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JUSTICE SHERMAN MINTON AND THE PROTECTION OF MINORITY RIGHTS*

DAVID N. ATKINSON**

Discrimination in education, in housing, and in employment brought cases before the Vinson Court which were often resolved by a nearly unanimous vote, but they frequently raised constitutional and institutional dilemmas of agonizing dimensions. A fundamental commitment of the Court at this time was accurately reflected by Justice Jackson's off-the-Court admonition to his colleagues on the inadvisability of seizing "the initiative in shaping the policy of the law, either by constitutional interpretation or by statutory construction."[1]

There were strong voices within the Vinson Court which held rigorously to Justice Holmes' dictum that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[2] Institutional caution, theoretically at

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* This is the fifth and final of a series of articles written by Professor Atkinson dealing with the Supreme Court career of Justice Sherman Minton. The previous articles in this series are: *Justice Sherman Minton and the Balance of Liberty*, 50 IND. L.J. 34 (1974); *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 NW. U. L. REV. 716 (1974); *Opinion-Writing on the Supreme Court, 1949-1956: The Views of Justice Sherman Minton*, 49 TEMP. L.Q. 105 (1975); *From New Deal Liberal to Supreme Court Conservative: The Metamorphosis of Justice Sherman Minton*, 1975 WASH. U.L.Q. 361.

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[1] R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 79 (1955) [hereinafter cited as Jackson].

[2] Justice Frankfurter expanded on this same idea when he wrote Justice Black:

> Some time ago at the end of a, to me, very stimulating talk between us, I told you that you were a Benthamite. Since I regard Bentham as the most fruitful law reformer of the Nineteenth Century, that was of course fundamentally a term of praise. But as is so often true of a reformer who seeks to get rid of the accumulated abuses of the past Bentham at times threw out the baby with the bath. In his rigorous and candid desire to rid the law of many far-reaching abuses introduced by judges, he was not unnaturally propelled to the opposite extreme of wishing all law to be formulated by legislation, deeming most that judges do a usurpation by incompetent men as to matters concerning which he believed them guilty of 'judicial legislation.' That phrase 'judicial legislation' has become ever since a staple term of condemnation. I, too, am opposed to judicial legislation in its invidious sense; but I deem equally mischievous—because founded on an

least, precluded an initiating role by the Supreme Court. The line between legislating and interpreting is shadowy and uncertain at best, but when it has been unwarily crossed "it has provoked reactions which have set back the cause it is designed to advance, and has sometimes called down upon itself severe rebuke."[3]

And yet the court did not doubt its obligation to protect minority interests from egregious abuse inflicted by majority fiat. The Court's power to restrain the majority was concomitant with its power to protect minorities.[4]

Carefully, with determined deliberation, the Vinson Court moved to insure protection under the Constitution for minority interests. The Court's opinions evidenced unremitting concern with the consistency of prior doctrine and, although the Vinson Court commenced a period of activism in the area of civil liberties which was continued and expanded by the Warren Court, it frequently disclaimed any innovative intentions.

Few questions troubled Justice Minton more than the boundary demarcations between state action constituting irrational discrimina-

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> untruth and an impossible aim—the notion that judges merely announce the law which they find and do not themselves inevitably have a share in the law-making. Here, as elsewhere, the difficulty comes from arguing in terms of absolutes when the matter at hand is conditioned by circumstances, is contingent upon the everlasting problem of how far is too far and how much is too much. Judges, as you well know, cannot escape the responsibility of filling in gaps which the finitude of even the most imaginative legislation renders inevitable. And so it is that even in the countries governed exclusively by codes and even in the best of all codes there are provisions saying in effect that when a controversy arises in court for which the code offers no provision the judges are not relieved of the duty of deciding the case but must themselves fashion the law appropriate to the situation.
> So the problem is not whether the judges make the law, but when and how and how much. Holmes put it in his highbrow way, that 'they can do so only interstitially; they are confined from molar to molecular motions.' I used to say to my students that legislatures make law wholesale, judges retail. In other words they cannot decide things by invoking a new major premise out of whole cloth; they must take the law that they do make out of the existing materials and with due deference to the presuppositions of the legal system of which they have been made a part. Of course, I know these are not mechanical devices, and therefore not susceptible of producing automatic results. But they sufficiently indicate the limits within which judges are to move.

Letter from Felix Frankfurter to Hugo L. Black (December 15, 1939). (The Felix Frankfurter Papers; The Library of Congress.)

[3] Jackson, *supra* note 1, at 80.

[4] *Id.*

tion and private discrimination not prohibited by the Constitution. He generally protected minority interests from irrational discrimination only when there was clear and persuasive evidence of direct state action. He considered the Court's role necessarily circumscribed by the language of the Constitution, which had been interpreted to mean that the Equal Protection and Due Process clauses of the fourteenth amendment were applicable only to the states and that the Due Process clause of the fifth amendment was applicable only to the federal government. It was not, he thought, the Court's function to safeguard minority interests from private discrimination, regardless of its nature, if the fact of irrational discrimination by a government, or an agency thereof, could not be directly established.

I. *The Segregation Cases*

Referring to the opinion of Chief Justice Lemuel Shaw in *Roberts v. City of Boston,*[5] which first introduced "into the jurisprudence of Massachusetts the power of a government body to arrange the legal rights of citizens on the basis of race,"[6] the Supreme Court upheld city regulation which provided for the separation of the races in *Plessy v. Ferguson.*[7] Justice John Marshall Harlan castigated the Court's separate but equal doctrine as "wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[8] The steady erosion of the doctrine was hastened by two

[5] 59 Mass. (5 Cush.) 198 (1849).

