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The Supreme Court and the Attrition of State Power*

PHILIP B. KURLAND†

[T]he judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one alone. This will lay all things at their feet, and they are too well versed in English law to forget the maxim, "boni judicis est ampliari jurisdictionem."

THOMAS JEFFERSON¹

I

Probably not since Lord Brougham has the legal profession numbered among its active practitioners so prolific an author as Professor Bernard Schwartz. Though not yet thirty-five, he already has to his credit at least seven published books² and an untold number of articles in law reviews and more popular periodicals. He seems able to turn out legal texts at a greater rate than most of us can write letters, meanwhile fully engaged as a professor of law and indulging in other no less important tasks, the latest of which is his work as counsel for a congressional committee surveying the functioning of the federal administrative agencies. It is admittedly with some envy for his facile pen that this reviewer undertakes to comment on his most recent volume, which is concerned primarily with the work of the Supreme Court over the past twenty years. And yet, with all the respect due an author of such demonstrated learning and scholarship, I am tempted to say of this book as a

* A review, of sorts, of *THE SUPREME COURT, CONSTITUTIONAL REVOLUTION IN RETROSPECT*. By Bernard Schwartz. New York: The Ronald Press Co. 1957. vii + 429 pages. \$6.50.

† A.B., University of Pennsylvania, 1942; LL.B., Harvard University, 1944; Professor of Law, University of Chicago.

1. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 46 (1928). For the benefit of those of us not equally "well versed in English law," the phrase has been translated: "It is the role of a good judge to expand his jurisdiction."

2. His autobiographical sketch in WEST PUBLISHING CO., *DIRECTORY OF LAW TEACHERS* (1958), lists the following books of his authorship: *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* (1956); *AMERICAN CONSTITUTIONAL LAW* (1955); *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* (1954); *LE DROIT ADMINISTRATIF AMERICAIN: NOTIONS GENERALES* (1952); *AMERICAN ADMINISTRATIVE LAW* (1950); *LAW AND THE EXECUTIVE IN BRITAIN* (1949).

more competent reviewer said of another—probably with equally poor judgment—“This will never do.”³

It won't do because it falls between two stools: too technical for that semimythical figure, “the intelligent layman” interested in the Court because of “the primordial role of the judge in American society”;⁴ oversimplified for those more expert in the area, certainly for those “for whom the *United States Supreme Court Reports* constitute . . . staple reading.”⁵ But even more, it won't do because of the author's overindulgence in and toleration of clichés of thought unbecoming so competent a critic. It is hard today for a sophisticated student of the Court to believe that its role is to act as a “check of a preceding generation on the present one.”⁶ This may have been an accurate description of the Court during the period under attack in Robert Jackson's *The Struggle for Judicial Supremacy*.⁷ But the Marshall Court and the Warren Court, to cite two examples, should be demonstration enough that the quotation is an inaccurate description of the Court as a long-lived institution. One might even suggest that the thrust of the present Court's work is the removal of the shackles of the preceding generations. Certainly law “expresses the pressures of the past,” but “the basic inquiry of any self-conscious jurisprudence is the extent to which it should do so.”⁸ It was in 1944 that Thomas Reed Powell wrote:

In times past the Supreme Court has often been called the bulwark of conservatism. It is now obviously relinquishing any such role. It might conceivably later become a bulwark of radicalism if the nation and the States should lean more to the right than to the left. We should then be entitled once more to think of constitutional law in terms of judicial domination. So long as courts have the last say we have judicial

3. See Lord Jeffrey's review of Wordsworth's *Excursion*, 24 EDINBURGH REV. 1 (1814). Keats said of this same poem that it was “one of the three things to rejoice at in this age.” And Bagehot commented on the review in this fashion:

“Nature ingeniously prepared a shrill artificial voice, which spoke in season and out of season, enough and more than enough, what will ever be the idea of the cities of the plain concerning those who live among the mountains; of the frivolous concerning the grave, of the gregarious concerning the recluse; of those who laugh concerning those who laugh not; of the common concerning the uncommon; of those who lend on usury concerning those who lend not; the notion of the world of those whom it will reckon among the righteous—it said, ‘This won't do!’”

1 LITERARY STUDIES 24–25 (Everyman ed. 1911). See also 3 STEPHEN, HOURS IN A LIBRARY 112 (new ed. 1904).

4. SCHWARTZ p. iii.

5. *Ibid.*

6. *Id.* at 8.

7. (1941).

8. FRANKFURTER, THE COMMERCE CLAUSE 2 (1937).

government, whether courts approve or condemn what others have done. This, however, still leaves the vast gulf between the alternatives. Judicial condonation puts responsibility on the political agencies which remain free to respond to popular pressure for change.⁹

Nor is the whole truth reflected in Schwartz' position, here in reliance on Corwin's *Constitutional Revolution, Ltd.*,¹⁰ that "if, in the generation before 1937, the Court construed the doctrine of judicial supremacy so as to give itself the virtual powers of a super-legislature, in the twenty years since that time, the Court's authority vis-à-vis the Congress has all but atrophied."¹¹ This thesis fails to take into consideration the fact that though the Court may well have surrendered the use of its blunderbuss, the power to declare congressional legislation unconstitutional, it continues to make very effective use of a more subtle weapon: the power to construe the statutes which Congress has enacted. "Nay, whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *He* who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them."¹² Nor should it be forgotten that the cruder weapon is still wielded with reference to state legislative, executive, and judicial action.

Professor Schwartz also repeats some typical cant about the work of the Court: The Court denies too many petitions for certiorari and is, therefore, shirking business which properly belongs to it.¹³ There are too many dissenting and concurring opinions.¹⁴ Some Justices fail to heed the demands of the doctrine of stare decisis.¹⁵

So far as its business is concerned, the Court at the 1956 Term disposed of 1670 cases.¹⁶ Admittedly, only 132 were the subject of opinions after argument, but each of the others certainly required and received some consideration from each of the nine Justices of

9. *Our High Court Analyzed*, N.Y. Times Magazine, June 18, 1944, p. 17, col. 4.

10. (1941).

