119 (dissenting opinion).
  \item \textsuperscript{209} \textit{Id.} at 120 (dissenting opinion).
\end{itemize}
ployee engaged in the construction of new railroad cars and to a blueprint file clerk. Justice Minton concluded that the duties of such employees "furthered" and "closely and substantially" affected the railroad's interstate transportation operations. He rejected the contention that the coverage of the Act should be limited to employees engaged in transportation, since the language of the Act contained no such limitation. Again Justice Frankfurter dissented, protesting against literal interpretation of a statute as if it were "merely a collection of words for abstract annotation out of the dictionary" rather than "an organism, projected into the future out of its past." These cases illustrate not so much varying approaches to Congressional regulation of commerce as differing views with respect to the manner of interpreting apparently unambiguous statutes generally, differences manifested in many other cases.

Perhaps a clearer indication of the broad scope which Justice Minton accorded to the Interstate Commerce Act is contained in his dissenting vote from a 5-4 decision holding that an interstate carrier could be required to obtain an Arkansas permit before operating on the state's highways. The dissenters urged that such a state permit was in reality a certificate of convenience and necessity within the exclusive jurisdiction of the ICC under the federal statute.

Where federal regulation was inapplicable, however, Justice Minton was reluctant to upset state legislation on the ground that it interfered with interstate commerce. For example, he wrote for a 5-4 majority in Buck v. California sustaining a San Diego County requirement for a permit for taxicabs operating between points in California and Mexico through, but not stopping in, the county. His position is consistent with his dissent in the Arkansas case since the Motor Carrier Act of 1935 expressly exempted taxicabs from its application. Justice Minton concluded that in the absence of applicable or conflicting federal legislation, the states and municipalities were free to impose reasonable regulations on interstate commerce the impact of which is essentially local. In his words:

213. Id. at 510 (dissenting opinion).
214. Ibid.
As the ordinance is not in conflict with and may be con-
strued consistently with the federal regulations and in keeping
with the latter's purpose, they may stand together.

The operation of taxicabs is a local business. For that
reason, Congress has left the field largely to the states. Opera-
tion of taxicabs across state lines or international boundaries is
so closely related to the local situation that the regulation of all
taxicabs operating in the community only indirectly affects
those in commerce, and so long as there is no attempt to dis-
criminatorily regulate or directly burden or charge for the
privilege of doing business in interstate or foreign commerce,
the regulation is valid. The operation is 'essentially local,' and
in the absence of federal regulation, state regulation is required
in the public interest. . . .

Similarly, in a unanimous decision sustaining California's power to
assess a portion of the cost of grade separation improvements to the rail-
road without regard to the benefits it would receive, Justice Minton rea-
soned that the "construction and use of public streets is a matter pe-
cularly of local concern and great leeway is allowed local authorities
where there is no competing federal regulation, even though interstate
commerce be subject to material interference."219

B. Regulation of Natural Gas

Justice Minton's votes with respect to federal and state regulation
of the distribution of natural gas followed a similar pattern. Thus, he
joined one opinion which broadly interpreted the applicability of the fed-
eral Natural Gas Act by holding that it applies to intrastate distribution.220 Subsequently, he wrote the Court's opinion in Phillips Petroleum
Co. v. Wisconsin221 holding that the Federal Power Commission had
jurisdiction over sales to an interstate pipeline company by an independ-
ent natural gas producer, although the FPC had determined that it lacked
such jurisdiction. The applicable provision of the Natural Gas Act ex-
empted from FPC jurisdiction "the production or gathering of natural
gas."222 Phillips' activities in the production and transmission of natural
gas ended with the sales to the pipeline companies, and did not extend to

221. 347 U.S. 672 (1954).
its interstate transportation or local distribution. Although Phillips' function was thus restricted primarily to producing and gathering gas, the Court held that its sales to the pipeline companies were separate and apart from its production and gathering activities and, therefore, not within the applicable exemption. Justice Minton's conclusion was buttressed by the legislative and judicial history which indicated that the Act was intended to fill a gap in regulation left by decisions of the Court which had denied to the states the power to regulate. He refused to weaken the "protection of consumers against exploitation at the hands of natural-gas companies [which] was the primary aim of the Natural Gas Act . . . by a strained interpretation of the existing statutory language."224

Consistent with the broad scope he attributed to the Natural Gas Act, he joined in two decisions denying the states' power to regulate on the ground that Congress had occupied the field and conferred exclusive jurisdiction on the FPC, in one instance with respect to interstate sales to municipalities225 and in the other to sales for resale in interstate commerce.226