[6] L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 115 (1967). When *Plessy* was decided, *Roberts* was a precedent of doubtful authority since "it antedated the Civil War and was repudiated by the Massachusetts legislature in 1855 in a statute prohibiting school segregation." R. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT 99 (1960).

[7] 163 U.S. 537 (1896).

[8] *Id.* at 562. (Harlan, J., dissenting). Justice Frankfurter was not prepared to acknowledge that the first Justice John Marshall Harlan would have favored school desegregation, as is evident from the two letters on the subject which he sent to the second Justice John Marshall Harlan:

> Dear John:
>
> You and I are not in disagreement that Harlan's dissent in *Plessy v. Ferguson* gives no justification for assuming that he would have found segregation unconstitutional. While you say that that's the most that can be drawn from his dissent, I would say that's the least that could be drawn from it. I put it that way because of the repeated restriction in his discussion to the particular fact of that case, for about a score of times he referred to the fact that the segregation involved was discrimination on 'the public highway,' assimilating, as he did, a railroad to a public highway. To me, his failure to refer to school segrega-

tion is significant, in view of the Court's reference to school discrimination and the fact that Harlan was not, I believe, persnickety in his opinions, as an ordinary rule, in restricting his opinions to the narrow scope of the facts of a case. I need hardly tell you that the notion is widely prevalent that Harlan anticipated striking down school segregation in his *Plessy v. Ferguson* dissent. That this isn't so is, of course, important as a matter of historic accuracy.

I gave you the wrong impression as to my purpose in referring to the *nisi prius* opinion of Judge Caldwell in Georgia. You are, of course, right that he didn't find constitutional invalidity in segregation and that the basis of his opinion was the separate-and-equal doctrine, it is rather surprising that Harlan should not have been at least as uncolor-blind as was that Georgia judge. I am not saying that the *Cumming* opinion result is not defensible. I am saying that it is a casuistic bit of reasoning. Anybody who felt passionately against school segregation could easily have reached at least the result that the Georgia *nisi prius* judge reached.

Letter from Felix Frankfurter to John Marshall Harlan (July 18, 1956). (The Felix Frankfurter Papers; The Library of Congress.)

When Justice Harlan remained skeptical, Justice Frankfurter pressed his argument still further:

Dear John:

Since cacophony is not alien to modern music, I dare to intrude upon you at Tanglewood with a disharmonious note. Duly mindful of all you say about *Plessy*, I am sorry to have to stand my ground. I cannot get away from the incongruity that a fellow who indulged in the broad rhetoric that the "Constitution is color blind," should have sponsored such a narrow result in *Cumming*. Both opinions must be read in the light of the intellectual habits of Harlan I. If I were dealing with a Brandeis, whose decisions practically always sailed close to the harbor of the specific facts of a case, the wearisome reiteration in the *Plessy* dissent that it was concerned with rights on a public highway and the intimation in *Cumming* that the case was confined to the particular pleadings, would be merely characteristic of the writer. But whatever virtues may be attributed to Harlan I, no one, I submit, would credit—or charge—him with having been a close reasoner, more particularly, a writer who strictly confined himself to the narrow limits of a particular case. And even when it comes to what might be called narrow adjudication, I submit that any judge who thought that the Constitution, as a legal proposition, is color blind, would at least have been able to reach the lawyer-like result, which, in my opinion, Judge Calloway did reach in Superior Court in Georgia, as not leaving colored high school children out in the cold.

Nor am I unmindful of Harlan's dissent in the *Civil Rights Cases*. About that, I have two things to say. In the first place, as one who opposed the adoption of the Civil Rights Amendments and thereby aroused hostility to his appointment, Harlan would not be a unique instance of a judge, who, by his opinions, contradicted, however unconsciously, the ground of opposition to him. Moreover, it is not without significance that even in his *Civil Rights* dissent, the rights which he urged were "the claim of a colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public

decisions in 1950 in which Justice Minton participated. In *Sweatt v. Painter*,[9] the Court employed the Equal Protection clause of the fourteenth amendment to disallow the State of Texas from prohibiting the admission of a black to the state's segregated law school. And in *McLaurin v. Oklahoma State Regents*,[10] the Court held invalid an Oklahoma law which required a black graduate student to sit apart from his fellow students both in the classrooms and at the school cafeteria. When *Brown v. Board of Education*[11] and *Bolling v. Sharpe*[12] were decided in 1954, Justice Minton joined a unanimous Court in rejecting the constitutionality of racial segregation by either the several states or the federal government.

Long opposed to racial discrimination (he had clashed with the Ku Klux Klan in his political campaigns when the Klan had been active in southern Indiana), Justice Minton was an uncompromising advocate within the Court for the result eventually obtained in the *Segregation Cases*.[13] Justice Douglas has disclosed that Justice Minton and Justice Burton joined with Justice Black and himself to permit a grant of certiorari.[14]

Both Justice Douglas and Chief Justice Warren confirmed Justice Minton's steadfast opposition to segregation in the public schools. According to Chief Justice Warren: "He [Justice John Marshall Harlan the Elder] said the Constituton was color blind. That's what Shay said too."[15] There were others on the Court, especially Justice

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> highways, or public inns, or places of public amusement, established under the license of the law."

Letter from Felix Frankfurter to John Marshall Harlan (July 31, 1956) (The Felix Frankfurter Papers; The Library of Congress.)

[9] 339 U.S. 629 (1950).

[10] 339 U.S. 637 (1950).

[11] 347 U.S. 483 (1954).

[12] 347 U.S. 497 (1954).

