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THE ROOSEVELT COURT BECOMES THE TRUMAN COURT

I.

Introduction

With the appointment to the Supreme Court by President Truman in the late summer and early fall of 1949 of Tom Clark and Sherman Minton, as successors to the deceased Mr. Justice Murphy and Mr. Justice Rutledge, a judicial era was waning and a new one beginning. When these two latest appointees to the Court took their places on the bench at the outset of the 1949-50 Term, President Truman had appointed four of the nine justices who presently comprise the Supreme Court. His predecessor, President Franklin D. Roosevelt, had appointed a total of eight justices during his long tenure as Chief Executive. One of these resigned, and the deaths of Justice Murphy and Rutledge left five Roosevelt appointees on the Court at the outset of the 1949-50 Term. The unprecedented opportunities that had been presented to the late President Roosevelt for appointing members of the Supreme Court who were favorably disposed to the political, economic, and social philosophy of his Democratic administration were not wasted. The story of how the "Nine Old

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1 Mr. Justice Clark, Attorney General under President Truman, was appointed to succeed Mr. Justice Murphy who died on July 19, 1949. Mr. Justice Minton, former United States Senator from Indiana and judge on the United States Circuit Court of Appeals for the Seventh Circuit, succeeded Mr. Justice Rutledge, who had followed his colleague, Justice Murphy, in death on September 10, 1949.

2 President Truman had appointed Fred Vinson, former Congressman from Kentucky, Economic Stabilization Director, and Secretary of the Treasury, as Chief Justice in 1946. His appointment of Harold Burton, Republican Senator from Ohio, was made in 1945 and was the first Truman Supreme Court appointment. Justice Burton is now the sole Republican on the Court.

3 The Roosevelt appointees were Hugo Black (1937), Stanley Reed (1938), Felix Frankfurter (1939), William O. Douglas (1939), Frank Murphy (1940), James Byrnes (1941), Robert Jackson (1941), and Wiley Rutledge (1943). All save Frankfurter, an "independent," were Democrats.

4 Mr. Justice Byrnes resigned in October 1942 to take the important war time post of Director of Economic Stabilization. He is the present Governor of South Carolina.
Men," representing judicial intransigence to the pressures of a changing, impersonal industrial society, gave way to the more amenable "Roosevelt Court," has been set down in complete and scholarly fashion by others. Suffice to say that the story they have told reaffirms once again that the "Constitution is what the Supreme Court says it is." Socio-economic change received a belated, but nevertheless, unmistakable judicial imprimatur of constitutionality at the hands of the reconstructed Rooseveltian Supreme Court. However, with only five of the original Roosevelt appointees still left on the Court, and four of President Truman's selections now their colleagues, the time has come to reassess the position of the Court as the guardian of American liberties and the authoritative diviner of Constitutional law. This is appropriate even though the Truman appointees are still in a minority by one. For the alleged "rubber stamp" judges who received the Rooseveltian nod proved to be anything but obsequious. Instead, a flood of five to four opinions, with special dissents and concurrences in part, and intra-court personality clashes, often spilling over into the pages of the national press, have proved that judicial harmony on the Roosevelt Supreme Court was very rare. The Roosevelt justices proved to be independent-minded men who did their own deciding. As a

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6 "Any theory of American history which denies the President's duty to exert political influence upon the Supreme Court is unworthy of its majestic theme. The Opposition will describe such influence as impious and the Administration will insist it is unthinkable; but it is nevertheless essential to good government in the United States." AGAR, THE PRICE OF UNION 492 (1950). It might be added that it has been practiced by Republicans and Democrats alike. Examine any reputable history text to see the attempts of the following to influence the Court by their choice of judicial appointees: John Adams, Andrew Jackson, Abraham Lincoln, Ulysses S. Grant, Theodore Roosevelt, William Howard Taft, Woodrow Wilson, and Franklin D. Roosevelt.

7 Jonathan Daniels reports an anonymous Roosevelt-appointed justice as saying: "Hell, they said the Court lost prestige because we were all Rooseveltian rubber stamps. Now they are giving us the devil because we are divided." Daniels, Battle of the Bench, Collier's Magazine, Aug. 17, 1946, p. 12. See also, Thomas Reed Powell, Behind the Split in the Supreme Court, N. Y. Times, Oct. 9, 1949, Magazine, p. 13.
result, a strong division in their ranks early appeared, of which more will be said later. This division among the Rooseveltian justices still exists. Clearly, in spite of Professor Pritchett's prediction in 1948 that the "Roosevelt members may be expected to dominate the Court for some time to come," the four Truman appointees now well may occupy the key position in determining the part that the Court is to play in future American constitutional development.

Other writers have turned their attention to the judicial philosophy of Chief Justice Vinson and Justice Burton, the two earlier Truman appointees. The purpose of this article is to analyze and appraise the work of Justices Clark and Minton during their first year on the Supreme Court, with a view to prophesying their probable influence on the immediate course of American constitutional law. Without swallowing completely Justice Holmes' terse definition of law (i.e., "positive" law) as accurate prediction of "what courts will do in fact," the comparatively limited evidence furnished by one term of Court should convince all but the most ardent abstractionist that constitutional law still has a direct nexus with the men who interpret and pronounce it.

Before embarking upon discussion of the first term work of Justices Clark and Minton, a brief summary of the Constitutional decisions and trends which the Roosevelt Court had produced prior to their elevation to the bench should furnish a logical point of departure. We should be able better

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8 Pritchett, op. cit. supra note 5, at 11. In fairness to Professor Pritchett it must be admitted that he qualified his prediction by prefacing it with "barring some holocaust of death."

9 Forrester, Mr. Justice Burton and the Supreme Court, 20 Tulane L. Rev. 1 (1945); Secretary Vinson Appointed Chief Justice, 14 U. S. L. Week 3434 (June 11, 1946).

10 If Holmes' definition meant to embrace "law" in its broad philosophical sense, including the nature and sources of law, its philosophical roots, and natural law, etc., then patently it is in error. On the other hand, if the reference was to judicially promulgated rules of law, including statutory interpretations, it has partial validity at least. In spite of the lack of clarity on the point, the author concurs in the charitable assumption, that perhaps Holmes meant the latter. See Lerner, The Mind and Faith of Justice Holmes 372 (1943).
to predict the direction in which the new justices may move the Court in the future, if we first understand where it is, or most recently has been.

Paramount among the achievements of the Roosevelt Court, prior to the 1949-50 term, has been the role it played as an active protector of the political, or civil, rights and liberties guaranteed to citizens of the United States through the Bill of Rights and the Fourteenth Amendment. Their predecessors had often invoked the reassuring incantations of "due process" and natural law to immunize business activity from federal and state regulation, but seldom had seen fit to apply them in the areas in which they had their genesis, and where their application has the greatest philosophical as well as historical justification, i.e., in the field of personal and political rights, rather than enshrining them in the sanctuaries of laissez-faire and freedom of contract. Be that as it may, the Roosevelt Court made it clear that they would pursue a role of judicial activism when examining federal and state legislation or judicial decisions which attempted to interfere with the free practice of religion, or hinted mildly at the establishment thereof; restricted freedom of speech

11 It has been observed of the non-Scholastic pseudo-natural law that: "No system of law was better fitted to restrict government to negative functions, to put property rights on a par with human rights, or to invest existing economic practices with legal sanction; and from the beginning the dominant forces of American economy gravitated to the support of natural law: slavery, corporations, and industrial capitalism." COMMACER, THE AMERICAN MIND 361 (1950). All of which proves that there is "natural law" and "natural law." For the Catholic view of a true "natural law" philosophy aimed at the protection of the common good, see ROMMEN, THE NATURAL LAW (1947). For an interesting treatment of two kinds of "natural law," the "progressive" and the "conservative," see STONE, THE PROVINCE AND FUNCTION OF LAW 237-8 (1950).


or assembly;\textsuperscript{16} discriminated in the awarding of the voting franchise,\textsuperscript{17} no matter how subtly conceived,\textsuperscript{18} or whether used at the general election or the primary; sanctioned the enforcement of racial restrictive covenants;\textsuperscript{19} or the racial discriminations by labor unions.\textsuperscript{20} Moreover, in the field of procedural due process the Court usually had been vigorous to see that the "search and seizure" clause of the Fourth Amendment had meaningful content,\textsuperscript{2} and that "due process" carried a constitutional realism as a brake on the arbitrary action of state law enforcement officers. Failure to provide counsel in a capital crime,\textsuperscript{2} systematic discrimination in the selection of juries,\textsuperscript{2} grand and petit, and the involuntary confession, whether elicited by physical\textsuperscript{24} or psychological\textsuperscript{25} coercion, all were struck down by a Roosevelt Court, which evidently believed that federal and state powers must be

\textsuperscript{648} (1948). Comment and criticism, \textit{pro} and \textit{con}, appeared in a flood. See the compendium contained in \textsc{Strong, American Constitutional Law} 477 (1950). For this author's own view on the matter see Scanlan, Book Review, 19 \textsc{Geo. Wash. L. Rev.} 114 (1950).

\textsuperscript{15} For a particularly extreme example of a case where the Court protected the vile but "free" speech of an unsavory fascist, see Terminiello v. Chicago, 337 U. S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).


\textsuperscript{17} Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944).


\textsuperscript{19} Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); and Hurd v. Hodge, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948). This writer among others, has reviewed the effect of these cases in weakening the cruel Constitutional illusion of "separate but equal." Scanlan, \textit{Racial Restrictions in Real Estate—Property Values Versus Human Values}, 24 \textit{Notre Dame Law}. 157 (1949).


\textsuperscript{21} Trupiano et al. v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948). However, there were lapses by the Roosevelt Court from their customary diligence in the area of the Fourth Amendment. See e. g., Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947).

\textsuperscript{22} Gibbs v. Burke, 337 U. S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686 (1949). However, the right still depends on whether five judges think the particular circumstances under which it was deprived amount to a denial of "due process." Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942).


\textsuperscript{24} Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940).

\textsuperscript{25} Watts v. Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949).
judicially contained when they are invoked in such a way as to jeopardize personal rights. Without pausing to examine the divisions among a Roosevelt Court on the question of whether the Fourteenth Amendment embraces the Bill of Rights in toto, or only "fundamental liberties of Anglo-American jurisprudence," and merely noting the criticism sometimes provoked by their judicial "activism" in the field of civil liberties, we can put the Roosevelt Court down as the Supreme Court most diligent in their solicitude for the preservation of the political liberties of the American citizen without regard to race, creed or color.

Contrasted to their judicial "activism" in civil rights decisions, the Roosevelt Court pursued a course of Holmesian tolerance when passing upon the constitutionability of federal and state regulation of economic activity. Having attempted elsewhere to resolve this paradox the writer will rest with the reminder that judicial zeal in the field of political liberty is not mutually exclusive of a corresponding deference to legislative restraints imposed by a democratic government for the common good on the excesses and abuses of an industrial society, which still accepts, in part at least, the inevitability of a dehumanizing business cycle.