As with respect to carriers, where federal regulation was not involved, he consistently voted to sustain state regulation. Thus, prior to the Phillips Petroleum case, he had joined the Court in sustaining state regulation of the well head price of gas sold in interstate commerce where the FPC's jurisdiction was not raised and was expressly not determined.227 And he himself wrote the Court's opinion in Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n228 holding that Michigan could constitutionally require a certificate of convenience and necessity for interstate sales of gas directly to the consumer which were not covered by the Natural Gas Act which applied only to "sales for resale."229 Justice Frankfurter, dissenting, urged that even in the absence of applicable federal legislation, such a state requirement is forbidden by the commerce clause itself. Justice Minton's reasoning was similar in many respects to his opinion a year later in sustaining San Diego County's permit requirement for taxicabs.230 He wrote in part:

It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this Court's decisions recognize no such license. . . . Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or the Commerce Clause of the Constitution. 231

C. Regulation of Labor Relations

Justice Minton's approach to federal and state regulation of labor relations was substantially the same as with respect to dual regulation of carriers and distribution of natural gas. The expansive applicability of federal regulation of labor relations embodied in the National Labor Relations Act232 and the Railway Labor Act233 is illustrated by a decision in which Justice Minton joined holding that the former Act applies to local car dealers. 234

Consistent with his view of the scope of this federal regulation, he joined in striking down a Michigan statute regulating strikes which conflicted with the NLRA235 and a Nebraska prohibition of the union shop, authorized by the federal Railway Labor Act.236 Similarly, Justice Minton wrote the Court's opinion holding that a state court has no jurisdiction over a suit by a railroad against a trucking union because federal law conferred jurisdiction of the dispute on the NLRB.237

But where the state regulation did not clearly conflict with federal regulation, Justice Minton consistently voted to sustain it. Thus, he joined in dissenting from a decision holding that the Wisconsin Public Utility Anti-Strike Law238 was unconstitutional because it conflicted with the NLRA, a decision which left Milwaukee's gas consumers helpless.239 The dissenters urged that although Congress had not prohibited such strikes, the federal statute did not clearly indicate that the states could not do so. Justice Minton later joined two decisions holding that

236. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).
a state may permit a civil tort action for acts constituting a federal unfair labor practice and may enjoin violent union action even though the action also constituted an unfair labor practice. Justices Douglas and Black, joined by Justice Warren in the latter case, dissented on the ground that the federal statute is exclusive and prohibits such supplementary state action. In a subsequent case following Justice Minton's retirement the states suffered a setback in a decision holding that the states have no power to regulate labor disputes over which the NLRB has jurisdiction, even though the NLRB refuses to exercise its jurisdiction. This decision can be supported on the basis of the statutory language although it certainly results in the kind of undesirable no-man's land free from any regulation which Justice Minton, among others, was reluctant to create.

State injunctions against picketing presented special problems. As with other forms of state regulation, Justice Minton and the Court consistently struck down injunctions of picketing involving disputes regulated by federal law. But because picketing is in part a means of communication to some extent within the protection for freedom of speech, under some circumstances a state may not enjoin picketing even though it has no relation to labor relations in interstate commerce regulated by federal statutes. Several important cases were decided before Justice Minton's elevation to the Court. In Thornhill v. Alabama the Court held unconstitutional an Alabama statute which was broad enough to authorize prevention of all picketing, in American Federation of Labor v. Swing it struck down an Illinois injunction based on the absence of an employer-employee relationship, but in Giboney v. Empire Storage & Ice Co. it sustained an injunction against picketing designed to induce an employer to violate Missouri's antitrust laws. Justice Black's opinion in the latter case concluded that the picketing was part of a course of conduct which created a clear and present danger of violation of state law which the state had power to prevent.

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245. See also Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).
246. 310 U.S. 88 (1940).
247. 312 U.S. 321 (1941).
In a series of subsequent decisions the Court, relying on *Giboney*, sustained state injunctions of picketing conducted for a purpose unlawful under state law. For example, Justice Minton joined in one decision upholding an injunction against picketing for the purpose of inducing a violation of Virginia's "right-to-work" law. He wrote the Court's opinion in *Building Service Employees Int'l Union v. Gazzam* in which the Court sustained an injunction against peaceful picketing by a union designed to induce an employer to coerce his employees to join the union, contrary to a statutory declaration of state policy. Thus, the purpose of the picketing was to use "its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the State." There is no contention that picketing directed at employees for organization purposes would be violative of that policy. The decree does not have that effect . . . [but] was tailored to prevent a specific violation of an important state law. "To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment." Justice Minton held that the *Giboney* decision applied even though the statutory policy contained no criminal sanctions, and he distinguished the *Swing* decision on the ground that there the state had "relied on the absence of an employer-employee relationship" while the "basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative." In a similar decision since his retirement the Court upheld an injunction against picketing, like that in the *Gazzam* case, for the purpose of coercing an employer to interfere with the right conferred by Wisconsin statute on his employees to freedom of choice in the selection of their bargaining representative.