11. SCHWARTZ p. 16.

12. Bishop Hoadly, quoted in GRAY, *THE NATURE AND THE SOURCES OF THE LAW* 120 (1909).

13. "Where the Court in Charles Evans Hughes's day used to decide from a hundred and fifty to almost two hundred cases a year with formal opinions, that in the first year of Earl Warren's tenure handed down only sixty-five full-fledged decisions, less than any Supreme Court had done in over a century."

SCHWARTZ p. 151.

14. "*Dissentio ad Absurdum*." *Id.* at 354-62.

15. "Good for This Day and Train Only?" *Id.* at 344-49. "Activism and Stare Decisis." *Id.* at 349-54.

16. Note, *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 83, 97 (1957).

the Court. I believe that the Court grants too many petitions for certiorari rather than too few,¹⁷ though I would confess that there are denials which seem hard to explain. But then as Professor Frankfurter said some thirty years ago, somewhat aghast at the thought that the Court would have to deal with as many as 500 petitions for certiorari in one term:

. . . . But when, as has already happened, the Court is confronted with 500 petitions at a single term, the objective standards governing the exercise of discretion may unwittingly fail in numerous instances. The reports make abundantly clear that because of the quantity of these petitions and the conditions under which they must be scrutinized, they are sometimes granted when they should have been denied. Is it not likely, too, that petitions are occasionally denied when they should have been granted? Their disposition rests inescapably upon judgment, and it is a familiar experience that judgment is less sure in the later stages of a long series.¹⁸

Certainly anyone acquainted with the business of the Court must conclude that there is no want of work to keep the Justices and their staffs thoroughly occupied with the duties of their office. If some of them do not occupy themselves fully with that business, it can only be because they feel that they do not need the time for consideration of the serious problems which face the Court which must be afforded their less expeditious or more conscientious brethren.

Professor Schwartz' plea for the delusive certainty that unanimous opinions appear to afford is, I think, similarly wanting in merit.¹⁹ Of course, he is not saying that the questions presented to the Court are not difficult and complex, or that different Justices cannot honestly disagree. He is saying, rather, that the conflict of views among the Justices ought to be hidden from the lower courts, the bar, the public, and the press. It is not really certainty for which he seeks, but the preservation of the myth, the destruction of which was Mr. Justice Holmes' contribution to Anglo-American jurisprudence. To put his thesis in his own words, Professor Schwartz says: "But even the Apollo at Delphi could not long retain the

17. See, e.g., the cases cited in the appendix to Mr. Justice Frankfurter's dissenting opinion in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 548-58 (1957).

18. FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 287 (1927).

19. "The older practice of filing separate opinions helped considerably to eliminate the inherent elements of unreliability in judicial opinions. But the working bar does not like multiple opinions. Paradoxically, the dislike seems to be based upon a desire for certainty."

SCHAEFER, *PRECEDENT AND POLICY* 6 (1956).

allegiance of men if it spoke with utterly inconsistent voices."²⁰ Certainly it is not the role of the Supreme Court to behave like the Delphic oracle; there is no greater reason why it should appear to behave like such an unreasoning body.

There are undoubtedly cases in which minority opinions would better remain unwritten and, if written, unpublished.²¹ There are more cases in which the minority opinions could be less wordy. But this may be equally well said of majority or even unanimous opinions. The fact is that the price of unanimity is often too high; certainly it is often much higher than the cost of published disagreement. As Professors Bickel and Wellington have recently said:

The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite [if they cite any] and the results they decree. This is very possibly a feature, even if not always a deliberate one, of the Court's response to today's controversy. The controversy has undoubtedly and understandably increased the pressure for unity within the Court and placed a great premium on opinions that speak for as many of Justices as possible. Hence we get opinions which have the vacuity characteristic of desperately negotiated documents.²²

Professor Schwartz says that the rejection of the principles of stare decisis in constitutional cases was appropriate in the course of the judicial revolution of the '30s, but now that the revolution has gone as far as he thinks it ought to go, the doctrine must be revitalized. He challenges Justices Black and Douglas for their "activist" role in continuing to reject prior constitutional doctrine. Without agreeing with the conclusions which these Justices reach in constitutional cases, one might believe that they, like the Court of the '30s and '40s as a whole, must be free to consider constitutional questions as constantly open for decision. The reasoning of the old opinions, the results of the constitutional doctrine stated in those cases, the current conditions to which such principles would be applied, and the effects that overruling precedent would have, should all weigh on the scale in determining whether to strike out

20. SCHWARTZ p. 354.

21. See Professor Bickel's admirable volume of opinions by Mr. Justice Brandeis which were never previously published. *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (Bickel ed. 1957).

22. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

anew in answering constitutional questions. One might ask for consistency in the applications of their own views whether the parties be accused of subversion or tax evasion. That personal predilection ought not to replace judicial wisdom, however, does not mean that this country must be burdened with ill-considered or inappropriate constitutional law.

It is in the area of nonconstitutional questions that the frequent rejection of the doctrine of stare decisis seems to be unwarranted. For here there are other agencies of government more competent to correct what the Court may consider to be its earlier errors. Yet Professor Schwartz seems to approve the denial of the application of the doctrine in such cases as *Girouard v. United States*.²³ In any event, there can be no quarrel that the doctrine ought not to be applied in a manner which can be justified only in terms of judicial fiat. If it is satisfactory to hold, even today, that professional baseball is not commerce for purposes of the application of the Sherman Act²⁴ because Mr. Justice Holmes once so ruled on behalf of the Court,²⁵ it borders on the absurd to go on from there to rule that professional boxing and professional football are commerce for purposes of the Sherman Act because there is no prior decision directly in point.²⁶

The rejection of the principles of stare decisis, however, can hardly have such harmful effects as the rejection of the notion of finality of the Court's own adjudications. Though the case has received little attention either from the press or from the law reviews, one of the more shocking decisions written into the *United States Reports* is that in the case of *United States v. Ohio Power Co.*,²⁷ where, on its own motion, after the denial of a timely petition for rehearing and the similar rejection of an untimely motion for rehearing, the Court reopened one of its own judgments, over a year and a half old, in order to reverse it. Little need be added to Mr. Justice Harlan's dissent on behalf of himself and Justices Frankfurter and Burton. His conclusion is hardly subject to challenge:

. . . I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the

23. 328 U.S. 61 (1946). SCHWARTZ p. 258.

24. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

25. *Federal Baseball Club, Inc. v. National League*, 259 U.S. 200, 26 A.L.R. 357 (1922).

26. *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club, Inc.*, 348 U.S. 236 (1955).

27. 353 U.S. 98 (1957).

Court's processes, than to be left in the kind of uncertainty which today's action engenders, as to when their cases may be considered finally closed in this Court.²⁸

Whatever criticisms may be levelled against the Court, however, and there are many, one cannot help but agree with Professor Schwartz' theme that it is important for all Americans to understand its function and its place. And, as Professor Paul Freund has said:

To understand the Supreme Court of the United States is a theme that forces lawyers to become philosophers. Alfred North Whitehead, suggesting that the key to a science of values will be found in aesthetics, remarked that the Supreme Court is seeking the aesthetic satisfaction of bringing the Constitution into harmony with the activities of modern America. That is a satisfaction which the Court, in fits of anesthesia, has sometimes denied itself; but no more so than legislatures and executives, upon whom the pleasureable quest equally devolves.²⁹

It cannot be gainsaid that the need for literature which will educate the public in the ways of the Court is a great one. The two most penetrating analyses of the role of the judiciary and especially of the Supreme Court in our system of government³⁰ have both recognized that the power of the Court "is the power of public opinion."³¹ If that public opinion is to be an enlightened one, the elucidation must come from such works as this one by Professor Schwartz. Ignorance about the Court's behavior is not likely to be dispelled by the inept or calculatedly inaccurate reporting and commentary in our daily and weekly press.

II

High on the lists of subjects vitally affected by the Court's activities and in need of elucidation are its rulings on matters concerning the distribution of power between the nation and the states. The demand is in part created by the Court itself, which often seems unable to formulate guiding principles applicable beyond the case immediately before it. In part the void exists because public and press reactions have been measurable in terms of heat rather than light.

28. *Id.* at 111.

29. FREUND, ON UNDERSTANDING THE SUPREME COURT 7 (1949).

30. 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 98-105, 139-52 (Bradley ed. 1945); 1 BRYCE, THE AMERICAN COMMONWEALTH 228-76 (3d ed. 1893).

31. 1 DE TOCQUEVILLE, *op. cit. supra* note 30, at 151.

In 1835 de Tocqueville confidently predicted the decline of federal power in favor of that of the states:

. . . . I am strangely mistaken if the Federal government of the United States is not constantly losing strength, retiring gradually from public affairs, and narrowing its circle of action. It is naturally feeble, but it now abandons even the appearance of strength. On the other hand, I thought that I noticed a more lively sense of independence and a more decided attachment to their separate government in the states. The Union is desired, but only as a shadow; they wish it to be strong in certain cases and weak in all others; in time of warfare it is to be able to concentrate all the forces of the nation and all the resources of the country in its hands, and in time of peace its existence is to be scarcely perceptible, as if this alternate debility and vigor were natural or possible.

I do not see anything for the present that can check this general tendency of opinion; the causes in which it originated do not cease to operate in the same direction. The change will therefore go on, and it may be predicted that unless some extraordinary event occurs, the government of the Union will grow weaker and weaker every day.³²

If we must seek that single "extraordinary event" to explain the failure of de Tocqueville's prognosis, it would, of course, have to be the Civil War. But it is more likely that the cause must be sought not only in that bloody conflict but in the rapid development of transportation, commerce, and communication, in the opening of the West where parochial loyalties did not have time to develop at the expense of loyalty to the national government until a much later day, and in the consequent emergence of the United States as a world power. In any event and whatever the causes, before the turn of the century Bryce was able to paint a very different picture. To him the rapid decay of the state governments was already patent:

. . . . [T]he political importance of the States is no longer what it was in the early days of the Republic. Although the States have grown enormously in wealth and population, they have declined relatively to the central government. The excellence of State laws and the merits of a State administration make less difference to the inhabitants than formerly, because the hand of the National government is more frequently felt. The questions which the State deals with, largely as they influence the welfare of the citizen, do not touch his imagination like those which Congress handles, because the latter determine the relations of the Republic to the rest of the world, and affect all the area that lies between the two oceans. The State set out as an isolated and self-sufficing commonwealth. It is now merely a part of a far grander whole, which seems to

32. *Id.* at 414-15.

be slowly absorbing its functions and stunting its growth, as the great tree stunts the shrubs over which its spreading boughs have begun to cast their shade.³³

On this score at least, Bryce has proved more far-sighted than de Tocqueville. By a decade ago, a third astute foreign observer, somewhat lacking in the objectivity which grounded the studies of de Tocqueville and Bryce, could nonetheless accurately talk of the American state as "a province in which it is not difficult to distinguish what may perhaps be termed the vestigial remains of sovereign power."³⁴

Some of the causes of the deterioration of state governments—those suggested by the quotations from Bryce and de Tocqueville—are obviously irreversible. Certainly to the central government belongs the power necessary to maintain the safety of the nation, its people, and its commerce, in a world in which the behavior of our international neighbors impinges only too directly on our own well-being. Insofar as the maintenance of this power is the cause of the enhancement of federal authority at the expense of the states, nothing can be done—certainly nothing should be done—to redress the balance. Similarly, developments in communication and transportation have meant that certain areas of our economy, to the extent that they are to be subjected to regulation at all, should be the subject of national rather than local authority. Unlike the subjects of war and peace, of foreign relations, of international commerce, however, there are subjects of government as to which the shift of power from the states to the nation is not equally justifiable in terms of the constitutional plan.

In these latter areas, however, the assumption of power by the federal government has been due in large measure to the inability or unwillingness of the states to deal with the problems which are properly theirs. Too often have the states thrown up their hands and begged the national government to assume responsibilities which belong to them. Too readily have they submitted to the coercive use of the central government's fiscal powers—used both in the form of bribe and in the form of threat, blackmail, and coercion—to take over matters of peculiarly local concern. Unemployment insurance, road construction, and even so direct a police

33. 1 BRYCE, *op. cit. supra* note 30, at 562.