So the Roosevelt Supreme Court willingly approved of an extension of the federal power over commerce, until we safely could say that it embraced any important economic activity.
affecting a segment of the nation’s economy. Whether sanctioning the application of the antitrust laws to an “appreciable amount of interstate commerce,” or approving the projection of the Fair Labor Standards Act to occupations far removed from the actual transit of goods in interstate commerce, the Court had rejected the limitations in the federal power over commerce and industry which the conceptualisms of their predecessors previously had spun. However, while they were willing to reject metaphysics for facts in supporting the wide sweep of the federal commerce powers, they were equally partial to a broader exercise of state powers of regulation and taxation without running afoul of the barriers of a judicially ‘bloated Commerce Clause. Likewise did the Court permit broad federal tax and war

30 See, e. g., American Power and Light Co. v. SEC, 329 U. S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946). It is gravely doubtful if an argument against the constitutionality of federal legislation, based on grounds that the federal power over commerce does not extend to the case, will ever again be able to sway a majority of the Supreme Court. Stern, The Commerce Clause and the National Economy, 1933-1946, 59 HARV. L. REV. 645 (1946).


33 “We reaffirm once more the constitutional authority resident in Congress by virtue of the commerce clause to undertake to solve national problems directly and realistically, giving due recognition to the scope of state power. That follows from the fact that the federal commerce power is as broad as the economic needs of the nation.” American Power and Light Co. v. SEC, 329 U. S. 90, 103, 67 S. Ct. 133, 91 L. Ed. 103 (1946).


35 Two recent examples of the Court’s realistic recognition that the states’ powers to tax should not be stifled by Commerce Clause conceptualism, if they are to somehow obtain the revenue needed to preserve their place in our federal system, are Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948), and Aero Mayflower Transit Co. v. Board of Commissioners, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947). However, even with the Roosevelt Court, ancient formulae sometimes prevailed over the harsh appreciation that the individual states must raise revenue from somewhere. Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946).

36 See representative cases collected in DOWLING, CASES ON CONSTITUTIONAL LAW 384-420 (4th ed. 1950).
powers to receive their approval, with only sporadic refusals to concur on several occasions when the power asserted entered the special "holy of holies" prohibited by the Court, i.e., civil liberties.

Turning to the field of labor relations, it is clear that the Roosevelt Court had regarded with approval, and often with thinly disguised satisfaction, federal and state action which gave statutory sanction to collective bargaining, immunized the boycott, and took from picketing the "illegal purpose" label affixed to it at common law, to give to it in exchange the constitutional glamour of "free speech." However, alert students of the Court could have prophesied accurately, even before the 1949-50 Term of Court, that reasonable State laws outlawing the closed and union shop nevertheless would pass Constitutional muster with the Roosevelt Court, in spite of any pro-labor sympathies that inhibited some of its members.

39 Associated Press v. NLRB, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); and see cases synopsized in Smith, Labor Law 119-33 (1950).
40 American Federation of Labor et al. v. Swing et al, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1940). Whether the Taft-Hartley Act forbids all secondary boycotts, and, assuming it does, whether such a prohibition is constitutional have not been resolved as yet by the Court. Although the language of Section 8(b) of the Taft-Hartley Act, supported by parts of the legislative history, might seem to indicate that all secondary boycotts were outlawed, it is open to doubt whether the Court will go that far. For if it does, it must face up to the constitutional issue.
43 The retreat from picketing as pure "free speech" set in soon after the Thornhill case. Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 321 U.S. 287, 61 S.Ct. 532, 85 L.Ed. 836 (1941); Carpenters and Joiners Union v. Ritters Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1178 (1942). "To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make
The Court which reached the results summarily described in the preceding paragraphs was far from unanimous in achieving them. It had two main opposing alignments, each claiming to be the legitimate heir of the Holmes tradition of proper judicial self-restraint. The Frankfurter-Jackson team numbered those who believed that judicial deference to legislative will was not a part-time affair, but one which should be adhered to even when that will was exercised in restraint of a civil liberty. Justices Black, Douglas, Murphy and Rutledge felt otherwise; legislative supremacy in their thinking was not to be honored when it was used to strike at the very postulates upon which it rested, i.e., free thought, free speech, free assembly, freedom of religion, and non-discrimination in the exercise of the voting franchise. It was not that ranks were not sometimes crossed with a consequent shifting of the line-up of judges in many decisions. Yet the basic division remained, and on the eve of the 1949-50 Term it was there still. However, Justices Black and Douglas had lost through death the articulate aid and the support which Justices Murphy and Rutledge had provided so often. It had been a persuasive combination, which, more often than not, could swerve one or more of the remaining justices to produce a majority of the Court, and thus become an “infallible five” whose pronouncements were the law of the land, the it impossible for them to enforce their anti-trade-restraint laws.” Justice Black speaking in Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 497, 69 S. Ct. 684, 93 L. Ed. 834 (1949).


46 For instance, Justice Frankfurter, although normally taking the position that civil liberties are not on any preferred plane of constitutional protection, often joined Justices Murphy and Rutledge in protesting against decisions of the Court which appeared to them to be sapping the “search and seizure” concept of vitality as a fundamental element of due process. On the other hand, Justice Black, one time police court judge and an investigator of a Senate Committee, often left his liberal colleagues to occupy the spot that Justice Frankfurter vacated in the “search and seizure” cases. See Reynard, Freedom From Unreasonable Search and Seizure —A Second Class Constitutional Right?, 25 IND. L. J. 259, 260 (1950).
"befuddled four" to the contrary notwithstanding. Now let us turn to the trail as it is picked up at the 1949-50 Term. Justices Clark and Minton occupy the seats vacated by the late Justices Murphy and Rutledge. Theoretically, under a "government of laws and not of men," this change of judicial personnel should not affect the immutable verities of constitutional law. That may be so, but a constitution, as Woodrow Wilson once remarked of government, "is as good as the men to whom it is entrusted." Let us see how the two newcomers to high judicial place are executing that trust.

II.

Pre-Supreme Court Experience of Justices Clark and Minton

The appointment of Tom Clark, then Attorney General, to the Supreme Court was not too favorably received, on the whole, by the press and commentators of the nation.\(^{47}\) If a general criticism was most prevalent it was the one that ascribed the appointment to the President's sometimes perverse habit of generously rewarding political loyalty by the bestowing of a public office on one whose capabilities to measure up to the honor thus received were open to question.\(^{48}\) However, perhaps the President was aware that the same disdainful view had often been taken of his own abilities by critics whom he thought he had lived to confound.\(^{49}\)

The varied legal experiences that Justice Clark brought to the Supreme Court may provide a background out of which a fine judge could emerge. Tom Clark, World War I veteran, a product of Virginia Military Institute and Texas Law

\(^{47}\) The appointment of Justice Clark came as quite a surprise, since it had been assumed that the President would appoint a Catholic to succeed Justice Murphy.

\(^{48}\) However, this is a common criticism when presidents appoint men who they believe will be sympathetic to the policies of the existing administration. Moreover, it seems to be an old American custom to appoint politically trustworthy judges.

\(^{49}\) Although his early days in the White House did not indicate it, President Truman certainly can not be characterized as a "weak" executive.
School, practiced law in Dallas for a number of years. During part of that time he was Civil District Attorney for Dallas County. Coming to Washington in 1937 when the New Deal's crusading tide had reached its flood stage and was beginning to recede, he joined the Department of Justice as an attorney, and worked his way up to Attorney General in 1945. Among the diversified roles in which he served were, War Risk Litigation attorney, special assistant (Antitrust) to the Attorney General, Coordinator of Alien Enemy Control, Chief of the Civilian Staff of Japanese War Relocation, Assistant Attorney General in charge of the Antitrust Division, and later, of the Criminal Division.

Perhaps these many services on the side of federal law enforcement may have inculcated in him an appreciation of the difficulties which face the Government, as prosecutor, and produced a bias in favor of granting a wide sweep for the powers of that Government. His antitrust background may loom as a key to his position in the future complex monopoly, patent, and unfair competition cases that continue to come before the Court. His connection with the Japanese exclusion cases may be an important factor in formulating his attitude in the difficult job of marking the line where free speech, press, and assembly end, and the legitimate anti-subversive regulatory powers of the national and state governments begin. Those who regard the Japanese exclusion cases as a most dangerous precedent in support of possible future oppressive government invasions of the sphere of free thought protected by the First Amendment, will not take too much heart.

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50 Thus Clark cannot be classified, purely and simply, as a "New Dealer," even by those who use the term loosely, and usually in a derogatory manner. He was rather a "middle of the road New Dealer" whose political fortunes flowered when he received the helpful support of Fred Vinson, now Chief Justice of the Supreme Court.

from Justice Clark's connection with these cases and the tragic story behind them.\textsuperscript{52}

During his tenure as an Attorney General he achieved a number of notable legal victories including a triumph over John L. Lewis,\textsuperscript{53} a successful antitrust prosecution against the monopolistic structure of the motion picture industry,\textsuperscript{54} the splendid achievement of the racial restrictive covenant cases,\textsuperscript{55} and his somewhat reluctant triumph for the national interest in the tidelands oil case.\textsuperscript{56} In his opinions as Attorney General he took a broad view of the scope of the national war and treaty powers.\textsuperscript{57} However, in contrast to the vigorous anti-monopoly position which he had assumed as antitrust prosecutor, his official opinion advising the War Assets Corporation that the proposed sale of the Geneva steel plant in California to the already powerful United States Steel Corporation did not violate the Sherman Act,\textsuperscript{58} became a pivotal factor in the later \textit{United States v. Columbia Steel Co.} case,\textsuperscript{59} a decision which many feel was a judicial lapse from the Court's usual awareness of the dangers of the "Curse of Bigness."\textsuperscript{60}

\textsuperscript{52} On the other hand, they may take some reassurance by recalling that what a lawyer must do as an advocate in the service of his clients is not always a fair indication of how he may behave in a similar situation when his role is that of judge. Let them remember it was Justice Brown, formerly a successful corporation lawyer, who delivered a sharp dissent in the income tax cases, declaring that the decision involved "nothing less than a surrender of the taxing power to the moneyed class." Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, 695, 15 S. Ct. 912, 39 L. Ed. 1108 (1895).


\textsuperscript{54} United States v. Paramount Pictures, Inc. et al., 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948).

\textsuperscript{55} Hurd v. Hodge, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948); Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).


\textsuperscript{57} 14 U. S. L. WEEK 2165 (Sept. 11, 1945).

\textsuperscript{58} See United States v. Columbia Steel Co. et al., 334 U. S. 495, 505, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948).

\textsuperscript{59} 334 U. S. 495, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948).

\textsuperscript{60} See Justice Douglas' dissent, \textit{id.}, 334 U. S. at 534.
Rewarded by the President for his fine work as Attorney General and for his loyalty under fire during the 1948 presidential election campaign, Justice Clark approached his first term of Court as a man of whom a good deal might be assayed. An efficient prosecutor, attuned to the political realities of his times, possessing a grasp of orthodox antitrust law, even if he misapplied it in an important instance, partial to strong federal powers, even at the expense sometimes of individual freedom, Tom Clark, nevertheless, showed real courage in pushing for the civil rights program of his President, at the risk of alienating his Texas backers, and demonstrated he was no slave to the abstraction of "states rights" at the expense of human rights. All in all, Justice Clark, although having acquired no previous judicial experience, still had participated in creditable style in the pressing events of the nineteen-forties. His performance could raise up the hope that his record as a Supreme Court Justice might at least be admirable, if not brilliant.