A significant extension of the *Giboney* rule is embodied in *International Brotherhood v. Hanke* in which the Court sustained an injunction against picketing designed to force a self-employer to observe certain hours, although his observance of such hours would not have been un-

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250. Id. at 540.
251. Id. at 539-40, 541.
252. Id. at 539.
253. Ibid.
254. Ibid.
lawful. In *Hughes v. Superior Court*\(^{257}\) decided the same day, Justice Frankfurter wrote the Court’s opinion sustaining an injunction against picketing for the purpose of forcing a grocer to hire Negro clerks in proportion to its Negro customers since such a hiring policy would apparently have been unlawful under California judicial decisions. To Justice Frankfurter the *Hanke* case was the same since the state courts could “choose to prohibit the right to secure submission through picketing”\(^{258}\) while at the same time permitting “voluntary acquiescence in the demands of the union.”\(^{259}\) Justice Minton dissented in the *Hanke* case on the narrow ground that the injunction in question was so broad that it applied to permissible picketing, and hence should be upset just as the broad statute in *Thornhill* was struck down because on its face it applied to permissible as well as prohibited picketing. Primarily, however, he was concerned with Justice Frankfurter’s conclusion that because “picketing is ‘indeed a hybrid,’”\(^{260}\) “peaceful picketing and truthful publicity”\(^{261}\) is not “protected by the constitutional guaranty of the right of free speech”\(^{262}\) as “publication in a newspaper, or by distribution of circulars, [which] may convey the same information or make the same charge as do those patrolling a picket line.”\(^{263}\) To Justice Minton it was “too late now to deny that those cases were rooted in the free speech doctrine. I think we should not decide the instant cases in a manner so alien to the basis of prior decisions.”\(^{264}\)

Justice Minton’s protest that the *Hanke* case represented a shift in the basis of the Court’s approach to the problem of picketing seems justified. The Court in the *Giboney* case could equate picketing with other forms of speech and still permit it to be enjoined where it created a clear and present danger of violation of state law. But it is one thing to permit a state to enjoin picketing for an unlawful purpose and quite another to prohibit picketing as an unlawful means to a lawful objective. Such a conclusion must rest on the assumption that picketing is more than speech, a “hybrid,” which may be enjoined when the element of speech


\(^{259}\) Ibid.

\(^{260}\) Id. at 474.

\(^{261}\) Senn v. Tile Layers Protective Union, 301 U.S. 468, 482 (1937).


is subordinated to its other aspects. The justification for such an assumption was left unclear in Justice Frankfurter's opinion, and it was not until later than he advised us that the Hanke decision has another "implied reassessment" following the Court's "decisive reconsideration" in Giboney. Assuming picketing may be more than speech, determination of the power of a state to enjoin picketing for a lawful purpose would seem to require careful analysis of the nature and elements of the particular picketing enjoined. Otherwise, even picketing which is solely or primarily for the purpose of publicity and communication could be enjoined under the reasoning of Justice Frankfurter's opinion in the Hanke case.

D. Regulation of Business

The generally broad applicability of the federal antitrust laws is illustrated by two decisions in which Justice Minton joined holding them applicable to real estate brokers and to an interstate seller of bread whose acts in question were aimed at a local competitor in one area and solely intrastate in character. The Court's per curiam decision in Toolson v. New York Yankees, Inc. that organized baseball is not subject to the Sherman Act was placed solely on the basis of an earlier decision to the same effect and was not followed in later decisions difficult to distinguish factually. Thus, the Court subsequently held that the legitimate theatre, boxing, football and local building construction were all subject to the Sherman Act.