[13] The *Segregation Cases* consisted of 4 cases decided together: *Brown v. Board of Educ., Briggs v. Elliott, Davies v. County School Bd. of Prince Edward County* and *Gebbart v. Belton*, 347 U.S. 483 (1954).

[14] Interview with Justice William O. Douglas, in Washington, D.C. (January 30, 1968). Justice Douglas' recollection would seem inconsistent with Justice Burton's record of the votes cast at the Conference of June 7, 1952, where he recorded all members in favor of noting jurisdiction, with the exception of Justice Jackson who voted to hold jurisdiction and Chief Justice Vinson, for whom no vote was recorded. (The Harold H. Burton Papers; The Library of Congress.) Perhaps Justice Douglas made reference to informal commitments on the issue before a formal vote was taken. In any event, law clerk recollections tally with what Justice Douglas has said. *See* Rodell, *It Is the Earl Warren Court*, in THE SUPREME COURT UNDER EARL WARREN 138 (L. Levy ed. 1972).

[15] Interview with Chief Justice Earl Warren, in Washington, D.C. (January 31, 1968).

Frankfurter and Justice Jackson, who were less enthusiastic about the Segregation Cases.[16]

Before a discussion was announced, Justice Frankfurter moved determinedly to discourage any reliance on the original meaning of the fourteenth amendment. It is now known that Justice Frankfurter believed emphatically that "how we do what we do in the *Segretation Cases* may be as important as what we do."[17] He circulated a sixty-page memorandum on the legislative history of the fourteenth amendment which included the following introductory remarks:

> It is, I believe, too much to hope that the *Segregation Cases* constitute the last litigation to come before this Court involving legislation affecting the relations between white and colored people. That being so, it is equally too much to hope that no further appeal will be made to the legislative history of the Fourteenth Amendment to support arguments, one way or the other, as to the intended scope of the Amendment. Having in the past found Flack's *Adoption of the Fourteenth Amendment*—the usual source of the legislative history of the Amendment—inadequate as a dependable, well-balanced summary of that history, I put one of my last Term's law clerks, Alexander Bickel, to work on such a summary. He was instructed to reread afresh every word in the Congressional Globe bearing on what ultimately became the Fourteenth Amendment, which necessarily included the history of related measures. Bickel was peculiarly equipped to carry out this assignment not merely because he has the disciplined habit of accuracy to a degree unusual even among good lawyers but also because he is something of a specialist on American history. I myself spent not a little time in studying and revising his draft, and his labors had the benefit of a second revision by him and me.[18]

Justice Frankfurter concluded that his historical research indicated "that the legislative history of the Amendment is, in a word, inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Amendment outlawed segregation in the

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[16] *Id.*

[17] Felix Frankfurter to the Court (April 14, 1955). (The Felix Frankfurter Papers; The Library of Congress.)

[18] Felix Frankfurter to the Court (May 18, 1954) (The Harold H. Burton Papers; The Library of Congress.) *See also* Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1 (1955).

public schools or authorized legislation to that end, nor that it manifested the opposite."[19]

Although Justice Minton was not insensitive to historical arguments, Chief Justice Warren did not think Justice Minton and the Court were particularly influenced by the Frankfurter memorandum.[20] Public education was not in existence in the South at the time of the adoption of the fourteenth amendment; consequently, the ambiguities surrounding the legislative intent were irrelevant to the question presented in the *Segregation Cases.*

Shortly before he was appointed an Associate Justice, the then Solicitor General, Thurgood Marshall, consented to an interview on the *Segregation Cases.* As chief counsel for the National Association For the Advancement of Colored People, he had been a leading strategist in the assault on school segregation.

There was, as Marshall explained, no planned sequence in which the cases were brought before the Court. The cases which were accepted by the Court arose suddenly and rather unexpectedly. After the law school case (*Sweatt v. Painter*) and the graduate school case (*McLaurin v. Oklahoma State Regents*), Marshall reasoned that the next cases would logically be ones which involved a college, a high school, and then an elementary school in that sequence. When Marshall and his associates found their next case following *McLaurin* involved an elementary school they were "kind of peeved. We didn't want it," said Marshall, "but we had it."[21]

The principal case, *Briggs v. Elliott,*[22] which came up from South Carolina, pitted Thurgood Marshall against the former Ambassador to the Court of St. James and the Democratic candidate for the Presidency in 1924, John W. Davis, who argued on behalf of the state of South Carolina. In taking jurisdiction, the Court indicated that one of the questions in which it had special interest was whether the fourteenth amendment was intended to abolish segregation in the public schools. The Attorney General, the appellants, and the appellees all documented lengthy responses to this particular inquiry. Shortly before the question was argued before the Court, John W. Davis took Marshall aside in private conversation and said to him,

[19] Felix Frankfurter to the Court (December 3, 1953) (The Harold H. Burton Papers; The Library of Congress.)

[20] Interview with Chief Justice Earl Warren, in Washington, D.C. (January 31, 1968).

[21] Hugh W. Speer's interview with Thurgood Marshall, in Washington, D.C. (April 3, 1967).

[22] 347 U.S. 483 (1954).

"My brief says positively 'No.' Your brief says positively 'Yes!' The government brief tells the truth—nobody knows."[23]

During oral argument Justice Minton said very little. Justice Frankfurter, above all others, led the questioning from the bench. At the outset of oral argument, it could not be assumed Justice Frankfurter could be persuaded to break with the *Plessy* precedent, at least with regard to school segregation in the states. He sat, as always, with an open mind, but he remained to be persuaded.[24] Moreover, the nature of his questions gave scant encouragement to the foes of school segregation. Early in the argument he admonished Marshall that when one starts with the assumption that there can be no segregation there is indeed no problem, for in that case one has begun an argument with a conclusion.