34. LASKI, *THE AMERICAN DEMOCRACY* 138 (1948). His bias against the states is revealed more specifically in Laski, *The Obsolescence of Federalism*, 98 *NEW REPUBLIC* 367 (1939), from which the material in his book is drawn.

function as the apprehension of kidnappers, will serve as examples. Such irresponsibility in turn may be accounted for by a lack of capacity and a corruption of state officials which have too often been the hallmarks of state and local governments. Robert S. Allen's indictments reflect the hyperbole which is so frequently an attribute of his writings. But in this instance there is unfortunately too much truth in his conclusions:

In state government are to be found in their most extreme and vicious forms all the worst evils of misrule in the country. Venality, open domination and manipulation by vested interests, unspeakable callousness in the care of the sick, aged, and unfortunate, criminal negligence in law enforcement, crass deprivation of primary constitutional rights, obfuscation, obsolescence, obstructionism, incompetence, and even outright dictatorship are widespread characteristics.³⁵

That the fault for this situation lies with the citizens of the states who have lost interest in the management of local affairs, in part because national party labels tend to overshadow real local issues, is an old story.³⁶

Thus, to speak today of the United States as a federated union is to speak of an ideal which has been largely but not completely dissipated. Yet contemporary history reveals only too clearly that Lord Acton's dictum about power is as relevant to governments as it is to individuals. For him it followed that "the distribution of power among several States is the best check on [the evils of] democracy."³⁷ In the revival of responsible state government lies a hope for the reconstruction of "the only breakwater against the ever pounding surf which [has] threatened to submerge the individual and destroy the only kind of society in which personality could survive."³⁸ Or, to put it in Professor Schwartz' terms: "[I]t is relevant to note, a country of continental extent such as ours has never been effectively governed save by a federal system or a despotism."³⁹ If the states are to reassume their part in the maintenance of that balance of power which the Constitution seems to have contemplated,⁴⁰ they must undertake a responsibility which they have

35. OUR SOVEREIGN STATE vii (Allen ed. 1949).

36. See, e.g., 1 BRYCE, *op. cit. supra* note 30, at 548, 576.

37. ACTON, *THE HISTORY OF FREEDOM* 23 (1907).

38. Learned Hand, "Mr. Justice Brandeis," *THE SPIRIT OF LIBERTY* 170 (2d Dilliard ed. 1953).

39. SCHWARTZ p. 48. See also POUND, "Law and Federal Government," *FEDERALISM AS A DEMOCRATIC PROCESS* 23 (1942); "No domain of continental extent has been ruled otherwise than as an autocracy or as a federal state."

40. See, e.g., *THE FEDERALIST* Nos. 45 & 46 (Madison); ROBERTS, *THE COURT AND THE CONSTITUTION* 1 (1951). This is not the place to express my disagreement with my

heretofore shunned, and, in doing so, they must receive the support of the Supreme Court among whose duties is the defense of "the states from the exaggerated claims of the Union."⁴¹

Nor should the desirable role which the states can play in our democracy be obscured by the rantings of New Hampshire witch hunters or Southern demagogues who would use the cry of states' rights to gain their own illegitimate ends. No one can, in good faith, doubt that the very same "statesmen" who deplore the Court's decision in *Brown v. Board of Education*⁴² as an "interference in local affairs," would applaud a decision by the Court imposing segregation on the nation's schools. The lack of principle behind the attacks on the Court by even the most principled of this group is made patent by a comparison of the views of Senator Byrnes,⁴³ Mr. Justice Byrnes,⁴⁴ and ex-Governor Byrnes⁴⁵ on the subject of division of power between the states and the nation.

Nevertheless, the Supreme Court must bear some of the onus for the situation in which the states find themselves. At a time when the states were the forward-looking members of the governmental partnership, the Supreme Court, along with the state courts,⁴⁶ in a long series of decisions expounding their notions of "substantive due process," succeeded in destroying to a very large extent the capacity of the states to deal with the problems which they were ultimately called upon to face. *Lochner v. New York*,⁴⁷ though probably the most infamous of these judgments, was by no means untypical.⁴⁸ It was only after the Court had committed

colleague Professor Crosskey. See CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953). But I would suggest to Professor Schwartz that Crosskey's two volumes form a more scholarly basis for the expansionist views of the Constitution than HAMILTON & ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW* (1937), to which he makes reference. See Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79, 92 (1953): "Never has so adequate a gloss—fashioned from materials from a hundred sources—been written to an authoritative text. It is for this reason that Crosskey's volumes are timely—that is, they are for all time."

41. I DE TOCQUEVILLE, *op. cit. supra* note 30, at 151.

42. 347 U.S. 483, 38 A.L.R.2d 1180 (1954). For a detailed and a fairly detached examination of the school segregation cases, see BLAUSTEIN & FERGUSON, *DESEGREGATION AND THE LAW* (1957).

43. E.g., *The Constitution and the Will of the People*, 25 A.B.A.J. 667 (1939).

44. E.g., *Taylor v. Georgia*, 315 U.S. 25 (1942); *United States v. Texas*, 314 U.S. 480 (1941); *Edwards v. California*, 314 U.S. 160 (1941).

45. E.g., *The Supreme Court Must Be Curbed*, U.S. News and World Report, May 18, 1956, p. 50.

46. See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

47. 198 U.S. 45 (1905).

48. See SCHWARTZ pp. 191-98; FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT app. I (1938).

its depredations on federal power as well as state power that the limited constitutional revolution of the '30s, which is the subject matter of Professor Schwartz' first chapter, occurred. That "judicial revolution," in setting to right that which had previously been overturned, operated primarily in the national sphere. To the states, therefore, was never returned fully the powers of which the Court had deprived them.

Obviously this is not the place to examine the whole subject of the Court's decisions which affect the distribution of power among the various governments in this country. Casual glances at two subjects may suffice to portray the kinds of problems which federalism presents to the Court and the manner in which these issues are being treated by the Court.