The public reaction to the appointment of Sherman Minton was similar to that which greeted the appointment of Justice Clark a short time before.61 However, in addition to the resentment of high honors allegedly allocated on the mundane basis of political loyalty and friendship, there was an additional criticism voiced. Back in the halcyon days of the middle thirties, Minton had been a strong supporter of President Roosevelt's programs. In particular, some hostile writers recalled his active leadership in supporting the President's "Court packing" scheme. A short-lived attempt was made to have him appear before the Senate Judiciary Committee which was then considering the appointment.

On the other hand, satisfaction was expressed in some quarters that the President had at last given recognition to a lower federal court judge instead of appointing a law professor,

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government lawyer, or member of Congress. Some commentators naively thought that Minton’s appointment was an addition to the liberal wing of the Court. These precipitous prognosticators should have taken a closer look at Minton’s record on the seventh circuit before thus hailing him as an addition to the Black-Douglas branch of the Court. Moreover, it seems accurate to say that the charge that Minton was a “rubber stamp Senator” during his term in Congress contained at least a grain of truth. Some hint that his liberalism was of a type not uncommon among aspiring Democratic politicians of the McNutt era, i.e., useful when the progressive tide was flowing strongly, but easily discarded for a more conservative approach if the occasion, and the election returns, might demand it.

At any rate, his record as a federal judge of itself would not allow any unequivocal appraisal to be made of his judicial philosophy. However, just as Justice Clark’s pre-Supreme Court experiences would seem to have stamped him as one who gives a broad play to the reins of government, so too did circuit court Justice Minton reveal in his opinions a similar disposition. Thus, he confirmed a lower court opinion holding that the Great A. & P. Company had violated the antitrust laws by, inter alia, the misuse of its mass buying power. In addition, he concurred in the rigid Conduit decision which prohibited the individual maintenance of a “losing part price” system with knowledge that others also maintained them. On occasion, he had demonstrated that he shares the view of those who would strictly contain the scope of the legal patent monopoly and would not allow it to be used as a leverage to crack the anti-monopoly dike. Finally, at

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62 The failure of presidents in recent years to reward able circuit court of appeals’ judges by elevating them to the Supreme Court is inexcusable.
63 Harold Ickes was one of these.
64 United States v. Great A. & P. Tea Co., 173 F. (2d) 79 (7th Cir. 1949).
least one of his opinions indicated that he was not hostile to flexible administrative action by the Federal Trade Commission. Moreover, several other of Justice Minton's opinions while on the seventh circuit, revealed a certain humanitarian strain which he would allow to override legal technicalities in order to achieve equity in a particular case, particularly in labor cases. On the other hand, he did hand down rulings against the Secretary of Agriculture and the NLRB, and concurred in a seventh circuit decision sustaining the "non-Communist" affidavits under the Taft-Hartley Act as a valid exercise of Congressional Power.

Since Justice Minton's judicial background probably offered the most reliable barometer of his possible behavior as a Supreme Court Justice, the writer will only mention in passing the fact that his early career included military service in World War I, high scholastic honors at Indiana and Yale law schools, private practice in Indiana, a term as attorney for the Public Utilities Commission of Indiana, and a successful election run for United States Senator. Reference previously has been made to his career in the Senate, where, in addition to supporting most administration legislation and policy, he became a close friend and supporter of Senator Hugo Black, now his senior associate in the Court.

Evaluating the pre-Supreme Court background of Justice Minton, it is surprising how his views seem to correspond closely to those that we have vouchsafed of Justice Clark. He appears as a politician, aware of the popular and persuasive tides of the moment, a man who realizes that a Twentieth Century Federal Government must be granted the capacity to govern in a way that permits it to solve some of

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67 United States v. Morton Salt Co., 174 F. (2d) 703 (7th Cir. 1949).
68 See, e.g., Tovar v. Jarecki, 173 F. (2d) 449 (7th Cir. 1949).
69 General Foods Corporation v. Brannan, 170 F. (2d) 220 (7th Cir. 1948), setting aside an order of the Secretary of Agriculture based on a charge that General Foods Corporation was manipulating commodity prices.
70 Sax v. NLRB, 171 F. (2d) 769 (7th Cir. 1948).
71 Inland Steel Co. v. NLRB, 170 F. (2d) 247 (7th Cir. 1948).
72 FRANK, op. cit. supra note 45, at 96.
the pressing problems, and eliminate the graver abuses that industrial society of necessity must breed. Veteran of Congressional service, including a stint as chairman of the Senate Committee on Lobbying, he may be likely, much like his friend, Justice Black, to recall the obstacles that confront efficient use of governmental investigative and enforcement powers. Like Justice Clark, he has demonstrated loyalty and courage under fire, although it was much easier to wear in the Senate of 1937 the badge of liberalism, than it was when Justice Clark proved his mettle in the 1943 election campaign. Unfortunately, Justice Minton's views on civil rights, whatever they may be, had not been revealed to any certain extent at the time of his appointment. However, recalling his acute political instinct, it would have been a fair observation to say that he would go as far, and no further, as the majority of the Court in supporting the principle of non-discrimination in the field of civil liberties.

III.

The Power to Govern (Federal)

Turning to a review of the work of Justices Clark and Minton during their initial term on the Court first reference will be made to cases treating of federal regulatory measures. The new Justices and their colleagues were faced with fewer cases involving either constitutional or statutory questions in the field of federal regulation of business. One possible explanation may be that the majority of federal statutes regulating economic activity have been on the books since 1938, aside from the temporary legislation passed during the war period. It may be that "creeping socialism," or the "Welfare State," New Deal brand, is now accepted by business, at least to the extent that the "government by law suit" approach is being discarded for awhile, since that technique has not achieved the

73 18 U. S. L. Week 3345 (June 20, 1950).
results it once promised. Thus, the Natural Gas Act of 1938,\(^7^4\) one of the last of the statutory reforms of the Roosevelt administration, was interpreted by the Court to embrace a gas company engaged solely in the business of local distribution of natural gas produced outside of the state, although the gas was transported by the distributing company from the state line entirely within its own high pressure pipelines.\(^7^5\) The Court, by a five to two decision, construed the Natural Gas Act to cover the separate functions of "sale" and "transportation" of gas in interstate commerce. The Court felt that the instant case was one of the latter category. The opinion was written by Justice Black, usually a friend of federal protection of the consumer; the two new justices, one a former public utility commission attorney, and the other a former federal prosecutor and Attorney General, joined the five man majority. Justice Douglas, still recuperating from a severe fall from a horse which disabled him for the great portion of the Term, took no part in the consideration of the case. The familiar team of Frankfurter and Jackson dissented.

Again, the new justices were sympathetic as a Court majority allowed the Federal Employer's Liability \(^7^6\) and the Federal Safety Appliance Acts \(^7^7\) broad coverage by following as it were, an "equity of fulfillment" canon of construction, to hold in one case that the FEL Act prohibited the railroad from limiting by agreement the forum in which an injured worker may maintain a suit.\(^7^8\) In another, the Court construed the FSA Act to mean that failure of an automatic coupling pin is *per se* an actionable wrong without regard to


proof of care, diligence, or lack of proximate cause.\textsuperscript{79} Finally, Justice Clark wrote a majority opinion in \textit{Affolder v. New York, C. \& St. L. R. R.},\textsuperscript{80} reaffirming the proposition that the duty of a carrier under the automatic coupler requirement of the Safety Appliance Act is unrelated to negligence, but is an absolute one. Clearly the new justices seem disposed to read social legislation in a manner that attains the broad social ends to which, presumably, it was directed. In contrast, the old "New Dealers," Frankfurter and Jackson quibble with this approach and continue to take refuge in the rigidities of the limited word tools with which legislative draftsmen seem doomed to ply their trade.\textsuperscript{81}

There were several other decisions of the 1949-50 Term in which the two new justices joined a majority of the Court to uphold a broad federal power of regulation. In \textit{Ewing v. Mytinger \& Casselberry},\textsuperscript{82} the Court sustained the multiple seizure provision of the Federal Food, Drug, and Cosmetic Act,\textsuperscript{83} holding that due process did not require a hearing as a prerequisite to the administrative finding of probable cause for the multiple seizures of misbranded articles which endangered the public health, since the owner of the seized articles would have an opportunity to secure a full hearing before a court when the libels (seizure orders) are filed. While Justice Minton joined the majority, Justice Clark did not participate. (This was to be the situation in a substantial number of cases, since Justice Clark had participated directly or indirectly as Attorney General in many of the cases reaching the Court in the 1949-50 Term.) The \textit{Ewing} case seems to

\textsuperscript{80} 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. ..... (1950).
\textsuperscript{81} See, \textit{e. g.}, Federal Power Commission \textit{v.} East Ohio Gas Co. \textit{et al.}, 338 U. S. 464, 70 S. Ct. 266, 94 L. Ed. ..... (1950), where Justice Jackson in dissent, joined by Justice Frankfurter, argued for a restricted interpretation of the Natural Gas Act which would exclude from federal jurisdiction the high pressure distribution lines.
\textsuperscript{82} 339 U. S. 594, 70 S. Ct. 870, 94 L. Ed. ..... (1950).
recognize a distinction between the Constitutional necessity of affording a hearing in the case of property seizure, when a later judicial hearing will be granted, and the case of detention of the person. Justices Frankfurter and Jackson dissented, being of the opinion that the seizure itself was sufficient injury to the business of the claimant as to acquire, in the interests of due process, a pre-seizure administrative hearing.

Again in Civil Aeronautics Board v. State Airlines, Inc., the Court, with Justices Clark and Minton aligning themselves with the majority, upheld the authority of the CAB to award air carriers in consolidated area proceedings air routes not specifically requested in the carrier's applications. And in Secretary of Agriculture v. Central Roig Refining Co., the Court sustained an order of the Secretary of Agriculture making an allotment of sugar among refiners operating in Puerto Rico. While the majority opinion by Justice Frankfurter recognized that although the quotas may work individual unfairness on late-comers to the industry, the Court was "not a tribunal for relief from the crudities and iniquities of completed experimental economic legislation."