Justice Minton concurred in the theatre case which followed an earlier decision to the same effect, but he dissented in both the boxing and building cases. With respect to the builders, he argued that the Government's allegations did not establish a conspiracy to restrain the interstate trade in building materials but only to restrain local activity. "Interstate commerce has ended. There is no intent or purpose to restrain interstate commerce. The effect upon commerce is incidental, re-

266. Ibid.
mote and indirect. It is a restraint that spends itself on a purely local incident.\textsuperscript{277} In Justice Minton's view not even the alleged exclusion of out-of-state contractors rendered the builders' conspiracy subject to the Sherman Act. To him \textit{Toolson} was not merely an aberration justified by stare decisis. "Contracting to plaster a building in Chicago by an outstate contractor is not commerce, even if the contractor did intend to bring his men from outstate, any more than bringing men from one state into another to play baseball is commerce. . . . The materials to plaster the building flow without interruption to the building site. There a local labor situation arises that has nothing to do with commerce or any conspiracy to restrain it."\textsuperscript{278}

His view with respect to the alleged conspiracy of professional boxing was substantially the same. To him it was "an example of the tail wagging the dog"\textsuperscript{279} to hold that "the boxing bout becomes interstate commerce" "when boxers travel from State to State, carrying their shorts and fancy dressing robes in a ditty bag in order to participate in a boxing bout, which is wholly intrastate. . . ."\textsuperscript{280} Not only did he believe that boxing is local, but also that it is "not trade or commerce"\textsuperscript{281} at all because personal services unrelated to production are not commerce.

His narrow view of the scope of the Sherman Act's prohibition of conspiracies in restraint of interstate commerce is not necessarily inconsistent with the broader scope he accorded to the FELA, for example,\textsuperscript{282} since the language of that Act, broader than the Sherman Act, applied to employees whose duties \textit{furthered} or closely and directly \textit{affected} interstate commerce. Nevertheless, his analysis of the scope of "[interstate] commerce" itself, as used in the Sherman Act, seems unduly restrictive.

These cases illustrate several aspects of Justice Minton's approach to the problems before the Court. First, in interpreting the scope of federal regulation, he stressed the literal language of the particular statutory provision and minimized external considerations bearing on the intent of Congress.\textsuperscript{283} Second, he was very reluctant to upset state regulation of local incidents of interstate commerce in the absence of a clear conflict with federal regulation or a clear preemption by Congress of a

\textsuperscript{277} United States v. Employing Plasterers Ass'n, 347 U.S. 186, 195 (1954) (dissenting opinion).
\textsuperscript{278} Id. at 196-97 (dissenting opinion).
\textsuperscript{280} Ibid.
\textsuperscript{281} Id. at 253.
\textsuperscript{283} See, \textit{e.g.}, Reider v. Thompson, 339 U.S. 113 (1950); cases cited note 282 supra.
particular field of regulation. Finally, he equated picketing with other forms of communication with respect to the constitutional protection of freedom of speech, but as with other forms of speech, he accorded to the states considerable power to restrain picketing in the interest of preserving and enforcing other public policies deemed by them important.

IV. FEDERAL LIMITATIONS ON POWERS OF STATE TAXATION

To meet the ever-increasing pressure for additional revenue, the states have frequently exercised their powers of taxation to, and sometimes beyond, the limits imposed on them by the Constitution. State taxes on private enterprises, often far distant, must comply with both the minimum standards of the due process clause of the fourteenth amendment and the limitations imposed by the commerce clause. Because "the power to tax involves the power to destroy" a comparable limitation is imposed on the power of the states to tax the federal government which, within the scope of the authority conferred upon it by the Constitution, is supreme. The Court's decisions with respect to such taxes illustrate, if nothing else, the importance of the form of the tax selected by the state. Justices continue to disagree whether this stress on form represents over-emphasis on labels or recognition of decisive constitutional distinctions.

A. STATE TAXATION OF INTERSTATE COMMERCE

In determining the validity of state taxes related to interstate commerce, the Court has sought to prevent interstate commerce from being subjected to burdensome taxes which adversely affect its competitive position with local commerce, and at the same time to assure that the states are left with sufficient power to require "interstate commerce [to] pay its way." Traditionally, the Court has held that "[i]nterstate commerce cannot be taxed at all, even though the same amount of tax is laid on domestic commerce, or that which is carried on solely within the

288. U.S. Const. art. VI.
But where the tax was imposed on an appropriate local subject, such as the privilege of using the state’s highways or of conducting a local retail business, Justice Minton joined the Court in sustaining it. For example, he joined the Court in upholding: an Illinois tax measured by gross receipts on the privilege of making retail sales, as applied to a foreign corporation which had qualified to do business in Illinois and operated a local retail outlet there; a Chicago flat fee per truck on the privilege of operating on the city streets, as applied to trucks used in both intra-city and interstate transportation; and an Illinois tax on the privilege of using its highways, measured by the weight of the vehicles, as applied to a taxpayer who used his trucks for both interstate and intra-state business.