III

"No matter how well screened by doctrinal phrases or sterilized principles, the cases arising under the commerce clause cover concrete conflicts between the state and national power."⁴⁹ This is true largely because the language of the commerce clause⁵⁰ has been read both as a grant of authority for federal action and as a limitation on the powers of the states. The negative implications are several. Insofar as the federal power is held not to reach certain aspects of commerce, the implication to be drawn is that such commerce is properly the subject of state authority.⁵¹ Even if power is present in the federal government, however, power to act on the same subject may still belong to the states, so long as the state regulation is not inconsistent with the federal regulation, does not discriminate against interstate commerce, and is not an "undue" burden on interstate commerce.

There is today little left for Supreme Court decision so far as the extent of congressional power is concerned. Though Professor

49. FRANKFURTER, MR. JUSTICE HOLMES AND THE CONSTITUTION 79 (1939).

50. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cl. 3.

51. For example, for many years insurance was thought to be beyond federal regulation and thus appropriately within the domain of the states. For some reason, Professor Schwartz seems to have assumed that a holding that the insurance business was the subject of control under the Sherman Act precluded state action generally. SCHWARTZ pp. 42-43. Certainly this was not a necessary conclusion to be drawn from the ruling in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See Powell, *Insurance as Commerce in Constitution and Statute*, 57 HARV. L. REV. 937 (1944). In any event, the reader of the Schwartz book would be hard put to discover that the Court was unanimous in the view that the insurance business could be the subject of federal regulation and divided only on the question whether the Sherman Act should be construed to cover that business.

Schwartz deplores the result, apparently because the Court has gone beyond even the Marshall conception of federal power, he depicts it accurately when he says: "there are really no limitations other than Congressional self-restraint upon the federal commerce power."⁵² He does not, of course, mean that action taken under the commerce power is not subject to the other limitations on federal authority contained in the Constitution. He means simply that by reason of opinions such as *Wickard v. Filburn*,⁵³ Congress is now free to read any economic activity as coming directly within the definition of interstate commerce or as affecting commerce so that it may be subjected to federal regulation. In short, the Court has read out of the commerce clause the qualifying phrase: "with foreign Nations, and among the several States, and with the Indian Tribes" Or it may be that the interdependence resulting from the advances of technology, rather than the Court, has made the qualifying phrase obsolete.

It might be thought that such a broad reading of the federal power (which Professor Schwartz suggests is excessive though he offers no alternative) should lead to a less stringent limitation on state action which affects commerce. But Professor Schwartz reaches a different conclusion. If he believes that the Court has not sufficiently restricted the power of the federal government under the commerce clause, he also believes that the Court has not been severe enough in limiting the powers of the States insofar as the exertion of that power may be said unduly to burden interstate commerce or to discriminate against it:

If separate state regulation of interstate commerce, such as that sustained in the recent decisions discussed,⁵⁴ is to be tolerable at all, it must be scrutinized with a jealous judicial eye.⁵⁵ For the power to regulate

52. SCHWARTZ p. 41.

53. 317 U.S. 111 (1942).

54. *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Maurer v. Hamilton*, 309 U.S. 598, 135 A.L.R. 1347 (1940); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952); *California v. Thompson*, 313 U.S. 109 (1941); *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72 (1939); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Bode v. Barrett*, 344 U.S. 583 (1953); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 17 A.L.R.2d 407 (1950). The cases are cited in the order in which Professor Schwartz dealt with them.

In fairness to Professor Schwartz, it should be stated that these conclusions on the inhibitions on state power are drawn from the transportation cases. But there is no indication that he would limit his conclusions to these cases.

55. Compare the following more recent pronouncement by Professor Schwartz: "Even in an era when states' rights exist largely by Federal sufferance, state authority should be scrutinized with anything but a jealous eye by one cognizant of the values which even a

also involves, to paraphrase the famous Marshall dictum, the power to destroy.⁵⁶ State regulation can all too easily be employed as a device to eliminate competition from out of state or to discriminate against such competition. Of course, outright embargo on interstate commerce by a state or patent discrimination by it against such commerce will be stricken down without any difficulty. But the states are hardly ever so artless as to avow such obviously unseemly uses of authority. When a state employs its regulatory power for an improper purpose (such as discrimination against interstate commerce), it is not so naive as to admit it. It disguises the true motives of its action and seeks to give some legal pretext (e.g., that its action is based upon the need for highway safety). The Supreme Court must then unmask the ruse—not always a simple matter.⁵⁷

Thus, Professor Schwartz would seem to call on the Court to indulge a presumption against the validity of state legislation affecting interstate commerce. Combining such a presumption with the broad reading of federal power under the commerce clause would be to destroy state authority over commerce, which is, indeed, where Mr. Justice Jackson was leading us:

There can be no doubt that in the original Constitution the states surrendered to the Federal Government the power to regulate interstate commerce, or commerce among the states. They did so in the light of a disastrous experience in which commerce and prosperity were reduced to the vanishing point by states discriminating against each other through devices of regulation, taxation and exclusion. It is more important today than it was then that we remain one commercial and economic unit and not a collection of parasitic states preying upon each other's commerce. I make no concealment of and offer no apology for my philosophy that the federal interstate commerce power should be strongly supported and that the impingement of the states upon that commerce which moves among them should be restricted to narrow limits.⁵⁸

Fortunately, almost from the beginning,⁵⁹ and with only occasional periods of aberration,⁶⁰ the Court has rejected the extremist views, such as those of Mr. Justice Jackson, in favor of the right of the

watered-down federalism may still possess." *States' Rights v. Federal Rights*, N.Y. Times Magazine, Nov. 17, 1957, pp. 24, 72. See also 2 REPORT OF THE ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS 62 (1940).

56. "[N]ot," said Holmes, "while this Court sits." *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 56 A.L.R. 583, 586 (1928) (dissenting opinion).

57. SCHWARTZ pp. 212-13.

58. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 66-67 (1955).

59. Professor W. Howard Mann, who reads the commerce power as broadly as does Professor Crosskey, if for different reasons, is in the course of preparing a monograph on the early commerce clause cases which may well shed new light on an area which most students of constitutional law had thought to be already fully illuminated.