Concluding a summary of the new Court's attitude toward federal regulation of business brief mention of several antitrust cases will aid in completing the picture. In United States v. Yellow Cab Co. the Court sustained the trial court holding that the circumstances surrounding a merger of cab manufacturing and cab operating companies did not warrant a finding that there was an intent to violate the Sherman Act. Justice Minton agreed with the majority opinion while Justice Clark did not participate. As the vigorous dissenting opin-

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84 For a full treatment of the problem of summary administrative notice and hearing, see GELLEHORN, ADMINISTRATIVE LAW 283-320 (1947).
85 338 U. S. at 602.
87 338 U. S. 604, 70 S. Ct. 403, 94 L. Ed. .... (1950).
88 Id., 338 U. S. at 618.
89 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. .... (1949).
ion of Justices Black and Reed pointed out, the trial court decision assumed that a formed, or specific, intent was an indispensable element of the crime of monopoly or attempted monopoly under Section 2 of the Sherman Act, whereas several important Supreme Court decisions previously seemed to have established the objective, or general intent, standard as all that need be spelled out by the facts in such cases. To the extent that the second Yellow Cab decision holds otherwise, the obstacles to successful prosecution of monopolistic mergers under Section 2 of the Sherman Act may have been increased. On the other hand, the majority opinion contributes to the line of decisions that implement Rule 52 of the Federal Rules of Civil Procedure, which requires an appellate court to give due regard "to the opportunity of the trial court to judge the credibility of witnesses." To that extent, it is a reflection of an attitude of judicial "self-restraint." The Roosevelt Court had quite often abandoned their Holmesian tolerance when examining antitrust cases. The new Court now may have indicated a reluctance to do that.

However, the Court did hand down one antitrust decision holding that the business of a real estate agent is included in the word "trade" within the meaning of Section 3 of the Sherman Act, and overruled the defense that when personal services are involved a combination to fix real estate brokerage commissions by a District of Columbia Real Estate Board was legal. While Justice Clark did not participate, Justice Minton joined the Douglas-Black group to concur in this

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90 Id., 338 U. S. at 342.
92 This faith in an alleged ability on the part of trial court judges may often be unwarranted. See FRANK, COURTS ON TRIAL (1950), reviewed by Scanlan, Book Review, 25 NOTRE DAME LAW. 396 (1950).
broad interpretation of "trade." The rationale that most real estate brokers are entrepreneurs engaged in business for a profit seems more in accordance with the realities of the real estate field than the analogies to ordinary industrial labor on which Justice Jackson relied in dissent.95

However, Justices Clark and Minton demonstrated that they did not share completely the antitrust fervor of Justices Black and Douglas, in which the late Justices Murphy and Rutledge usually shared. This was apparent in several patent cases in which the Court had to consider the proper delineation of where the legal patent monopoly ends and the illegal monopoly begins. In *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*96 the Court, with Justice Minton writing the majority opinion, refused to apply the doctrine of misuse of patents to a fact situation where the licensee was required to pay royalties based on its sales even though none of the patents licensed were used. Justice Black, joined by Justice Douglas, who always is sensitive to the slightest attempts to extend a legal monopoly into prohibited areas, reminded the Court of previous decisions which had the effect of prohibiting the owner of a patent to use his patents in such a way as "to bludgeon his way into a partnership with his licensee," by collecting royalties on unpatented as well as patented articles.97 The minority thought that the facts of the instant case fell within the reason behind that rule, while Justice Minton, speaking for the majority, thought the principle of the previous tie-in cases could not "be contorted to circumscribe the instant situation... The right to a patent includes the right to market the use of the patent at reasonable returns."98 Justice Minton seems to have ignored the fact that

95 *Id.*, 338 U. S. at 496.
97 Especially fresh in the Court's memory should have been United States v. United States Gypsum Co. et al., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948); United States v. Line Material Co., 333 U. S. 287, 68 S. Ct. 550, 92 L. Ed. 701 (1948). See an excellent discussion of these two cases in, Note, 23 *Notre Dame Law* 547 (1948).
98 339 U. S. at 833.
the patentee in the instant case was using the leverage of his patent monopoly to obtain a share of the market that would not otherwise be his. Such an extension of itself may not be a violation of the Sherman Act, but it appears to be the type of misuse of patents that the Court had prohibited in the past.99

In another patent case, the Court restricted the sweep of the *Halliburton Oil Well Cementing Co. v. Walker* decision,100 which had been rendered at the previous term of Court. That case had deeply upset the patent bar by holding that a claim for a combination mechanical patent, describing the most critical element of the patent in terms of what it will do, rather than in terms of its physical characteristics, is invalid as functional. The new Court modified the effect of that holding by deciding that the *Halliburton* rule is not applicable to a combination patent in which the inventive uniqueness inheres in the combination, rather than in any particular element.101 Justice Black, always skeptical of broad patent claims, dissented, while Justices Clark and Minton again indicated they do not share this skepticism toward patentees by associating themselves in the per curiam majority opinion. Finally, in *Graver Tank Manufacturing Co. v. Linde Air Products Co.*,102 the Court, with Justice Clark one of the majority, and Justice Minton abstaining upheld the patent law doctrine of "equivalents" and applied it broadly. The doctrine of equivalents means that a patent need not be copied in every detail before it will be protected from the attempted infringement. Reasoning logically, the Court held that, since "outright and forthright duplication" of a patent is a rare type of infringement, "to prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form."103 The Court's proper appre-
ciation in this case of the dangers of substituting an empty verbalism for the realities of the fact situation contrasts with their rejection of the same approach in the *Hazeltine* case, where application of it perhaps would have resulted in classifying the patentee's conduct as a misuse of his patent.

Concluding the analysis of the attitude of the new Justices toward the federal powers of regulation, including antitrust and the related field of patent law, we may say that the two new Justices share almost identical views on the subject. While Justice Clark participated in fewer decisions because of his connection with several of them as Attorney General, both he and Justice Minton have given substantial evidence that they do not take a niggardly view of the scope of federal regulatory statutes. This is especially true when the statutes before them for construction have a broad humanitarian objective, such as a Safety Appliance Act. Such statutes they will interpret broadly. On the other hand, they have given some manifestation that, while they possess a grasp of orthodox antitrust concepts, they will not be quick to extend them to new situations. Moreover, they feel that trial court findings in antitrust cases are entitled to very favorable consideration by appellate courts, in spite of the fact that in previous decisions the Roosevelt Court often had manifested an eagerness to review the facts. Finally, both Justices Minton and Clark have indicated, that in the clash of argument as to where the patent monopoly ends and the antitrust violation begins, they will throw their weight in the close case on the side of the patentee. The new Justices seem to have no quarrel with the statutory prerequisites of an industrial democracy, but they will not volunteer too much of their judicial initiative in seeing to it that the statutes are pushed to cover novel situations. Theirs is a tolerant, orthodox liberalism, no more, and no less.

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104 See note 96 *supra.*
IV.

The Power To Tax

The cases decided at the 1949-50 Term which involved questions of federal and state taxation were not too numerous. Nor did they raise fundamental questions of the permissible scope of the federal or state powers in the field. However, if any trend in the tax cases could be detected at all, it was one that favored the taxpayer, for a change. The new Justices played an important part in the tax decisions; and if we can say the Court displayed a more receptive attitude toward the tax "loopholes" on which petitioning taxpayers relied in their appeals, it was the Truman Court which was mainly responsible. The Truman appointees (Burton, Vinson, Clark, and Minton) wrote all but one of the tax opinions handed down at the 1949-50 Term.

In Brown Shoe Co. v. Commissioner of Internal Revenue, Justice Clark wrote a majority opinion in which Justice Minton, among others, joined. The Court held that corporations which received property as an inducement to locate their plant in a particular town or community, were entitled to deduct depreciation on such property in determining their excess profits income. These transfers by the inducing communities were "contributions to capital," and thus deductible, said Justice Clark, apparently following a somewhat automatic "plain meaning" canon of construction to reach the result. The Bureau of Internal Revenue had argued for the more specialized restricted meaning of legal "capital," or capital actually invested or "paid-in" by the taxpayer. Although the rule is otherwise in the case of public utilities, Justice Clark's opinion distinguished that situation, and the former public utility commission counsel, Justice Minton, found no trouble in going along with an opinion that sapped

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the old war-time excess profits tax of some of its vitality. Legislative draftsmen concerned with the drafting of a new excess profits law might take heed.

In another tax case, *Commissioner v. Korell*, the Truman Court again pursued the "plain meaning" canon of statutory construction to hold, that the term "amortizable bond premiums," as used in the Internal Revenue Code, included a bond premium paid for a conversion privilege, and allowed the claimed deduction, even though the Government had argued that the statute meant to permit deductions only for true bond premiums. Justice Vinson wrote the opinion, in which both Justices Minton and Clark agreed. And in the important decision of *United States v. Cumberland Public Service Co.*, a unanimous Court held that a corporation is not liable for income tax on the sale of corporate assets which first were transferred to its stockholders in partial liquidation, and then sold, when the corporation was in fact dissolved, where the trial court had found that the sale was actually made by the stockholders and not the corporation, notwithstanding the fact that the trial court also had determined that the prime motive of the stockholders was to reduce taxes. Strangely enough, Justice Black wrote the unanimous opinion of the Court, whereas in the *Brown Shoe* and *Korell* cases he had been a lonely minority of one. Justice Black was willing to sustain in the *Cumberland* case the trial court's findings that this was a genuine dissolution, in contrast to his attitude in the *Yellow Cab* antitrust decision, discussed *supra*, where he had expressed dissatisfaction with the trial court's decision that the merger questioned in that case was one entered into for genuine business reasons and not with an intent to violate the Sherman Act. This time,

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107 339 U. S. 619, 70 S. Ct. 905, 94 L. Ed. ... (1950).
108 338 U. S. 451, 70 S. Ct. 280, 94 L. Ed. ... (1950).
109 See note 90 *supra*. Justice Black usually has manifested a view of antitrust which, at least, could be called "comprehensive." See, e. g., *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).
however, Justices Minton and Clark and Justice Black were in agreement in their deference toward trial court findings.

Aside from two other minor cases, the 1949-50 Term was a favorable one for the taxpayer who challenged the broad statutory sweep that the Government usually has claimed successfully for its tax laws. However, taxpayers only broke even in four attempts to escape the burdens of state-imposed taxes. One petitioner who placed his faith in the doctrine of sovereign immunity did not prevail in his arguments that a state operated bathing beach was not subject to a federally imposed admissions tax. Moreover, in Capitol Greyhound Lines v. Brice, the interstate bus carriers received a setback when the Court in an opinion by Justice Black, with Justices Clark and Minton joining therein, sustained a nondiscriminatory two percent tax imposed by the State of Maryland on the fair market value of motor vehicles. The Black view that the proper interpreter of the Commerce Clause is the Congress and not the Court was very much in evidence. The senior associate Justice commented, obiter dicta, that, if there was to be a rule prohibiting taxes measured by vehicle value as violation of the Commerce Clause, it should be enunciated—in Congress, and not by the Court. The academician, Justice Frankfurter dissented, joined as usual by Justice Jackson. To a motoring laity, familiar with the mechanical monsters which the interstate truckers have unleashed on the country’s highways, the ruling, which the new Justices helped to formulate, has a reasonable cast

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110 One of these deserves to be noted. In Manning v. Seely Tube & Box Co., 338 U. S. 561, 70 S. Ct. 386, 94 L. Ed. ___ (1950), the Court held that a taxpayer whose validly assessed deficiency was abated by a subsequent carry-back of a net operating loss was not relieved of the burden of paying interest when the deficiency was not promptly paid.