Justice Frankfurter's comment from the bench could be construed as an objection to only one of Marshall's three arguments against the South Carolina statutory and constitutional segregation provisions. Marshall first argued on the very narrow ground established by *Sweatt* and *McLaurin*. He here maintained the separate but equal doctrine had not been adequately implemented in South Carolina. Second, he contended the statutory and constitutional provisions of the state represented arbitrary classifications and were violative of the Equal Protection clause of the fourteenth amendment. And third, he insisted that distinctions based on race were in and of themselves invidious. He believed that any one of these three grounds provided a sufficient basis for reversal. Marshall's first argument, and possibly his second, assumed the continued existence of racial segregation. Justice Frankfurter's invariable practice was, however, not to read briefs before oral argument, which was the practice then followed on the Second Circuit. He therefore tended to ask a number of questions which were largely superfluous. Justice Minton, on the other hand, followed the customary practice of the Seventh Circuit by reading each brief before oral argument.

The *Segregation Cases* were treated procedurally quite unlike any other cases which were before the Court. Everyone— including the law clerks—was excluded by the Justices from any contact with their deliberations.[25] Great secrecy surrounded the preparation of the opin-

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[23] Hugh W. Speer's interview with Thurgood Marshall in Washington, D.C. (April 3, 1967). This was of course not inconsistent with Justice Frankfurter's conclusion that no clear intent in fact existed.

[24] For a reconstruction of judicial attitudes within the Court based on the Burton Papers, see Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689 (1971) [hereinafter cited as Ulmer].

[25] Interview with one of Justice Sherman Minton's law clerks.

ions. Justice Minton's secretary recalled that shortly before the cases were announced, Justice Minton abruptly took them from his desk and said, "Frances, what do you think?"[26] The secretaries had not been included in the Court's confidence and even special precautions were taken in the typing of memoranda connected with the cases.

On May 7, 1954, Chief Justice Warren circulated the following memorandum to the Court, accompanied by the *Brown* and *Bolling* opinions:

> TO THE MEMBERS OF THE COURT:
>
> As suggested by the Conference, I submit the attached memoranda as a basis for discussion of the segregation cases.
>
> It seemed to me there should be two opinions—one for the state cases, and another for the District of Columbia case. Also, because of the divergent conditions calling for relief and because this subject was subordinated to a discussion of the substantive question in both the briefs and oral argument, the cases should be restored to the calendar for further argument on Questions IV and V previously submitted by the Court for the reargument this year. It also occurred to me that we might appropriately invite the Attorneys General of the States requiring or permitting segregation to present their written and oral views should they desire to do so.
>
> The memos were prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional, and above all, non-accusatory.[27]

There was very little difference between Chief Justice Warren's memoranda opinions and the opinions which were finally adopted by the Court.

Thurgood Marshall was certain that the result in the *Segregation Cases* was influenced by Earl Warren's appointment as Chief Justice.[28] Because of Chief Justice Vinson's dissenting opinion in *Barrows v. Jackson*,[29] which concerned a racially restrictive convenant, it was not entirely evident how he viewed the segregation issue.

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[26] Interview with Justice Sherman Minton's secretary (January 30, 1968).

[27] Memorandum from Earl Warren to the Court (May 7, 1954) (The Harold H. Burton Papers; The Library of Congress).

[28] Hugh W. Speer's interview with Thurgood Marshall, in Washington, D.C. (April 3, 1967). *See also* Ulmer, *supra* note 21, at 702. Ulmer persuasively documents the conclusion that, "The unanimous opinion in the case must, of course, be attributed to Warren." *Id.*

[29] 346 U.S. 249 (1953).

The power of persuasion which lies with a Chief Justice who is willing to exercise it may in certain circumstances be an important factor. And especially so in the *Segregation Cases,* for it would seem that unanimity was in substantial doubt even during the week before the decision was announced.[30]

In urging the abolition of segregation, Marshall and his associates relied on testimony furnished by a group of social scientists.[31] In oral argument, John W. Davis objected to any reliance on this sort of evidence in scathing language:

> It seems to me that much of that which is handed around under the name of social science in an effort on the part of the sicentist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find.[32]

Others have since been more kindly disposed toward the use of social science testimony and have expressed optimism with regard to the benefits likely to be conferred on the fact-finding process in the courts.[33] In effect, Marshall submitted a Brandeis Brief, an evidentiary technique which in recent years has been used increasingly by counsel in cases involving securities, federal trade regulations, and labor relations.[34]

"One of the reasons the court ruled against segregation in education," Justice Minton later said, "was that it was a discrimination against the colored school child that was psychologically detrimental."[35] His comment suggested the importance and wisdom of placing social science testimony before the Court.

Shortly after the decisions in the *Segregation Cases* were handed down by the Court, Thurgood Marshall met privately with Justice Frankfurther, who then told him, "I have a feeling you gave me the right answer."

"I sure did," replied Marshall.

Justice Frankfurter then asked, in a mock inquisitorial manner, "What is the right answer?"

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[30] *See* Ulmer, *supra* note 21, at 699. Justice Burton's *Diary* reveals he was uncertain as to the Court's unanimity five days before the opinion was read. (The Harold H. Burton Papers; The Library of Congress.)

[31] *See* Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954).

[32] *See also* Cahn, *Jurisprudence,* 30 N.Y.U.L. Rev. 150 (1955).