Adhering to the traditional view, however, Justice Minton joined a majority of the Court in holding unconstitutional a Connecticut tax on the privilege of doing business where the business conducted by the taxpayer was solely interstate. He also joined in two subsequent decisions striking down similar Mississippi and Virginia taxes, even though in the latter instance the state court had denominated the tax as one on property rather than on the privilege of doing business. The Court reasoned that since a state has no power to withhold the privilege of doing interstate business, these taxes lacked a constitutionally permissible subject matter. The view of the minority in these cases that this was simply a matter of labels having no constitutional significance seems erroneous. No one would seriously contend that an Indiana property tax on the Wisconsin real estate of an Indiana resident is constitutional merely because Indiana might have imposed a tax of like amount on the same taxpayer by adoption of an income tax, for example. While the distinctions involved in the privilege tax cases are more subtle, in either instance the Court must judge the validity of the tax on the basis of what it is, not what it’s called or what it might have been.

While sales taxes have become increasingly popular as revenue producers, they have been held unconstitutional as applied to interstate sales as taxes directly on interstate commerce. However, the states have
been able to accomplish substantially the same result by enactment of a use tax to be collected by the seller but theoretically justified on the ground that it is not imposed until after the interstate transaction is completed. The Court has recognized, but refused to give effect to, the fact that a use tax so inextricably interwoven with interstate sales is just as great a barrier to interstate trade as a sales tax. However, Justice Minton joined a 5-4 majority in the *Miller Brothers Co. v. Maryland* striking down the Maryland use tax as a denial of *due process*, as applied to a Delaware retailer whose contacts with Maryland were minimal but did at least include regular deliveries to Maryland customers.

State property taxes on moving instrumentalities of interstate commerce have also caused difficult constitutional problems. The Court has held that a state other than the corporate domicile and home port may impose a property tax on railroad cars and barges fairly apportioned to the amount of commerce done in the state. Justice Minton joined the Court in extending this rule to airplanes, sustaining an apportioned Nebraska property tax on airplanes which on interstate flights regularly landed in Nebraska which was neither the corporate domicile nor the home port.

This rule permitting a number of states to impose *apportioned* taxes would seem to represent an accommodation of the competing interests of various states under the commerce clause where each may have sufficient contact with the property taxed to satisfy the requirements of *due process* even with respect to an unapportioned tax. Where it is not apparent, however, that more than one state has power to tax the same property, there is no danger of multiple taxation and hence no need under the commerce clause to restrict the taxing state to an apportioned tax. Hence, the Court sustained unapportioned taxes by the corporate domicile on railroad cars and airplanes where it was "not shown here that a defined part of the domiciliary corpus has acquired a permanent location, *i.e.*, a taxing situs, elsewhere." In these two cases the property taxed was located in the taxing states for a substantial portion of time. Hence, the only problem was whether the commerce clause limited the power of these states to the imposition of an apportioned tax. Where, however, a

305. Id. at 295 (even though apportioned property taxes were being paid to other states).
state imposes an unapportioned tax on property wholly outside the state, its power under the due process clause is brought into question. It is a different problem from that in the Miller Brothers case striking down the Maryland use tax, for here the taxing state clearly has jurisdiction over the taxpayer, but it has no contact with the property sought to be taxed.

In Standard Oil Co. v. Peck the Court struck down as a violation of due process an unapportioned Ohio tax on inland boats and barges which, for practical purposes, were never in Ohio, the domiciliary state, although they were not shown to have acquired a taxable situs elsewhere. Justice Minton dissented on the ground that: “Where no other taxing situs was shown to exist, the state of the domicile was permitted to tax, irrespective of the amount of time the vessels were present in that state.” From a due process standpoint, a state's power to tax ordinarily should depend on the degree of its contact with the property taxed, rather than on the presence or absence of permanent contact with any other state, the significance of which should relate primarily to the burden of the tax on interstate commerce. Justice Minton’s position is clearly the rule with respect to seagoing vessels, but they are unique in that they spend most of their time at sea, outside any state. A comparable decision in Union Refrigerator Transit Co. v. Kentucky with respect to railroad cars is not completely clear since the Court seemed to assume that cars which were never in the domiciliary state would necessarily acquire a taxable situs elsewhere. Like railroad cars, inland vessels will necessarily be in another state or country whenever they are out of the domiciliary state. In this respect both differ from coastal vessels which are not in any state much of the time, despite the fact, relied upon by Justice Minton, that there may be difficult factual problems of proof with respect to an inland vessel which operates on rivers which form state boundary lines. Accordingly, the Court appears to have been correct in concluding that absence from the taxing state, not presence in another state, was the decisive factor in the Union Refrigerator case, and in applying the same principle to inland vessels to test the power of the domiciliary state under the due process clause to impose an unapportioned tax.