111 Wilmette Park District v. Campbell, 338 U. S. 411, 70 S. Ct. 195, 94 L. Ed. ___ (1949). Justice Clark wrote the opinion in the case. Justice Minton did not participate in the decision. This was one of the several cases in which he had already participated when he sat as a federal circuit court judge on the Circuit Court of Appeals for the Seventh Circuit.


113 Frank, op. cit. supra note 45, at 60.

114 339 U. S. at 548.
to it. However, in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals,*\(^\text{115}\) a New Jersey personal property tax on a domestic insurance company's paid-up capital, which did not deduct United States bonds and accrued interest thereon, was held to violate a federal statute exempting interest-bearing obligations of the United States from state and local taxation. Justice Clark wrote the opinion, joined by the rest of the Court who participated, save that the "States-Righter," Justice Black, dissented. Finally, in *Treichler v. Wisconsin,*\(^\text{116}\) with the same judicial line-up as in the previous *New Jersey Realty* case, Justice Clark handed down an opinion which declared that the Wisconsin emergency tax on inheritances was a tax on property rated and measured in part by tangible property outside of the State, and was unconstitutional because it attempted to achieve this extraterritorial effect. Justice Black, as could be expected, dissented from the Truman Court's reaffirmance of the rule of *Frick v. Pennsylvania,*\(^\text{117}\) where an older and more conceptualistic minded Court had said that a Pennsylvania tax law was invalid "in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other States."\(^\text{118}\)

What, then, have the two new Justices meant in the complex judicial field of taxation? It appears that their presence has strengthened the hand of those who probe the federal tax laws for loopholes. While in the field of state taxation previously discredited and suppositive arguments of "federal immunity" and "extra-territorial taxation" were revived in two cases to inject new hope in the cause of the taxpayer, but to make more difficult the ever acute task of those who must solve the problem of raising state revenue in an age of an expanding national government. The prime claim of the states for their existence, aside from appeals to a Constitu-

\(^{115}\) 338 U. S. 665, 70 S. Ct. 413, 94 L. Ed. \ldots (1950).

\(^{116}\) 338 U. S. 251, 70 S. Ct. 1, 94 L. Ed. \ldots (1949).

\(^{117}\) 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058 (1925).

\(^{118}\) *Id.*, 268 U. S. at 496.
tional tradition, is their ability to better govern those to whom their responsibility is close rather than distant. If they cannot raise the monetary minimums necessary to execute that duty, Holmes' wish for social experiments in the isolated compartments of the States will forever go unrealized. The damage done to responsible state government will be heavy. However, with two decisions the other way, it cannot be predicted that there is any general trend in that direction as a result of the change in the Court's personnel.

V.

Problems of Federal-State Relationships.

Two landmark cases, involving the politically ticklish question as to whether the Federal Government or certain individual states had paramount rights in, and dominion over, the valuable underwater lands (or marginal sea), were decided during the last Term. In United States v. Louisiana, the Court, following the square precedent set in United States v. California, held that the marginal sea, including the coveted oil that it may contain, is a national and not a state concern. Louisiana, like California, never acquired ownership in the marginal sea. As Justice Douglas remarked: "The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty." The decision of the Court in the Louisiana case was unanimous. However, Justice Clark, victor as Attorney General in the previous California case, did not participate. While Justice Minton was one of the unanimous majority, because of his dissent in the other tideland's case, it is a reliable surmise to say he did

119 See notes 111 and 112 supra. One of these, however, was actually a problem of state regulation of its highways through the tax device, rather than a pure tax issue.
120 339 U. S. 699, 70 S. Ct. 914, 94 L. Ed. ... (1950).
122 339 U. S. at 704.
so more out of considerations of stare decisis, than because he believed in the actual result reached.

With respect to *United States v. Texas,* the other tidelands decision, there were more troublesome objections to be overcome before the Court could decide the case in the same manner as it had the two previously mentioned tidelands decisions. Texas had been an independent republic before its admission to the Union, and consequently it argued that, prior to its annexation by the United States, it had possessed both property rights and powers of government over the lands, minerals, and other resources underlying the marginal sea. The Court, with Justice Douglas writing an opinion in which Justices Black, Vinson and Burton joined, rejected Texas' effort to distinguish its position from that of its two unsuccessful sister states. The majority opinion relied on the "equal footing clause" of the Joint Resolution which admitted Texas to the Union. This entailed a relinquishment by Texas of some of her sovereignty, at least to the extent that the United States thereafter exercised the same powers of "national external sovereignty" as it did over the tidelands of the other states of the Union. Justice Clark did not participate. However, Justice Minton joined Justices Reed and Frankfurter in a dissent which expressed the opinion that the case should be tried on the merits, with an examination of just what power and authority the terms of the Joint Resolution presented to Texas. They could not accept the proposition that national sovereignty arose out of the necessities of national defense, international affairs, etc.

These decisions in favor of federal supremacy over the tidelands oil were hostilely received in many quarters. Yet as a conservative Washington newspaper perspicuously ob-

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124 *Id.*, 339 U. S. at 716. The Joint Resolution was approved March 1, 1845, 5 Stat. 797 (1845).
served: "When the needs for orderly conservation of oil resources becomes more visible than they are now, the wisdom of the decisions may become more generally accepted." 126 What is puzzling to this writer is the failure of the Government to argue, especially with reference to the Texas case, that, since Texas had rebelled against the United States, when it was accepted back into the Union after its unconditional surrender, it retained only those rights restored to it by the victorious United States, one of which did not include ownership of the tidelands. Whatever the logical arguments on either side of this controversy, the new Justices, with one of them not participating, did not join completely in the Court's two decisions which have the effect of putting under national control an asset of tremendous potential value to the national defense, albeit depriving some states of a potentially rich source of revenue.127

However, all was not too gloomy for the states and their cherished powers at the 1949-50 Term of Court. For instance, the Supreme Court in one of the few five to four opinions handed down during the last Term, upheld the authority of Virginia to issue a cease and desist order to enforce, at least, the requirement that a foreign insurance company doing business through the mails in Virginia, must consent to suit in Virginia by service of process on the Secretary of State.128 Any other result might have forced a complaining Virginia citizen to sue the insurance company in its home state, Nebraska. While Justice Clark joined in this functional view of the state power, as expressed in Justice Black's majority opinion, the other Court freshman, Justice Minton,
wrote the dissent.\textsuperscript{129} It was one of the few times during the Term that the two new Justices disagreed in a case. Truthfully, Justice Minton's dissent was mainly a rehash of the quasi-metaphysics of the much labored and much misunderstood doctrine of \textit{in personam} service. He does not regard doing business by mail as sufficient to warrant the imposition of constructive personal service. In the face of present day business realities, with special reference to the mail order houses, Justice Minton's dissent is departure from the practical approach to the problems of regulation which he usually manifests.

Again, in \textit{United States v. Burnison},\textsuperscript{130} with only Justice Black registering a dissent, the Court sustained a California probate statute which prevented a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations. The two new Justices joined Justice Reed in his majority opinion which found nothing in the Supremacy Clause of the Constitution to prohibit a state from preventing its domiciliaries from willing property to the Federal Government. Thus the Court permitted a small measure of comfort to the states in their never ending efforts to raise and preserve needed funds. Compared to the limitations which other decisions, previously mentioned, imposed on the realization of state hopes along these lines, it was not much about which the states could rejoice.

Moreover, federal supremacy received a more favorable reception in \textit{Brown v. Western Railway of Alabama},\textsuperscript{131} where the two new appointees joined a majority opinion by Justice Black, to rule that state pleading and practice requirements cannot override federal substantive rights. A state court decision sustaining a general demurrer to a complaint claiming damages under the Federal Employer's Liability Act was re-

\textsuperscript{129} Id., 339 U. S. at 655.

\textsuperscript{130} 339 U. S. 67, 70 S. Ct. 503, 94 L. Ed. \textellipsis\textsuperscript{130} (1950).

\textsuperscript{131} 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. \textellipsis\textsuperscript{131} (1949).
versed by the Supreme Court. The Court made it clear that the state court's construction of the complaint to the effect that it did not state a cause of action for negligence under the federal statute, was not binding on the Supreme Court, which will determine for itself whether a federal right granted by Congress to injured workmen has been alleged properly.

The cases just summarized on the federal-state relationship furnish some interesting clues to the judicial philosophy of President Truman's latest two appointees. In those cases where a state's power to tax was questioned, Justices Clark and Minton usually had displayed stronger sympathy for the taxpayer, rather than the state. However, "states-rights" was not entirely neglected by them. The tidelands oil decisions found Justice Minton partially hostile to the federal claims which prevailed therein. The Travelers Health Ass'n decision shows that Justice Clark, at least, is willing to tolerate broad, but seemingly necessary, state powers of regulation over out-of-state corporations doing business there. However, the humane bias which the two new Justices usually manifest in favor of the claims of labor or the workingman overrode consideration of a state's control over its rules of pleading. Where broad federal social legislation is concerned, the two High Court initiates seem predisposed to subserve other questions of practice, pleading, comity, etc., to a sensible execution of the basic purposes of the statute from case to case.

VI.

Labor

This article has already attempted to point out the sympathies that the two newest Supreme Court Justices apparently harbor toward labor. The cases decided during the 1949-50 Term which involved questions of labor relations

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132 See text supra, Part II.
seem to support, in part, that observation. For instance, while Justice Clark did not participate, Justice Minton joined a majority of the Court in the important holding that the Fair Labor Standards Act and the Walsh-Healy Act are not mutually exclusive, but supplementary. Thus, the employees of an independent contractor who was operating a government owned munitions plant, were to be considered employees of the contractor and not the United States, and hence entitled to the benefits of the Fair Labor Standards Act. The Walsh-Healy Act, the statute passed two years before the Fair Labor Standards Act, protects only employees working on materials to be sold to the government. Its remedial procedures are more cumbersome and less advantageous to the employee, than those provided by the Fair Labor Standards Act which applies over the broad field of interstate commerce, so far as Congress has exercised its power thereover by that Act. At any rate, the Court makes it clear that some employees may be in the comfortable position of enjoying the complementary protection afforded by both these statutes.

Again, in Railway Labor Executive's Ass'n v. United States, the Court, with both Justices Minton and Clark agreeing, handed down an opinion which went far to protect railroad employees whose employment would be affected by a railroad consolidation. Justice Burton's majority opinion held that the Interstate Commerce Commission had the power to require a fair and equitable arrangement to protect the compensatory interests of the railroad employees beyond the four years which the Interstate Commerce Act specifically allowed. The Court, ignoring the plain words of the statute and respectfully rejecting the administrative interpre-

tation of the ICC, held that the four year protection afforded by the statute was merely a minimum and not a maximum period of protection. Those who are familiar with the interminable length of corporate reorganizations will appreciate the realism, as well as the humanitarianism, of the Court’s decision.