60. See, e.g., *Barrett v. City of New York*, 232 U.S. 14 (1914).

states to protect their interests in that commerce. Mr. Chief Justice Stone supplied a rationale in *Duckworth v. Arkansas*,⁶¹ which is not untypical of a whole series of cases which Professor Schwartz has chosen to ignore:

.... As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity, and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court, notwithstanding the commerce clause.⁶²

Insofar as these issues arising under the commerce clause are concerned with the question whether congressional legislation has precluded state action, however, Professor Schwartz would go further than has the Court in sustaining the power of the states:

Due regard for our federalism, in its practical operation, favors survival of the reserved authority of the states, unless Congress has clearly swept the boards of state power. Instead, the Supreme Court has even held state regulation invalid because incompatible with federal laws, in the face of express indications of a Congressional intent not to displace existing state regulation.⁶³

It is significant that Professor Schwartz is forced to rely for the support of his thesis on dissenting opinions of the Court, such as that of Mr. Justice Frankfurter in *Bethlehem Steel Co. v. State Labor Relations Board*:

.... Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any

61. 314 U.S. 390, 138 A.L.R. 1144 (1941). Significantly, Mr. Justice Jackson concurred specially:

"I agree that this Court should not relieve Duckworth of his conviction, but I would rest the decision on the constitutional provision applicable only to the transportation of liquor, and refrain from what I regard as an unwise extension of state power over interstate commerce."

Id. at 397, 138 A.L.R. at 1147.

62. *Id.* at 394-95, 138 A.L.R. at 1146.

63. SCHWARTZ p. 225.

indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.⁶⁴

Like Professor Schwartz, I find this proposition unanswerable. But the Court has consistently rejected this concept by a majority which usually includes Mr. Justice Black, who is otherwise dedicated to the preservation of states' rights in commerce clause cases, and occasionally even includes Mr. Justice Frankfurter, despite his clearly expressed presumption in favor of the states which is contained in the above quotation.⁶⁵ As in the *Bethlehem* case, the question has arisen most frequently in recent years in terms of regulation of labor relations.⁶⁶ The result of the Supreme Court's emphasis on exclusive federal power, when combined with the persistent refusal of the NLRB to exercise its authority, is the creation of a no-man's land of indefinite boundaries in which important aspects of labor relations remain free from required supervision. The ensuing confusion has begun to impose on the Supreme Court's docket a series of cases in themselves as insignificant as those which are perennially put there by claimants under the FEOLA, but which cannot be finally resolved by the lower courts until further clarification is forthcoming from above.

Mr. Justice Black once advocated a course of action which, like that of Mr. Justice Jackson, might be labeled as extreme. But I think his views have not been fairly represented by Professor Schwartz in this book. Professor Schwartz' assertion is that Mr. Justice Black would abandon the power of judicial review with

64. 330 U.S. 767, 780 (1947), quoted in SCHWARTZ at 227. See also Mr. Chief Justice Stone, dissenting in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 176-77 (1942), quoted in SCHWARTZ at 223:

" . . . Due regard for the maintenance of our dual system of government demands that the courts do not diminish state power by extravagant inferences regarding what Congress might have intended if it had considered the matter, or by reference to their own conceptions of a policy which Congress has not expressed and is not plainly to be inferred from the legislation which it has enacted."

65. See, e.g., *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957).

66. The problem of federal occupation of the field is not, of course, limited to commerce clause cases, though such cases predominate. Indeed, it is only when the issue arises in other contexts that the public and the press seem to take any notice of it whatsoever. Thus, when in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (a case which Professor Schwartz did not think sufficiently important to include in this consideration of the Supreme Court's business), the Court sustained the ruling of the Pennsylvania Supreme Court that federal legislation had superseded the Pennsylvania sedition laws, a not extraordinary clamor arose in which the Court was charged with protecting communists and subverting the states. Bills were introduced in Congress which would have created a presumption against federal occupation of the field not only with reference to "security cases," but in general terms. The bills died when the hubbub subsided. See Note, *The Supreme Court*, 1955 Term, 70 HARV. L. REV. 83, 116-20 (1956).

reference to matters of state regulation of commerce. The fact is that the Court has retained for itself the power of allocation of authority between the states and the federal government over the subject of commerce, and thus it decrees on the basis of shadowy principles whether state regulation does or does not "unduly" burden interstate commerce, whether such legislation does or does not "discriminate" against interstate commerce, and whether such legislation does or does not conflict with federal policy. These doctrines originated at a time when Congress had not entered what Professor Schwartz aptly terms its "Benthamite" phase, and it may then have been necessary for some branch of the federal government to exercise this power restrictive of the states. Now that Congress has learned how to implement its views on this subject by legislation, it may well be time for rejection of the "negative implications" doctrine. And this is what I believe Mr. Justice Black has called for rather than the total abandonment of judicial review in this area.⁶⁷ The silence of Congress during the early days of this country could reasonably be construed to mean that Congress intended to leave the subject free from all regulation. Today such inaction can more reasonably be construed to mean that Congress has left the power of regulation to the states. Mr. Justice Black would substitute for the "negative implications" of the commerce clause as a basis for review, the supremacy clause and the equal protection clauses of the Constitution. Where the expressed congressional policy is in conflict with the attempted exercise of power by a state, certainly the Court would be called upon to strike down the state legislation. Similarly the particular evil of discrimination by the states against interstate commerce would be adequately handled by review under the equal protection clause.⁶⁸ Any time state legislation threatened to become a burden on interstate commerce, federal legislative or administrative action could eliminate

67. See, e.g., *Morgan v. Virginia*, 328 U.S. 373, 387, 165 A.L.R. 574, 585 (1946) (concurring opinion); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 788 (1945) (dissenting opinion); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 189 (1940) (dissenting opinion); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 316, 117 A.L.R. 429, 435 (1938) (dissenting in part). Mr. Justice Black seems to have surrendered on this issue since the *Morgan* case.

68. "State legislation which patently discriminates against interstate commerce has long been held to conflict with the commerce clause itself. The writer has acquiesced in this interpretation . . . , although agreeing with the views of Chief Justice Taney that the commerce clause was not intended to grant courts power to regulate commerce even to this extent. The equal protection clause would seem to me a more appropriate source of judicial power in respect to such discriminatory laws." Black, Jr., dissenting in *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 551 n.2 (1949).

such effects.⁶⁹ Whether one concludes with Mr. Justice Black that Congress is the better forum for determination of the propriety of state regulation of interstate commerce or rejects his thesis, as the Court has consistently done, it must be said that it is entitled to more accurate representation than that afforded by Professor Schwartz.