[33] *See* Tanenhaus, *Social Science in Civil Rights Litigation,* in Aspects of Liberty 91-114 (M. Konvitz and C. Rossiter eds. 1958).

[34] *See* M. Ladd & R. Carlson, Cases and Materials on Evidence 60-67 (3d ed. 1972).

[35] "Retired Justice's Revealing Words on School Decision," 4 La. B.J. 149 (1957).

Marshall answered, "I put it in there [the social science appendix] so that you would not have to tell your law clerks to go look it up."

"I thought that is why you put it in there," said Justice Frankfurter. "You saved the life of that clerk. That's just what I would have done."[36]

Some years later, on the occasion of his 70th birthday, Justice Minton reflected on the decisions in which he had participated and concluded that none had exceeded the *Segregation Cases* in importance. "But I doubt," he said, "if I'll live to see the end of segregation."[37]

II. *Restrictive Covenants*

Although Justice Minton was not known to express particular interest in any one area of constitutional law, nor did his colleagues indicate any widespread recognition of such expertise, some of them did seem to regard him as a technically skillful constitutional lawyer. His opinion in *Barrows v. Jackson*,[38] a case replete with constitutional difficulties, lends credence to this judgment of his legal ability.

In *Shelley v. Kraemer*,[39] which was delivered before Justice Minton came to the Court, it was decided that a state could not enforce private discrimination. Chief Justice Vinson, writing for the Court, held that racially restrictive covenants could not be enforced in equity against black purchasers. State enforcement of such covenants was a violation of the equal protection of the laws as guaranteed by the fourteenth amendment. The principal thrust of the Court's opinion was fairly obvious: action by a state court is state action. What was not obvious was whether this was state action within the meaning of the fourteenth amendment. Herbert Wechsler, who was decidedly critical of the Court's rationale in *Shelley*, explained that under the Court's reasoning "the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make."[40] Accordingly, the question Wechsler insisted must be asked was: precisely what was the principle the Court thought was involved in *Shelley*? He found it entirely ambiguous.

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[36] Hugh W. Speer's interview with Thurgood Marshall, in Washington, D.C. (April 3, 1967).

[37] Associated Press release, October 20, 1960. (The Harold H. Burton Papers; The Library of Congress.)

[38] 346 U.S. 249 (1953).

[39] 334 U.S. 1 (1948).

Although the complexities of the case should not be minimized, it may be suggested that Wechsler somewhat overstated them. A classificiation enforced by state law may be reasonable when there is a persuasive basis for the classification. The fourteenth amendment is, of course, not a bar to discrimination per se; but it does forbid discrimination based on an unreasonable classification. There must be a legitimate reason for private discrimination which, to be effective, depends on state enforcement even as there must be a legitimate reason for governmental discrimination. Hence, the general principle which emerged from *Shelley* was simply that "a state may not enforce discrimination which it would not itself require or perpetrate."[41]

In *Barrows*, the petitioners sought to distinguish their case from *Shelley*. Petitioners' counsel characterized *Shelley* as a case where a contract between *A* and *B* was enforced against *C*, who was not a party to the contract. In *Barrows*, however, the question was whether a state court could award damages for breach of contract. The petitioners in *Barrows* were white property owners who were subject to the same racial restrictions as the respondent, who was a former white owner who had sold land to a black. Contract damages were demanded of the respondent, who had clearly breached her contract. The case was not an easy one since the Court in *Shelley* had dealt only with the enforceability of racially restrictive convenants through state action. Racially restrictive covenants were not, on the authority of *Shelley*, unconstitutional. The Constitution was found not to bar voluntary compliance.

The Supreme Court's refusal to declare racially restrictive covenants illegal while at the same time declining to give them legal effect created some uncertainty in the law. The approach of the Vinson Court (which was to treat such covenants as illegal in practice if not in form) raised important implications for the concept of state action. To reach a desired result, it was necessary for the Court, as in *Barrows*, to expand the traditional meaning of state action.

When the Court was confronted with the factual situation in *Barrows*, a tentative majority of four Justices eventually coalesced around Justice Black (with Justices Reed and Jackson not participating) and a determination was made to disallow recovery for dam-

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[40] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959). *Cf.* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

[41] *See* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 490-91 (1962).

ages.[42] They were initially uncertain as to how to obtain the desired substantive result.

There was a further problem. As the senior Justice in the tentative majority, Justice Black was much concerned that whatever was circulated might alienate someone, thereby changing the result. Because of the delicacy of the case, Justice Black assigned the opinion to Justice Minton.[43] The case was known to pose one of the more difficult legal problems of the October Term, 1952. Justice Minton devised a legal solution which eventually satisfied all members of the Court with the exception of Chief Justice Vinson.

The first question in *Barrows* to which Justice Minton addressed himself was whether damages awarded by a state court constituted state action as required by the fourteenth amendment. If the state court allowed recovery for breach of contract, in effect the state would be punishing the respondent for refusing to discriminate in accordance with the terms of an unenforceable racially restrictive covenant. "Thus," said Justice Minton, "it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as if it was state action to enforce such covenants in equity, as in *Shelley*."[44]

If contract damages were disallowed, whose constitutional right would be violated? Justice Minton expressed interest in this issue during oral argument when he asked the respondent's lawyer whose constitutional rights would be violated if California failed to award contract damages to the petitioners. The lawyer replied that no one's rights would be violated.