Coming now to cases involving the more controversial questions of labor relations, we see that the favor with which the two new Justices usually regard labor’s claims is not so much in evidence. In the now well known American Communications Ass’n, C. I. O. v. Douds case,\(^\text{138}\) the Court sustained Section 9(h) (Non-Communist affidavit provision) of the Taft-Hartley Act\(^\text{139}\) against objections that it was a denial of free speech, an *ex post facto* law, a bill of attainder, unconstitutionally vague, and violative of the non-religious oath provision of the Constitution. Chief Justice Vinson’s majority opinion emphasized that 9(h) was a regulation of conduct bearing a reasonable relation to the evil which it was designed to reach. He rejected axiomatic application of the “clear and present danger” test without consideration of all the circumstances presented by the particular situation in which it is asserted. The prevention of political strikes, called by Communist union leaders, is a legitimate Congressional objective, and is properly directed at a serious substantive evil, said the Court. The two new Justices disqualified themselves. Justice Black dissented in a ringing exposition of the principles of free thought as symbolized by the First Amendment.\(^\text{140}\) Justice Jackson, joined by Justice Frankfurter, handed down a brilliant opinion.\(^\text{141}\) In it he concurred in that part of the Court’s decision which upheld the parts of the Taft-Hartley oath provisions which required disclosure of overt acts of affiliation or membership in the Communist party, but dissented from


\(^{140}\) 339 U. S. at 445.

\(^{141}\) Id., 339 U. S. at 422.
sustaining that part of the oath requirement which called for a disclosure of belief in a totalitarian organization, unconnected with any overt act. His opinion contained what is, perhaps, the most lucid judicial analysis of the nature of the Communist party yet made. 142

There the situation stood until a second decision involving the controversial oath provision, Osman v. Douds. 143 Justice Minton, following the view he had taken as a circuit court judge, joined Justices Vinson, Reed and Burton to sustain the oath in toto, in this second “oath” case, while Justices Black, Jackson, Frankfurter, and Justice Douglas, who was absent at the time of the American Communications Association case, dissented, on the grounds that the belief parts of the oath were unconstitutional. 144 Justice Clark abstained, and until he indicates his views on this controversial question of oath, the matter cannot be said to have been settled with finality, at least insofar as the provisions require disclosure of political belief. Perhaps we may find some clue to his position if he participates in the decision on the appeal of the Communist leaders convicted under the Smith Act. 145

The difficult assignment which the Court had of deciding the permissible regulatory powers of the states over picketing brought forth some surprising reactions on the part of Justice Minton. The cases involving picketing problems demonstrate that the Court continues to entertain a view of picketing similar to that popularized by Professor Gregory, 146 that is, picketing is more than the pure dissemination of information. It is rather a type of coercion, depending for its persuasive-

142 It was widely popularized, appearing in Harpers Magazine, September, 1950, p. 21.
144 Id., 339 U. S. at 847. Actually, Justice Black dissented en toto on the same grounds as he took in his dissent in the American Communications Ass'n. case. However, he joined Justices Frankfurter, Jackson, and Douglas who dissented on the portion of the oath dealing with beliefs. Justice Douglas felt that the membership and beliefs sections of the oath were not severable and must both fall since he had come to the conclusion that the belief section was unconstitutional.
145 United States v. Dennis et al., 183 F. (2d) 201 (2d Cir. 1950).
146 GREGORY, LABOR AND THE LAW 345-8 (1946).
ness not so much on the justice of the cause in which it is used, but rather on the psychological embargo that it exerts around the picketed employer.\textsuperscript{147} For instance, at the 1948-49 Term, in the \textit{Giboney v. Empire Storage \& Ice Co.} case,\textsuperscript{148} the Supreme Court had sustained a state court decree enjoining peaceful picketing carried on for the acknowledged purpose of coercing the employer to violate a state antitrust law. This decision clearly presaged what happened at the 1949-50 Term. In one decision the Supreme Court sustained a Washington state court injunction restraining peaceful picketing which had been carried on to coerce an employer to compel his employees to join the union.\textsuperscript{149} Justice Minton wrote the majority opinion, emphasizing that the public policy of the state insisted that workers shall be free to join or not join a union without any employer coercion. An injunction which helps preserve that policy does not violate "free speech" concepts when applied even to peaceful picketing.\textsuperscript{150} Justice Clark joined in the unanimous opinion.

However, in another decision on picketing, Justice Minton took a different tack from the position he had assumed in the preceding case. The majority of the Court, including Justice Clark, held that the Fourteenth Amendment does not bar a state court injunction prohibiting picketing which had as its objective the compelling of an owner-controlled and operated business to grant a union shop.\textsuperscript{151} However, Justice Minton had other ideas, and in his dissent, while asserting his awareness that "picketing is more than speech," he disagrees with the state court's attempt to enjoin all peaceful picketing, rather than directing itself at any specific abuses.

\textsuperscript{147} \textit{Gregory and Katz, Labor Law-Cases, Materials and Comments} 309 (1948).
\textsuperscript{148} 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949).
\textsuperscript{150} \textit{Ibid.}
\textsuperscript{151} \textit{International Brotherhood, etc. v. Hanke et al.}, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. .... (1950).
Moreover, we perceive once again Justice Minton's particular reverence for stare decisis as he reminds his colleagues that the doctrine of peaceful picketing as free speech has its roots deep in several important precedents, from which, he felt, the Court was departing in the instant case. Justice Minton then departs from the judicial deference which he had exhibited in the Washington case toward the judgment of a state in striking the proper balance between peaceful, constitutionally protected picketing, and the permissible limits of contest open to industrial combatants. Perhaps the stare decisis factor is the key to the difference in approach. More likely, however, Justice Minton regards peaceful picketing to compel violations of a state prescribed labor policy as different in nature from that used to secure a well known and legitimate goal of trade unions, i.e., the union shop.

In the related field of state labor laws, the Truman Court was faced with the problem of determining how far Congress has occupied the labor relations field. In the International Union, etc. v. O'Brien case, the Court unanimously agreed that Congress has closed the field to the extent that there is attempted concurrent state regulation of peaceful strikes for higher wages. Therefore, Michigan's Bonine-Tripp Act, which prohibited strikes unless and until a majority of the employees had voted to strike in an election conducted by the state, conflicted with superior federal regulation on the same subject. The result here may be regarded as a limitation on decisions of previous terms which had permitted rather extensive state regulation in the area of labor relations.

Finally, the Truman Court made it clear that administrative "expertise" in the difficult labor relations field was not

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152 Id., 339 U. S. at 481.
153 Ibid.
154 339 U. S. 454, 70 S. Ct. 781, 94 L. Ed. ... (1950).
to be slighted or ignored by the Courts. Thus, in *Slocum v. Delaware, L. & W. Ry.*, the Court ruled that the National Railway Adjustment Board had exclusive jurisdiction to adjust grievances and disputes arising out of collective bargaining agreements. Similarly, the Court held that a state court has no jurisdiction of a declaratory judgment suit instituted by a railroad in search of a ruling on the terms of a collective bargaining agreement concerning conductor's extra pay for certain types of services. Justices Clark and Minton were with the majority of the Court in both of these decisions. Moreover, they gave further evidence that they would not acquiesce in any attempts to circumvent judicially the use of the administrative powers in the complex field of labor relations when, with Justice Clark writing the majority opinion, they helped fashion a polite admonition to the Federal Circuit Court of Appeals for the Fifth Circuit in *NLRB v. Mexia Textile Mills*. The Court in this case overruled the fifth circuit court, and held that compliance by an employer with a cease and desist order of the NLRB does not render the case moot, since the Board is entitled to have any possible resumption of the unfair practice barred by the enforcement decree of the reviewing court. In his majority opinion Justice Clark manifests a respectful appreciation of the proper scope of administrative responsibility in a field where it is particularly necessary that it be brought to bear without being subverted, either by premature appeals to the judiciary, or by restrictive judicial restraints which are imposed, not for the protection of individual litigants, but only to make more difficult effective administrative actions in pursuance of statutorily imposed duties.

Scanning the record of the new Justices in labor decisions at their first term, we merely can repeat what has been men-

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157 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. ... (1950).
159 339 U. S. 563, 70 S. Ct. 826, 94 L. Ed. ... (1950).
tioned previously. Generally they are sympathetic to the claims of labor, especially if the question is one of the scope of a remedial piece of social legislation. Yet Justice Minton, at least, with Justice Clark's position not yet having been adequately indicated, is willing to allow the federal powers over commerce to be used in attempt to forestall political strikes by requiring an oath of orthodoxy from union leaders. Since the great national unions already had purged themselves of Communists who formerly had infiltrated their ranks, presumably Justice Minton's position is not inconsistent with his usual attitude in other types of labor cases. The problem of picketing found the two new colleagues in their first major disagreement, with Justice Minton willing to go much further in tolerating peaceful picketing. Both, however, joined in opinions which set limits to any process by which the states might appropriate to themselves authority in the areas of labor relations where federal uniformity is an essential, if a national problem is to receive a uniform solution. Finally, the two new Justices, with Justice Clark sparking the effort, curbed several efforts to reduce the sweep and effectiveness of the administrative process in favor of a return to an outmoded judicial handling of labor disputes.

VII. 

*Criminal Law and Procedure*

In this field of law, where strong claims that fundamental constitutional guarantees have been ignored by law enforcement officers are raised frequently by vicious felons, the mettle of the Court often has been severely tested. It was no different at the 1949-50 Term of Court. The cases produced one grave overruling of what had been considered to be a notable precedent, and in doing so the two new Justices laid themselves open to the charge that with a change in the personnel of the Court, there had come a change of law. In
United States v. Rabinowitz, Justice Minton wrote a majority opinion which overruled Trupiano v. United States to the extent that the latter decision required that the necessity for procuring a search warrant be judged on the basis of practicability; rather than upon the reasonableness of the search following a lawful arrest. Justice Clark also joined in this majority opinion, which held that a general search without a search warrant of an accused’s one-room office following his lawful arrest therein on a charge of selling illegal postage stamps, was a lawful one, incidental to the arrest, even though the arresting officers knew the accused possessed the stamps and could have secured a search warrant in advance. A strong dissenting opinion, written by Justice Frankfurter and concurred in by Justice Jackson and, in an unusual reversal of form on this question, by Justice Black, scored what was labeled as a departure from the Fourth Amendment and the doctrine of stare decisis. In the course of his stricture to the majority Justice Frankfurter remarked:

Especially ought the Court not reinforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.

While these are remarkable words coming from a judge who has pioneered more than one of the Roosevelt Court's

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162 339 U. S. at 66.
163 Justice Black usually demonstrates a tendency to support broad “search and seizure” authority. See, e. g., Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947). As a matter of fact, Justice Black had dissented in the Trupiano decision. In the Rabinowitz dissent, however, he indicates that the rule of the Trupiano case should not be discarded so soon, until, at least, it had been given a fair test. Moreover, he manifests a sympathy for the Constitutional values on which Justice Frankfurter relies in his dissent. Perhaps Justice Black really is quite embarrassed that the new faces on the Court have placed in a majority position a concept of “search and seizure” in which, though he had previously supported it, he did not believe very enthusiastically.
164 339 U. S. at 66.
departures from the avenues of precedent, nevertheless, it seems fair to observe that, had Justices Murphy and Rutledge lived, the result undoubtedly would have been the other way in the Rabinowitz case. If so, it seems the possibilities of abuse by conviction-happy police officers would have been lessened rather than, as was the case, increased.