So far as the issue is state taxation of interstate commerce rather than state regulation thereof, Professor Schwartz, once again reverting to his principle that the Court should indulge a distrust of state action, offers no light to dispel the Stygian darkness in which the Court has engulfed the problem.⁷⁰ Probably neither is to blame for the failure to provide a solution adequate to the myriad problems which are contained in the various details of state fiscal programs. The principle which underlies the Court's decisions is a simple one: "We are told that interstate commerce is to be unfettered by state taxation but that interstate commerce must pay its own way."⁷¹ Nonetheless, the application of this simple formulation has confounded the Court and placed the state legislatures and the state courts in the unenviable position of not knowing whether the taxes assessed are collectible until the state has gone through the lengthy and expensive test of securing Supreme Court adjudication.⁷² As one of the best of state supreme court justices has said:

. . . . In some areas of the law decisions have proliferated without forming recognizable patterns. As examples I would cite the federal decisions on state taxation of interstate commerce or our own decisions in will-contest cases and zoning cases. The result is that although general principles are always stated in the opinions, decision actually turns on the court's subjective appraisal of the facts. Under such circumstances a court, unless it is bold enough to wipe the slate clean, is forced, despite Holmes's injunction, to join lawyers in a search for cases on a pots-and-pans basis.⁷³

The inhibitions on state action resulting from the inability of the state to know whether its fiscal policy will be sustained are apparent. But the sole solution in this area which appears to have some

69. See Black, J., dissenting in *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 788-90 (1945).

70. For one description of the confusion with relation to gross receipts taxes, see Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 710 (1947).

71. Freund, "Review and Federalism," *SUPREME COURT AND SUPREME LAW* 101 (Cahn ed. 1954). See 2 REPORT OF THE ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS 65-66 (1940).

72. The *Spector* litigation, culminating in *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951), was in the courts for almost a decade before the Court held that the tax was invalid.

73. SCHAEFER, PRECEDENT AND POLICY 9 (1956).

feasibility contains within it another problem. Professor Paul Freund has suggested that

In the field of state taxation of interstate enterprise, the case for a special tribunal with rule-making powers is stronger. The possibility of framing standards and of working out their application through more continuous supervision than the Court can furnish might well justify the establishment of a federal commission comparable to the Interstate Commerce Commission.⁷⁴

But will the states prefer the uncertainties of Supreme Court litigation to the "indignities" of submitting themselves to adjudication before a "mere" administrative agency?

The Court has shifted to the congressional forum the issue of what power the federal government shall exercise over commerce. It may well be that exclusive authority should also be shifted to that body, in which the states are adequately represented, to answer the other questions arising out of the "negative implications" of the commerce clause, what powers the states may exercise over commerce, leaving to an administrative tribunal the resolution of the difficult issues of state taxation of interstate commerce. If the Court has not volunteered this solution, there is no reason why Congress should not examine the possibilities and take appropriate action should it find such action desirable. Certainly it can do no worse than the Court has done. The latter's action is summed up in Professor Powell's "Restatement" of this area of the law, unfortunately accurate both in its representation of the work of the Supreme Court and of some of the work of the A.L.I. Restatements: "*Black letter text*: Congress has power to regulate interstate commerce. *Comment*: The states may also regulate interstate commerce, but not too much. *Caveat*: How much is too much is beyond the scope of this Restatement."⁷⁵

IV

There are many, including Justices of the Supreme Court, for whom questions of federal jurisdiction involve no more than the application of technical formulae created only to confuse the uninitiated. More sophisticated students of government, again including members of the Supreme Court, understand that these problems really involve fundamental questions of power between

⁷⁴ Freund, *supra* note 71, at 101.

⁷⁵ *Id.* at 96-97.

the nation and the states.⁷⁶ As it was put by Mr. Justice Stone for the Court: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."⁷⁷ Often as such statements have been uttered by the Court, however, they have not always provided a guide to its action. Over the years, the federal judicial power has been vastly expanded, necessarily at the expense of that of the states, largely through self-aggrandizement and occasionally with congressional sanction.

Insofar as the judicial power of the federal courts has been extended by the exercise of the power of judicial review, it has been the subject of numerous treatises and tracts. When the encroachments have taken the form of opinions dealing with technical aspects of federal jurisdiction, however, they seem to have been the concern of but a few ivory-towered scholars. And yet, by the latter means as surely as by the former have the federal courts taken unto themselves a power which they ought not to have. And though the lower federal courts have been the prime transgressors, they have usually received the sanction of the Supreme Court or at least have not met with its disapproval. A few recent examples may demonstrate this proposition.

In *National Mutual Ins. Co. v. Tidewater Transfer Co.*,⁷⁸ the issue was the constitutionality of the statute extending the diversity jurisdiction to suits between citizens of the District of Columbia and citizens of the states.⁷⁹ The opinion, written by Mr. Justice Jackson for a majority of the majority,⁸⁰ proceeded to read out of the Constitution all the limitations on the jurisdiction of the federal courts except the requirement of the existence of a case or controversy. In a sort of "this is the house that Jack built" opinion, Mr. Justice Jackson piles previous invasions of article III limitations

76. See, e.g., Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Kurland, *Mr. Justice Frankfurter, The Supreme Court and The Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187 (1957).

77. *Healy v. Ratta*, 292 U.S. 263, 270 (1934). See also Frankfurter, J., dissenting, in *Konigsberg v. State Bar*, 353 U.S. 252, 274 (1957).

78. 337 U.S. 582 (1949).

79. 28 U.S.C. § 1332(b) (1952).