The corollary question was whether, if contract damages were allowed, any constitutionally protected rights would be abridged. There were no non-Caucasians before the Court. Unidentified (but identifiable) non-Caucasians were the third party to the litigation. In effect, the respondent defended her breach of contract by invoking the rights of a third party not directly involved in the case. This practice had long been disfavored by the Court, but Justice Minton viewed the situation presented in *Barrows* as unique. He counseled

[42] At Conference the initial vote was as follows: Justices Clark, Burton, Douglas, and Black voted to affirm; Justices Minton and Frankfurter voted to dismiss the case as improvidently granted; Chief Justice Vinson voted to reverse; and Justices Jackson and Reed did not participate. (The Sherman Minton Papers; The Truman Library.)

[43] Questionnaire reply from one of Justice Sherman Minton's law clerks.

[44] 346 U.S. 249, 254 (1953).

against an adherence to the consistent application of rules of procedure which would permit the implementation of a kind of covenant "universally condemned by the courts."[45]

By bringing an action for damages in the amount of $11,600 against the respondent, the petitioners avoided joining in the action persons against whom they intended to discriminate. The rather obvious purpose of the damage action was to intimidate white sellers who might at a future time elect to sell their property to a non-Caucasian. Since the petitioners attempted to invoke the assistance of a state court to avoid the effect of *Shelley v. Kraemer,* which forbade the enforcement of racially restrictive covenants by recourse to the judicial process, the Court's most difficult hurdle was perhaps not the alleged absence of state action, but whether the effect of *Shelley* could be so easily circumvented by a state court. If so, non-Caucasians would still be denied the equal protection of the laws.

It could be argued that since *Shelley* established the principle that racially restrictive covenants were unenforceable, it might then follow that the Court should not elect to hear a case wherein improper assistance was sought. So reasoned, the Court could move to dismiss *Barrows* on its own motion, even though the point was not raised by the respondent, since jurisdiction cannot be conferred by waiver. The situation was analogous to those cases where the parties attempted to confer jurisdiction on a court, as in a collusive divorce action. To summarize, inasmuch as the petitioner's purpose was unconstitutional under the *Shelley* doctrine, it could be contended the Court was without jurisdiction to hear the case and should have dismissed it on its own motion. This was a dispositional recommendation which was made by one of Justice Minton's clerks.[46]

It was uncertain whether the respondent could prevent injury to herself by seeking protection from unconstitutonal action directed toward unidentified third parties not before the Court. A possible explanation was, of course, that a denial of equal protection to persons not before the Court would nonetheless injure the respondent.

This explanation may be supported by cases which have arisen in the field of administrative law. When administrative agencies, entrusted with the protection of public welfare, have acted contrary to their trust, competitors of those who received the improper advantages conferred by the agency have been allowed to raise the question

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[45] *Id.* at 259.

[46] *See* the undated memoranda prepared by Justice Sherman Minton's law clerk concerning *Barrows v. Jackson.* (The Sherman Minton Papers; The Truman Library.)

of the impropriety, even though the administrative agency owed no duty to the complainant.

A similar result was reached in *Pierce v. Society of Sisters,*[47] where a state statute had required parents to send their children to public schools. The Court accepted jurisdiction in an action brought by a parochial school and a private school on behalf of parents and guardians not before the Court. The Court held the state statute unconstitutional in the *Pierce* case because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[48] Justice Burton was especially pleased with Justice Minton's reliance on *Pierce,* for he found the analogy complete and persuasive.[49]

As in *Pierce,* the situation in *Barrows* was somewhat unique. Even though no particular individual could be isolated as the recipient of a constitutional injury inasmuch as the non-Caucasian had already taken possession of the property, a verdict in favor of the petitioner could have resulted in the future denial of property conveyance to non-Caucasians.

There was yet another option for the respondent to explore. A constitutional interpretation problem was posed as to the meaning of "any person" in the fourteenth amendment's Due Process clause. What is the meaning of "any person"? If the Court had awarded damages to the petitioner, no specific "person" would have been discriminated against. But as indicated by the number of amicus curiae briefs which were filed, it could not be doubted that many persons believed they would be adversely affected by a decision in favor of the petitioner. It is therefore significant that the Constitution does not refer to "any specific and named person." The constitutional reference to "any person" may be thought, with due appreciation of the uniqueness of the situation in *Barrows,* to have reference to persons who were momentarily unidentified.

In Justice Minton's final draft, as published, there were two paragraphs written by his clerks (which they strongly felt should not be omitted) wherein they argued that the Court was not arbitrarily regarding its long settled practice of denying standing to one who wishes to vindicate the constitutional rights of parties not before the Court. The clerks also successfully impressed upon the Justice the need to limit as narrowly as possible the holding on standing. Other-

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[47] 268 U.S. 510 (1925).

[48] *Id.* at 534-35.

[49] Letter from Harold H. Burton to Sherman Minton concerning *Barrows v. Jackson* (undated). (The Sherman Minton Papers; The Truman Library.)

wise, the Court might be asked to consider the alleged constitutional deprivations of third parties not before the Court in a bewildering variety of cases.

A rule was needed which recognized *A*'s standing in *Barrows*, but which denied standing to *A* in those circumstances where the Court had held *A* has no standing. A possible rule, as stated by one of Justice Minton's clerks, was as follows: "*A* has standing to raise *B*'s rights if, and only if, a judgment against *A* would inflict on *both A* and *B* a legally recognizable injury."[50]

The *Barrows* case clearly conformed to this rule. Certain taxpayer's suits, where the legal injury is indirect, trivial, and remote, are distinguishable because *A*, the respondent in *Barrows*, had $11,600 at issue.