However, in another case dealing with the "search and seizure" problem, the new Justices were found this time on the side of a petitioner who claimed that Constitutional rights under the Fourth Amendment were being impaired. In District of Columbia v. Little the Court held that the refusal of a respondent to open the door for an inspection by a District of Columbia health inspector, who did not have a warrant, was not a violation of an ordinance prohibiting "unlawful interference" with the duties of inspectors. Justice Minton wrote the majority opinion and in doing so avoided decision on the constitutional question presented. The District of Columbia had raised the point by arguing that the Fourth Amendment has no application whatever to administrative health inspections.

The habeas corpus merry-go-round returned to plague the Court at the 1949-50 Term. In Darr v. Burford, a majority of the Court, including the two new judges, held that a federal district court had properly denied habeas corpus to a petitioner who had failed to take a petition of certiorari to the Supreme Court following a denial of his original habeas corpus petition by the highest court of a state. Respect for

165 Justice Frankfurter, speaking in Helvering v. Hollock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940), one of the reversals of precedent in the tax field which aroused the blood pressure of the tax bar, said: "But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however, recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

166 That the pendulum is swinging in the direction of a more restricted "search and seizure" protection, see Fraenkel, Searches and Skulduggery, 171 The Nation 32 (1950).

167 339 U. S. 1, 70 S. Ct. 468, 94 L. Ed. .... (1950).

the major responsibilities which the states have for the maintenance of law and order within their own borders, and "the dignity and importance of their role as guardians of the administration of criminal justice" demand that the Supreme Court be given an opportunity to review their acts before resort may be had to the federal courts. However, Justice Clark in his concurring opinion took pains to emphasize that a denial of certiorari following a state high court disallowance of habeas corpus has no necessary reference to the merits of the claim. This point was developed further in Justice Frankfurter's dissent wherein, joined by Justices Jackson and Black, he argues persuasively that the power of federal district courts to issue a writ of habeas corpus should not be barred simply because a petition for certiorari was not first made to the Supreme Court. It would appear that the two new Justices and the rest of majority have ignored two considerations: one, a rule of judicial procedure, the other, the psychological realities of the actual situation. First, it is well settled that "a denial of certiorari has no legal significance"; and, secondly, federal district courts will not feel favorably disposed to habeas corpus petitions to which the Supreme Court has already indicated that it is indifferent, if not opposed, by denying certiorari. As a matter of fact, a lower federal court has already taken the view that the denial of certiorari by the Supreme Court precludes a later grant of habeas corpus. This court merely seems to outspokenly express a view that every federal court will embrace, consciously or unconsciously. If so, the Truman Court has helped to restrict an ancient and honorable writ out of hyper-solicitude for state court "dignity."

Habeas corpus received another, but more justifiable curtailment, in Johnson v. Eisentrager. There the new Jus-

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170 Ibid.
tices joined a six judge majority which held that federal courts have no jurisdiction to grant habeas corpus to German military aliens who were captured and convicted in China by an American Military Commission for their military activities against the United States after the surrender of the Reich but before the capitulation of Japan. While Justice Black, along with Justices Douglas and Burton, protested earnestly against the majority's alleged failure to remember that "conquest by the United States, unlike others, does not mean tyranny," it seems that the decision has the merit of "restricting the scope of American law to the areas where it can reasonably be enforced." At any rate practical considerations may justify the Court's restriction of habeas corpus in this instance, whereas, in Darr v. Burford, their persuasiveness seems rather feeble when examined in the light of what actually may have been done.

Several important decisions dealing with jury composition questions also highlighted the criminal law side of the 1949-50 calendar. Two of them dealt with the question of whether federal government employees are disqualified from serving on a jury in a criminal case to which the Government is a party solely by reason of their government employment. In Dennis v. United States, with Justices Clark and Douglas not participating, Justice Minton wrote the majority opinion which gave a negative answer to that question, by holding that government employees were not barred from serving on a jury trying a well known Communist for contempt of Congress. Justice Minton deprecated the defense's argument that government employees, fearful that the slightest taint of Bolshevism might be applied to them, hardly could bring dispassionate objectivity to bear in deciding the case. Justices Frankfurter and Black, continuing the surprising number

173 Id., 339 U. S. at 791.
175 339 U. S. 162, 70 S. Ct. 519, 94 L. Ed. .... (1950).
176 Id., 339 U. S. at 175.
of occasions at the last Term when these two judicial opposites were found together in vigorous dissent, took powerful issue with the assumptions of Justice Minton that only "vague conjecture" supported the argument that Government employees might be intimidated in their judgment in a case involving the United States of America versus a known or strongly suspected Communist. However, in Morford v. United States,\textsuperscript{177} a companion case to the Dennis appeal, Justice Minton presumably agreed with a per curiam opinion which reversed the conviction for contempt where defense counsel had not been permitted to ask questions seeking to prove actual bias on the part of Government employees who served on the jury.

The final jury problem was posed by Cassell v. Texas\textsuperscript{178} where a majority of the Court agreed that there was unequal protection of the laws in the grand jury selection practices of county jury commissioners who admitted "that they chose only whom they knew and that they knew no Negroes." The case involved the reversal of a murder conviction by a Negro who had been indicted by a jury subject to selection in the manner just described. Justice Minton concurred, not because reversal in his eyes was justified by the jury commissioners' admissions, but because of the practice of the commissioners in compiling jury lists which never contained more than one Negro.\textsuperscript{179} Justice Clark also concurred and, after some questioning of the policy of reversing convictions of those obviously guilty solely because of discrimination in the selecting of a grand jury, goes along out of what, perhaps, can be discerned as more a respect for stare decisis than any firm conviction in the righteousness of the decision.\textsuperscript{180}

There were other interesting miscellaneous decisions in the field of criminal law and procedure, including a holding, in

\textsuperscript{177} 339 U. S. 258, 70 S. Ct. 586, 94 L. Ed. .... (1950).
\textsuperscript{178} 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. .... (1950).
\textsuperscript{179} Id., 339 U. S. at 290.
\textsuperscript{180} Id., 339 U. S. at 296.
which both the new Justices joined, that the Fourteenth Amendment does not require that an adversary hearing be given after sentence to a convicted murderer on the question of his sanity, where the proof of his sanity had been supported by the report of three physicians.\(^\text{181}\) Justice Frankfurter dissented by the strained, syllogistic reasoning that, since due process forbids a state to execute an insane man, *ergo*, a petitioner is entitled to an adversarial trial of that issue.\(^\text{182}\)

However, Justice Frankfurter was more fortunate in persuading the two new appointees to join his judicial camp on another and more important issue. One of the great divisions on the Court over the recent years has been over the question of whether the Bill of Rights is embraced in the Fourteenth Amendment, or whether the latter merely embodies "fundamental principles of natural justice." Justice Black, formerly supported by Justice Douglas, and the late Justices Murphy and Rutledge, has argued vigorously, and with great efforts at historical documentation,\(^\text{183}\) for the former view, while Justice Frankfurter has headed a majority view of the matter which adheres to the "natural justice" case-by-case approach. In the field of criminal procedure the argument is not a sterile, philosophical one, but bears a direct relationship to a final determination of whether men live or die, go to prison or go free. In *Quicksall v. Michigan*,\(^\text{184}\) the Court decided that the fact a prisoner was not offered counsel after being charged with murder did not amount to a denial of a due process, where the record shows he had pleaded guilty and failed to complain of a lack of counsel. Justice Frankfurter wrote the majority opinion in which Justices Clark and Minton joined. Justice Black, with Justice Douglas not participating, and Justices Murphy and Rutledge gone, was the single dissenter, apparently still supporting the view that what would be a vio-

\(^{182}\) *Id.*, 339 U. S. at 14.
\(^{184}\) 339 U. S. 660, 70 S. Ct. 910, 94 L. Ed. .... (1950).
lation of the Sixth Amendment in the federal sphere, likewise should be a violation of the Fourteenth Amendment when committed by state action.\textsuperscript{185} The advent of Justices Clark and Minton seems to have foreclosed any immediate hopes that the minority view of the \textit{Adamson v. California} case\textsuperscript{186} would become a majority.

We may say that the one area of Supreme Court action in which the opinions of the new Justices have caused a definite shift in the course of decisions is that of criminal law and procedure. More tolerant than their predecessors of the sweep of the search and seizure powers, less imbued than they with a reverence for habeas corpus, and not convinced of Justice Black's concept of inter-relationship of the Fourteenth Amendment and the Bill of Rights, they may have contributed to what one commentator has referred to as "a dangerous attitude of cynicism"\textsuperscript{187} toward the inviolability of constitutional safeguards.

\section*{VIII.}

\textit{Civil Rights}

It was in the broad field of civil liberties that the Truman Court both scored its greatest decisional triumphs of the term, and, on the other hand, handed down an opinion which may serve as an evil precedent by which all of their good work could be severely curtailed, if not actually undone. In three monumental cases the Court stripped away the cruel constitutional facade called "separate but equal." In \textit{McLaurin v. Oklahoma State Regents}\textsuperscript{188} the Court refused to sanction even a symbolic segregation. In a unanimous opinion the Truman Court held that Oklahoma could not segregate Negro students from white students even though it was merely an absurd, "nominal" segregation, consisting of special sections

\begin{itemize}
  \item \textsuperscript{185} \textit{Id.}, 339 U. S. at 666.
  \item \textsuperscript{186} See note 183 supra.
  \item \textsuperscript{187} Fraenkel, supra note 166 at 35.
  \item \textsuperscript{188} 339 U. S. 637, 70 S. Ct. 851, 94 L. Ed. .... (1950).
\end{itemize}
for Negro students in the classrooms, cafeteria, and library. With even "nominal" segregation in public education perhaps now outlawed, it seems that Justice Harlan will soon be vindicated, and the vicious "separate but equal" doctrine given a well deserved repose. This prophesy is supported by illuminating remarks which the Court made in a second precedential education-segregation case. In *Sweatt v. Painter* the Court told Texas that its establishment of a separate law school for Negroes did not comply with the "equal protection of the laws" clause of the Fourteenth Amendment, and, therefore, the state must admit a Negro, qualified in all other respects, to its "white" law school. In reaching that conclusion the Court, after comparing the tangible and intangible values of the two law schools, closed its opinion with this realistic appraisal: "It is difficult to believe that one who had a free choice between these law schools would consider the question close." With those words, "separate but equal" at last should have been denuded of any applicability it may have had, even as a shibboleth, in the field of public higher education. An early decision of the 1950-51 Term concerning the question of segregation on a public golf course, supports the assumption that the Court meant what it said in the education-segregation cases.