80. "A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable." Frankfurter, J., dissenting, 337 U.S. 582, 655 (1949).

one upon the other until the logical extreme is reached. An example of the process is revealed by the use of *Williams v. Austrian*⁸¹ and *Schumacher v. Beeler*⁸² to state a constitutional proposition which in fact counsel in neither case had either briefed or argued. In this manner does stare decisis become a dangerous doctrine. The Court has not again taken up the issue mooted in the *Tidewater* case, but the lower federal courts have continued to put the latitudinarian opinion of Mr. Justice Jackson to what they consider a good use.⁸³

A more recent example of the extension of federal judicial power is found in *Textile Workers Union v. Lincoln Mills*.⁸⁴ There the relevant statute purported to create jurisdiction in the federal courts over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce."⁸⁵ The Court sustained the power of the federal courts on the thesis that it was Congress' intent to have the federal courts create the substantive law controlling the resolution of such controversies. Thus, the Court proved willing to expand federal question jurisdiction in a manner which even John Marshall had rejected in *Osborn v. Bank of the United States*.⁸⁶ Congress' power to grant judicial authority to the federal courts is now practically unlimited, for no longer need they even go through the form of specifying the federal right which is to be vindicated in the federal forum. And the Court is willing to undertake the job of filling in any blank check which it says Congress can give it. That Congress had no such idea in mind when the statute involved in the *Lincoln Mills* case was enacted seems clear from the legislative history appended to Mr. Justice Frankfurter's dissenting opinion.⁸⁷

At least, on these two occasions, the Court has sought to carry out what it thought to be the will of Congress. Under the shibboleths of "pendent jurisdiction,"⁸⁸ and "ancillary jurisdiction," the lower federal courts without restraint by the Supreme Court have proceeded to take jurisdiction over nonfederal claims and have

81. 331 U.S. 642 (1947).

82. 293 U.S. 367 (1934).

83. See, e.g., *Food Machinery and Chemical Corp. v. Marquez*, 139 F. Supp. 421 (D.N.M. 1956).

84. 353 U.S. 448 (1957).

85. 61 STAT. 156 (1947), 29 U.S.C. § 185 (1952).

86. 9 Wheat. 738 (U.S. 1824).

87. 353 U.S. at 485-546 (1957).

88. See the progeny spawned by *Hurn v. Oursler*, 289 U.S. 238 (1933), such as *United Lens Corp. v. Doray Lamp Co.*, 93 F.2d 969 (7th Cir. 1937).

practically read the limitation of *Strawbridge v. Curtis*⁸⁹ off the books. An example of the process is available in the cases following *Treinius v. Sunshine Mining Co.*,⁹⁰ which have used its holding, that absolute diversity between claimants in an interpleader action satisfied the *Strawbridge* rule, to justify jurisdiction over interpleader actions in which some of the claimants—or indeed all but one—are citizens of the same state.⁹¹ Meanwhile the Court has refused to entertain the question again to give guidance to the other courts in the federal judicial system, with confusion the natural result. However justified may be the expansion of jurisdiction in cases of statutory interpleader, it certainly cannot be equally well-explained in those opinions finding “ancillary jurisdiction” so easily in class actions,⁹² intervention,⁹³ and impleader cases,⁹⁴ to cite but a few categories. In almost all of these situations a conflict among circuits seems to exist, but there is no elucidation forthcoming from the Court. The new criterion for accepting jurisdiction appears to be “convenience” rather than constitutional and statutory authorization.

With most such matters Professor Schwartz is not concerned, at least in this volume. When he does talk of jurisdictional problems it is to take exception to the “strict” application of the doctrines requiring adequate standing for the litigants before the Court and requiring abstention from decision of “political questions.”⁹⁵ Indeed, he also objects to the one major decision of the past twenty years which sponsored a doctrine limiting the power of the federal courts rather than expanding it. He says of *Erie R.R. v. Tompkins*:⁹⁶

. . . . It may be, as Justice Frankfurter stated only last year, that the *Erie Railroad* doctrine’s essence is that the difficulties of ascertaining state law are fraught with less mischief than the doctrine it repudiated.

89. 3 Cranch 267 (U.S. 1806).

90. 308 U.S. 66 (1939).

91. The cases are well analyzed in *Haynes v. Felder*, 239 F.2d 868 (5th Cir. 1957).

92. In the case of *Black v. Amen*, the Court had under advisement the question of the necessity for absolute diversity in “spurious” class actions. See 26 U.S.L. WEEK 3171 (U.S. Dec. 3, 1957). After argument, but before decision, the case was settled by the parties. See also Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

93. See, e.g., *Wichita R.R. & Light Co. v. Public Util. Comm’n*, 260 U.S. 48 (1922); *Virginia Elec. & Power Co. v. Carolina Peanut Co.*, 186 F.2d 816, 32 A.L.R.2d 234 (4th Cir. 1951).

94. See, e.g., *Morrell v. United Air Lines Transp. Corp.*, 29 F. Supp. 757 (S.D.N.Y. 1939).

95. SCHWARTZ pp. 142–50.

96. 304 U.S. 64, 114 A.L.R. 1487 (1938).

But is such mischief so much less that it justified the Court in overturning a doctrine that proved workable for so long a period?⁹⁷

Nevertheless, he concedes that with the promulgation of the *Erie* doctrine, the last vestige of excuse for the retention in the federal courts of diversity of citizenship jurisdiction disappeared. With this, I heartily concur.

What seems called for is a reasoned revision by Congress of the Judicial Code. The revision of ten years ago was a haphazard job at best. It certainly did not receive the attention from Congress which it deserved. In any new revision the legislators would do well to remember that the allocation of power to the federal courts should be limited to those matters in which their expertise in federal law might be used, leaving to the state judiciaries the primary obligation of pronouncing state law.⁹⁸

The Supreme Court has had and continues to have a vital part to play in the distribution of power between the states and the nation. Whether one believes that federalism is an outmoded and expensive luxury which will have to disappear, or that local government is the last real safeguard against totalitarianism, or some more reasonable intermediate thesis, it is appropriate to ask that the Court understand not only the immediate but the ultimate effects of the judgments which it renders. It is equally important that the people of this country understand this problem and the Court's role. Toward this latter goal, Professor Schwartz makes a substantial contribution in this volume. If it is not so good a book as he is capable of writing, it is far better than the screed which is so often offered on the same subject.

97. SCHWARTZ p. 158.

98. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216 (1948).