III. *The Perimeter of Government Action*

Some of his clerks have suggested that Justice Minton did not entertain a consistent theory of constitutional adjudication. He instead approached each case on an ad hoc basis. Perhaps his dissenting opinion in *Brotherhood of Railroad Trainmen v. Howard*[51] lends some support to this interpretation. Although he was able to devise a solution which forbade racial discrimination in *Barrows v. Jackson*, he was unwilling to join Justice Black and the Court in the *Howard* case, decided only a year earlier. There an all white union, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, and the railroad company attempted to contract away positions held by black porters. The effect of the contract would have been to cause the dismissal of black porters solely because of their race.

Justice Minton, joined by Justice Reed and Chief Justice Vinson, took the position that the Brotherhood in no way represented the black porters. The porters had in years past bargained separately with the company. Accordingly, the Brotherhood did not consider itself the bargaining agent of the porters, who had their own elected representative through which they bargained with the company. Justice Minton concluded that the Court did not invalidate the contract between the company and the Brotherhood because the porters were entitled to be represented by the Brotherhood. Instead, he concluded that the Court's reason for invalidating the contract could be solely

[50] See the undated memoranda prepared by Justice Sherman Minton's law clerk concerning *Barrows v. Jackson*. (The Sherman Minton Papers; The Truman Library.)

[51] 343 U.S. 768, 775 (1952) (Minton, J., dissenting).

attributed to the fact that the porters were blacks who were being discriminated against by the company at the Brotherhood's instigation. Justice Minton saw no constitutional reason why two private parties—the company and the Brotherhood—could not discriminate against third parties on the basis of race if they so desired, even though similar discrimination could not be tolerated by either the state governments or the federal government. Here the distinguishing feature was private discrimination. Justice Minton did not doubt the power of the Court to annul the contract agreed to by the Brotherhood and the company. But he did warn his colleagues that "sheer power is not a substitute for legality."[52] He did not, as he said, "have to agree with the discrimination here indulged in to question the legality of today's decision."[53]

Because the Brotherhood enjoined the benefits of economic protection under the Railway Labor Act, Justice Black and the Court reasoned that a privileged position created by an act of the federal government could not be used to discriminate racially against other workers. Justice Black's rationale in *Howard* was not drastically different from the reasoning used a year later by Justice Minton in the *Barrows* case. In both cases the Court was confronted with racial discrimination; in both cases the concept of state or federal action was of questionable applicability; and in both cases the Court resolved the issue substantively in favor of the party against whom discriminatory sanctions were directed. On the other hand, Justice Minton's Court papers indicate he perceived the jurisdictional issue to be of paramount importance in *Barrows* whereas in *Howard* the hard question was the source of state action. So viewed, the two cases were distinguishable since they presented dissimilar issues.

Another case which involved minority rights came before the Court when the constitutionality of the Texas Jaybird Democratic Association was questioned in 1953. *Terry v. Adams*[54] was by no means free of difficulty. Although all members of the Court, with the exception of Justice Minton, agreed that the Jaybird Association practiced racial discrimination in a manner disallowed by the Constitution, the Justices differed sharply among themselves as to the reasons for their disapproval.

The Jaybird Association, which was first organized in 1889, had always restricted its membership to white persons whose name appeared on the county voting polls. In both form and practice, the

[52] *Id.* at 778.
[53] *Id.*
[54] 345 U.S. 461 (1953).

Jaybird Association functioned similarly to the regular political parties in Texas, even though it purported to be a private organization. Those candidates who were successful in the Jaybird primary invariably entered the Democratic Party's primary where they were usually unopposed. Since the support of the Democratic party was tantamount to election in Texas, the Jaybird Association's primary was the decisive determinant in the Texas election process.

Justice Black, who wrote the Court's opinion, held that the Jaybird Association functioned in violation of the fifteenth amendment which prohibits an abridgment of the right to vote because of race. By allowing the Jaybird Association to duplicate the state-regulated election process, Texas had improperly permitted the circumvention of the fifteenth amendment. The Jaybird primary, the Democratic primary, and the general election were viewed as an integrated whole which abridged the right to vote.

Justice Frankfurter, in a separate concurring opinion, held the state responsible for having tolerated a scheme which denied voting rights to citizens because of race. He believed that a court of equity was not without the power to enjoin the activities of the Jaybird Association, since those activities had caused the process through which all voters exercised their political opinions to become dysfunctional.[55]

Justice Clark also wrote a concurring opinion, which was joined by Chief Justice Vinson and Justices Reed and Jackson, in which he concluded that the Jaybird Association was in fact a political party, operating as an integral part of the Texas Democratic party.[56] Consequently, the activities of the Jaybird Association were found to fall within the Court's ruling in *Smith v. Allwright*,[57] where the Texas Democratic party was found to violate the fifteenth amendment when it excluded blacks from voting in the party's primary.

The *Terry* case was the occasion for one of Justice Minton's longest and most spirited dissents. Although he seldom dissented (and even then only infrequently dissented at length), he was here persuaded there was no state action which could bring the activities of the Jaybird Association within the scope of the fifteenth amendment. He was, as he said, "not concerned in the least as to what happens to the Jaybirds or their unworthy scheme."[58] But he was "concerned about what this Court says is state action within the meaning of the

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[55] *Id.* at 470-77.

[56] *Id.* at 477-84.

[57] 321 U.S. 649 (1944).

[58] Terry v. Adams, 345 U.S. 461, 484 (1953).

Fifteenth Amendment to the Constitution."[59] The fifteenth amendment does not, he emphasized, apply to discriminatory misconduct by a private party.