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189 The terms in which the Court has overruled segregation in the instant case makes its ultimate and complete rejection in all areas more likely to occur, *Jim Crow in Handcuffs*, 122 New Republic, June 19, 1950, p. 5.
191 *Id.*, 339 U. S. at 634.
192 Indeed, the tide is running strong against segregation in education, at least at the college level. The following Southern states, at the time this article was written, have either admitted qualified Negro students to their higher educational facilities, are taking steps to admit, or legal action is pending to require them to do so: Delaware, Georgia, Louisiana, Maryland, Missouri, North Carolina, Tennessee, Texas, and Virginia. These successes have not been achieved without much litigation, but litigation, along with legislation and education, is equally an instrument of democratic advance which must be used when propitious in order to secure the equality under law of which we boast. Rose, *The Art of Compromise*, The Progressive, August, 1950, p. 11.
193 *Rice v. Arnold*, 340 U. S. ...., 71 S. Ct. 77, 94 L. Ed. .... (1950). In its brief order in the golf-course case, the Supreme Court sent the case back for action "in light of" its racial segregation decisions of previous term. Case is found below at .... Fla. ...., 45 So. (2d) 195 (1950).
The pattern of the Court's thinking, as revealed in the education cases was reflected further in the *Henderson v. United States case,* where a unanimous Court overturned the segregation imposed in the dining cars on railroads moving in interstate commerce. While the decision was based on the anti-discrimination provision of the Interstate Commerce Act, it is another marking on a barometer which indicates that the constitutional sophistries that once we relied on to inflict second-class citizenship are fast losing any force they may have once had.

In all of these splendid judicial achievements, the two new Justices went along with the unanimous majority although Justice Clark did not take part in the *Henderson* case. Their participation in the already tremendous catharsis of racial prejudice in education and transportation which these cases have caused must be complimented. However, their record on civil rights has other, more depressing aspects. For instance, there was a disturbing blight on the record which the new Court had achieved in giving real meaning to equal protection of the laws. In the *Dorsey v. Stuyvesant Town Corp.* case, the Supreme Court refused to review a decision of the New York Court of Appeals which had upheld the Negro ban that the Metropolitan Life Insurance Company applied in its ninety-three million dollar publicly subsidized housing project, Stuyvesant Town. The constitutional issue in the case appeared clear cut enough: may a private company exclude a racial group from a housing project which the company has erected with the help of eminent domain, tax

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195 The ICC recently ordered the Southern Railroad to end all racial segregation on dining cars running across state lines. Washington Post, November 11, 1950, p. 15B.
concessions, and other special governmental aid and supervision? In avoiding a direct decision on this point, the new Court, unwittingly or not, has given a shot in the arm to those who would foster patterns of racial segregation in the federal urban redevelopment program. What the Court has prohibited the states to do in the area of education seems to have been sanctioned indirectly as proper in the great semi-public housing programs over the nation. *Stuyvesant Town Corp.* is a decision that brings no credit to the Court, especially in view of their other magnificent anti-segregation decisions.

In *South v. Peters*, the two new Justices joined a per curiam majority opinion which refused to rule on the constitutionality of Georgia's uniquely discriminatory county unit rule method of counting votes in the primaries. Under this system, each county is assigned from two to six votes, according to population. The candidate who gets the most votes in a given county gets that county's whole unit vote. Since a populous county like Fulton, with a five hundred thousand population, is weighted equally with a rural county of forty-five thousand population, the disproportionate influence of the anti-Negro rural votes is self evident. The majority used the familiar dodge of "political question" to evade their duty of rectifying this method of scaling down the weight of individual votes in the city areas. As the dissent pointed out, this "last loophole" around previous clear-cut, courageous civil rights decisions of the Court well may provide an effective technique to achieve in fact discrimination in the right of suffrage among voters of Southern states, where anti-Negro feeling still runs high. If so, it is the black-

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198 For a critical view of the Court's decision in the Stuyvesant case, see Abrams *Slum Clearance Boomerangs*, 171 *The Nation* 106 (1950). There is some evidence that the Metropolitan Life Insurance Co. after its success in the case, attempted to evict tenants who had played a part in appealing the case to the courts. *New York Times*, Sept. 25, 1950, p. 25, col. 6.


200 The county-unit system has enabled the Talmadges, Sr. and Jr. to be elected to office in Georgia when their popular vote was less than a majority. *Herman Again*, 123 *New Republic*, July 10, 1950, p. 7.
est mark that a neutral observer may assess against the early judicial records of Justices Clark and Minton.²⁰¹

Some miscellaneous decisions in the field of civil rights reveal further evidence that the two latest Truman appointees sometimes display a less than bubbling enthusiasm for the protection of personal rights. For instance, previous reference has been made to Justice Minton’s position on the constitutionality of the belief provisions of “non-Communist” oath, and also his willingness to restrict somewhat the protections of the “search and seizure” clause. In addition, Justice Minton joined in an opinion at the 1949-50 Term which held that a lack of a quorum at the time of the return of a subpoena is no defense to a contempt conviction for failure to comply with the subpoena of a Congressional investigating committee.²⁰² Moreover, both of the new Justices joined in a per curiam opinion which denied certiorari to the Hollywood writers who were convicted of contempt for their failure to answer questions put to them by a Congressional committee on their alleged membership in the Communist party.²⁰³ With the current fervor for loyalty oaths of all sorts, sizes and descriptions,²⁰⁴ the contribution which Justices Clark and Minton have made in steering the Court to an attitude of indifference to the delicate demarcation of the sphere in which legitimate political beliefs are to be protected from legislative and executive inquisition, looms as an important element in evaluating constitutional trends in the field of political liberty.

Thus the record of the two Justices runs hot and cold in that broad field labeled “civil liberties.” Accepting the

²⁰¹ Of course, the disproportionate representation which is afforded the rural counties in most states is a broader problem than the county-unit system alone. It really is “government by the minority” in a rather blatant way. Neuberger, Farmers in the Saddle, 123 New Republic, Oct. 2, 1950, p. 13. A recent grievous example was the Maryland Democratic primary where the gubernatorial candidate who received a majority of twenty thousand in the popular vote, nevertheless lost the primary by 16 unit votes. Washington Post, Sept. 30, 1950, p. 7.


²⁰⁴ For a case study, see Stewart, The Year of the Oath (1950).
Court's realistic approach to the application of "equal protection of the laws" clause of the Constitution to public education, they evidently are not ready to apply the same realism in the field of semi-public housing. Concerned lest a Negro be denied a meal on an interstate train, they turn their backs when it is a question of watering down his vote. Coupled with the evidence of their apparent acquiescence in the "oath-taking" rage of the moment, it becomes fairly evident that the Truman Court, like the Roosevelt Court, and all the Courts that have gone before it, "follows the election returns." The crucial test would be put if and when the election returns place fundamental constitutional guarantees in danger. It may be premature, but one gets the feeling that the two new appointees have an inclination to ride with public opinion no matter where it may lead.

IX.

Administrative Law, Statutory Construction, Etc.

Limitations of space confine the writer to merely general remarks regarding the attitudes and approaches which the two new Justices bring toward administrative law. Several decisions, some of them discussed previously in this article, make it quite clear that Justices Clark and Minton have no prejudice against the administrative process. In fact, they seem to be even more willing than the old administrative law teacher, Justice Frankfurter, to allow it free play within broad areas of action. Administrative "expertise" usually was upheld by the Court during the Term. However, the Court did indicate in one decision that the remedial purposes for which Congress passed the Administrative Procedure Act were to be broadly construed.205 This, however, is no manifestation of hostility toward the administrative process, it merely demonstrates a respect for the legislative process.

In general, the two new Justices approached the construction or interpretation of statutes as functionalists, rather than as metaphysicians. This was especially true, as previously indicated, if the statute to be construed was one of those in the class of social legislation. True, there were several occasions when they played the role of the strict constructionist and used the “plain meaning” canon of statutory interpretation, as in the tax decisions of the Term. Nevertheless, their usual approach to a problem of statutory construction was one of “what was it meant to do,” rather than “what does it say.”

However, the two new Justices, especially Justice Minton, displayed an unusually deep respect for stare decisis. Justice Minton, after all, had been a federal circuit court judge and had grown accustomed to following the precedents declared by a higher judicial authority. Stare decisis, while a desirable postulate, essential for certainty in the law, can be misused if too automatically applied in the field of constitutional law. The county unit-rule case illustrates a situation where the new Justices could better have served the cause of the Constitution and the Court by casting their vote in favor, at least, of a decision on the merits, rather than join the per curiam opinion which preserved stare decisis, perhaps, but damaged representative government in Georgia.

X.

Concluding Observations

What, then, of Justices Clark and Minton? First let it be said that the two new Justices worked very hard and produced an unusual number of opinions for freshman Justices.\(^{206}\) In the line-up of Justices they were usually found on the majority side. This writer has attempted to show that this

\(^{206}\) Each of the new Justices wrote twelve opinions which was greater than any other Justice's contribution, save for Justices Black and Jackson, who each handed down 13 written opinions.
undoubtedly resulted from the fact that their judicial views were peculiarly reflective of the current tides of public opinion. Their presence on the Court beyond a doubt has played a major part in pushing the Court to furnishing a quicker response to the fluctuations of public opinion than might have been the case otherwise if Justices Murphy and Rutledge had lived. A notable example of this was the "non-Communist" oath decision.

The two new Justices have not as yet clearly displayed their allegiance to either the Frankfurter-Jackson, or the Black-Douglas wing of the Court. On the one hand they have manifested a tendency to go along with the former group in their more reserved attitude toward the judicial protection of civil liberties. On the other hand, they seem to share the more expansive view which Justice Black, especially, takes of the federal and state powers of regulation. And just to complicate the picture, the statistics of the Term show that Justice Black has joined Justices Frankfurter and Jackson in an increasing number of dissenting opinions.207 This was apparent in the criminal procedure and free speech decisions. The old opponents of the Roosevelt Court may be closing ranks as the new Court, in their opinion, drifts in the dangerous direction of allowing promiscuous legislative and judicial inquisitions in the realm of what they regard as free thought.

If any final comment may be made of the work of Justices Clark and Minton, it is that they pursued a middle-of-the-road judicial philosophy. Careful not to unspade the ground covered before, amenable to cautious advance in the areas where public opinion had flashed a green, or at least, an amber light, and declining invitations to proceed into uncharted judicial territory, they have helped to keep the Court on a fairly even keel throughout the term. Those who might be uneasy about the possible ramifications of the county unit-rule case and the Rabinowitz decision take heart from the

207 These two personality opposites joined in ten dissents.
anti-segregation cases. While those who worry at the ever expanding federal and state powers of regulation may take a measure of comfort in the tax cases, or the Yellow Cab decision. At the 1949-50 Term there was a little something for everybody, and that, in a sentence, sums up the two new Supreme Court Justices. Those who recall Justice Murphy's emotional, almost spiritual defense of civil liberties, or remember Justice Rutledge's independent liberalism, may not be convinced that the replacing of the good by the average is enough in this crucial day. However, what is done cannot be undone; and all can take fresh appraisal that in a constitutional democracy the Supreme Court should neither run too far ahead, or lag too far behind, the will of the people. It is with the people themselves that the battle for individual freedom and personal security, both political and economic, must be won. If so, Justices Clark and Minton will neither make nor mar the final outcome. For, as Walt Whitman reminds us: "Liberty relies upon itself, invites no one, promises nothing, sits in calmness and light, is positive and composed, and knows no discouragement." Our fate, then, is ours to determine, not the Supreme Court, but—they can help!

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