B. State Taxation of Federal Instrumentalities

In McCulloch v. Maryland, Chief Justice Marshall wrote the Court’s opinion striking down a state tax on a national bank because “the power

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307. Id. at 388 (dissenting opinion).
309. 199 U.S. 194 (1905).
to tax is the power to destroy" an authorized federal instrumentality. But as the activities of the federal government have continued to expand, the pressure on the states to find permissible methods of taxing at least those with whom the Government does business has correspondingly increased. The questions which have presented the Court with the most difficulty are those with respect to which Congress has neither expressly authorized nor forbidden the states to tax. The course of the Court's decisions has been accurately described by Justice Jackson:

Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand. But since 1819, when Chief Justice Marshall in the McCulloch case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government. In recent years this Court has curtailed sharply the doctrine of implied delegated immunity. But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation.

In that case the Court struck down a Pennsylvania property tax on Government property leased to a private contractor although collection of the tax was sought only from the latter. On the other hand, where the subject matter of the tax belonged to the private contractor, the Court sustained similar taxes even though they might impose a like economic burden on the Government. Thus, Justice Minton joined the Court in sustaining a Tennessee tax on the privilege of storing gasoline, as applied to a private corporation storing gasoline owned by the United States.

Similar distinctions were made with respect to taxes on transactions in which the Government was involved. Earlier cases had sustained state sales taxes on sales to Government contractors, even though the ultimate

economic burden of the tax fell on the Government. But Justice Minton joined the Court in striking down a similar Arkansas tax where the contractor made the purchase as agent for the Government, even though collection was sought only from the private contractors, since the legal incidence of the tax was on a sale to the United States.

The Court recently demolished these distinctions with respect to property taxes in sustaining a Michigan property tax as applied to property owned by the United States but in the possession of a private contractor. Although the Court conceded that the tax in question was not a privilege tax, it concluded that "to strike down a tax on the possessor because of such verbal omission would only prove a victory for empty formalisms. And empty formalisms are too shadowy a basis for invalidating state tax laws." To some this will appear to be a victory of substance over form, while to others it will represent a departure from 140 years of venerable and unbroken judicial authority. While this decision will neither bankrupt the federal government, nor offend the "states' righters" who are the current Court's most vocal critics, it is an interesting illustration of a departure by the present Court from prior judicial authority.

Sometimes Congress has made the Court's job easier by expressly exempting particular private persons or activities from state taxes. For example, Justice Minton joined the Court in striking down a Colorado tax on a soldier's property exempted from such tax by federal statute and a Tennessee sales tax on sales to contractors with the Atomic Energy Commission similarly exempted by federal statute.

At other times Congress has lent the states a helping hand by expressly authorizing the states to tax activities otherwise exempt. For example, the Buck Act permits states to impose taxes on or "measured by" net income derived from activities in a federal area. Relying on this statute, Justice Minton wrote the Court's opinion sustaining a Louisville tax measured by net income for the privilege of working in the city, as applied to employees of a federal ordnance depot. The dissent of Justices Black and Douglas reasoned that the Louisville tax was not an income tax because for state purposes it was a privilege tax and not an

316. Id. at 493.
income tax. But Justice Minton correctly concluded that "the right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for any tax measured by net income, gross income, or gross receipts." More interesting than this question of statutory interpretation was the expression of Justice Minton's philosophy in resolving this problem of dual sovereignty:

The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.  

Whether or not the traditional views with respect to the power of the states to tax interstate commerce and federal instrumentalities over-stress form, it is clear that Justice Minton adhered to them. This is manifested in his dissenting opinion from the case denying the domiciliary state power to tax barges outside the state, as well as by his votes in decisions striking down state attempts to tax the privilege of engaging in interstate commerce and sales to the federal government. As far as Justice Minton is concerned, more than anything else, these cases illustrate the heavy reliance he placed on relatively old courses of decision of the Court, and his reluctance, manifested in other cases, to extend recent intervening deviations from them.

(To be concluded.)

322. Id. at 627.