Justice Minton was displeased with what he deemed was Justice Black's mistaken willingness to invoke the fifteenth amendment to invalidate private as well as state action. Although Justice Minton found this view "praiseworthy,"[60] he did not find it in the language of the fifteenth amendment, which clearly states that state action must be shown. Although Justice Frankfurter recognized the need for state action, he seemed to assume that the requirement was sufficiently met if state officials in any way participated in the Jaybird primary. This participation was thought to constitute the requisite state action. Justice Minton considered this analysis vulnerable on two grounds. Initially, he could not admit that all acts in which state officials engage are definitionally infused with the imprimatur of state action, nor, even assuming the logic of Justice Frankfurter's argument, could he find satisfactory evidence in the record of participation by state officials in the Jaybird primary.[61] Justice Clark's

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[59] *Id.*

[60] *Id.* at 485.

[61] Justice Frankfurter acknowledged the strength of Justice Minton's dissent, although he elected to hold to his own views as stated in his concurrence;

> Dear Shay:
>
> Such is the perversity of the human mind that while I find your dissent in *Terry v. Adams* wholly convincing in exposing the inadequacies of the Black and Clark opinions, you leave me undisturbed in my own view of the same.
>
> Not only do I think you have made out a powerful case for your position, but I should like to take satisfaction, if you will let me, in having you express the convictions you entertain. I say "if you will let me," because I like to think that whatever may be our differences on the merits of problems you and I deeply have in common what is more important than agreement in opinion. It is agreement about the duty to express convictions and not yield merely on the score of prudence or good fellowship or whatever the reason may be by which convictions that matter are suppressed and their opposites are embraced.

Letter from Felix Frankfurter to Sherman Minton (April 29, 1953). (The Felix Frankfurter Papers; The Library of Congress.)

Justice Minton responded to Justice Frankfurter as follows, on one of the few major cases on which they disagreed.

> My dear Felix:
>
> I appreciate more than I can tell you your generous remarks about my dissent in the Jaybird case. Since I have been here, you have comforted me more than a little, not only by your attitude towards my work but in our personal relations.
>
> I know you will always feel free to criticize as well as approve, and I

opinion was summarily rejected for essentially the same reasons. It was gratuitous to assume that the Jaybird Association functioned merely as an auxiliary to the Democratic Party in the absence of evidence more specific than that brought before the Court.

IV. *Conclusion*

The cases affecting minority groups which came before the Vinson Court can be generally placed into one of three categories. The cases involved the constitutionality of segregation in education, the limits of private discrimination with regard to property interests which depend on state enforcement, and private discrimination affecting the political representation of minority groups. A determinative consideration in the two latter classifications was the extent and type of state action presented by the facts in a given case.

Justice Minton found the most difficulty with questions raised within the second and third classifications and had relatively little difficulty with the first classification. He was a thorough Midwestern populist who attached special importance to the equitable treatment of all persons when state involvement was obvious. His vote in the *Segregation Cases* was not in question. As he told the other Justices in Conference on December 12, 1953, he "could simply imagine no valid distinction based on race or color. He was in favor of outlawing public-school segregation on both equal-protection and due-process grounds and was inclined to let the District Courts have their heads in the matter."[62] During oral argument he spoke infrequently, although he did question the petitioner's counsel in the *Prince Edward County* case[63] (which was one of the consolidated segregation cases) on the meaning of the fifth amendment's Due Process clause. Justice Minton inquired whether the adoption of a due process clause in the fourteenth amendment in any way changed the meaning of the fifth amendment's Due Process clause. Counsel replied that inasmuch as the thirteenth amendment abolished slavery and the first clause of the fourteenth amendment conferred federal citizenship on "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," these two considerations removed any power the federal government might otherwise have retained to deal with

assure you I shall appreciate both—as I have your friendship.

Letter from Sherman Minton to Felix Frankfurter (April 29, 1953). (The Felix Frankfurter Papers; The Library of Congress.)

[62] Ulmer, *supra* note 21, at 695.

[63] 347 U.S. 483 (1954).

persons solely on the basis of race or color. The Due Process clause of the fifth amendment should, counsel implied, be given the same meaning as the Due Process clause of the fourteenth amendment, at least with regard to segregated educational facilities. This position, as argued in response to Justice Minton's question, was reflected in the Court's opinion in *Bolling v. Sharpe,* which implemented the *Brown* decision in the District of Columbia under the authority of the fifth amendment. Significantly, the major question Justice Minton asked in oral argument raised a point of law. His personal inclinations were usually tempered by a close examination of the authority on which he was asked to rely.

Justice Minton reacted differently to cases involving private discrimination which only tangentially involved state action. Although he was able to discover state action in *Barrows v. Jackson,* he was unable to find state action in *Brotherhood of Railroad Trainmen v. Howard* and *Terry v. Adams.* The cases are distinguishable on the ground that in the former, intervention by the state was required to implement private action, while in the latter it was not. Whether that distinction should differentiate as between private and state action is a fair question, but that distinction, whether fair or not, explains Justice Minton's votes in these cases.

Several important short-term contributions were made by Justice Minton to constitutional law insofar as the protection of minority groups was concerned. Principally, he refused to compromise the legal rights of black Americans within the public school system and provided one of the votes needed to bring the *Segregation Cases* before the Supreme Court. He furthermore devised the rationale, in *Barrows v. Jackson,* which persuaded the Court to disallow the circumvention of its policy forbidding the enforcement of restrictive convenants founded on race. Thus, in the public schools and in housing his views were implemented by landmark decisions which protected minority interests. On the other hand, his long range influence was decidedly more modest. His reluctance to extend the concept of state action to many situations where the state was indirectly involved resulted in a far narrower scope of protection for minority interests than the rest of the Court was willing to permit.

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