THE WARREN COURT AND AMERICAN FEDERALISM—A PRELIMINARY APPRAISAL

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ATTACKS UPON the Supreme Court during the past half-decade have centered about judicial pronouncements which, critics contend, reflect an excessively narrow view of state powers. While some of these criticisms question directly the institutional role of the Court, more often they represent expressions of displeasure with respect to a single holding or a particular line of decisions interpretive of federal-state relationships. Among hostile groups, the labeling of a decision as that of the "Warren Court"¹ serves to evoke an emotional response usually reserved for the forum of partisan politics. Nor are such outbursts limited to persons or organizations ordinarily unconcerned or unacquainted with the judicial process. Indeed, the leadership for such "crusades" against the Court has come from professional associations which, in former years, could be counted among the most outspoken defenders of a vigorously assertive judiciary.²

What factors have called forth the most recent barrage of invective from presumably responsible state advocates and their supporters in Congress? Has the Court deliberately reentered the political thicket from which it seemed to have emerged following the contest of the 1930's? Is the Court guilty of an excessive degree of judicial activism in the determination of federal-state issues? Exploration of these questions requires a reappraisal of the Court's behavior in those traditional but vital areas which relate to the apportionment of powers between nation and state. The bases of conflict will be familiar to all students of the American constitutional system and its development. A modern garb presents variants, but the contour of power relationships and the nature of the struggle for control remain essentially unchanged.

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¹ Since President Eisenhower's appointment of the present Chief Justice in 1953, four new associate Justices—Harlan, Brennan, Whittaker, and Stewart—have joined the Court. Justices Black, Frankfurter, and Douglas represent the old "Roosevelt Court." Justice Clark is the sole Truman appointee who continues to serve.

² For a review of the changing attitudes of the American Bar Association, see John R. Schmidhauser, *The Warren Court and State Power*, a paper presented before the 1959 Annual Meeting of the American Political Science Association. A useful survey of anti-Court sentiment reflected in recent studies appears in Kurland, *The Supreme Court and Its Literate Critics*, 47 YALE REV. 596 (1958).

THE DOCTRINE OF DEFERENCE

Decisions of the Court during the last twenty years have evidenced a marked decline, if not a complete demise, of the much-decried standards which had been applied to test the constitutionality of congressional enactments. The deferential treatment accorded legislative acts and administrative actions has proceeded to such a point that few limitations of substance continue to exist. This retreat has meant that national powers may be exercised within a broad range that holds few dangers of transgression of constitutional boundaries. Relegated to the annals of the past are the once rigid restraints on economic and social programs imposed by the commerce, taxation, and contract clauses; the non-delegability requirements implicit in the exercise of legislative authority; and the narrow philosophy of government characteristic of due process interpretations dating from the closing years of the nineteenth century.³ With few notable exceptions, the present Court seems inclined to limit sporadic holdings of unconstitutionality to cases involving the protection of individual liberties.⁴

In all of the controverted areas of the 1930's, there has been a noticeable tendency to extend to the states the same permissive attitude adopted toward federal enactments. The bases of decision, to be sure, differ in terms of constitutional principles, but the results are remarkably similar. What has occurred is the atrophy of the fourteenth amendment in the field of economic regulation. Substantive due process, in the tradition of the *Allgeyer-Lochner-Adair-Coppage*⁵ line of reasoning, no longer applies. Admittedly, the Court has not

³ The Court's permissive attitude with respect to the issue of delegability is expressed succinctly in *Yakus v. United States*, 321 U.S. 414, 424 (1944): "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate." For an exposition of similar principles applied to the areas of interstate commerce and taxation, see *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Kahriger*, 345 U.S. 22 (1953). An excellent analysis of the Court's recent approach to economic legislation may be found in Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446 (1951). A good review of post-1937 trends appears in Krislov, *The Supreme Court and the Protection of Economic Rights*, in *THE POLITICS OF JUDICIAL REVIEW, 1937-1957: A SYMPOSIUM* 17 (Claunch ed. 1957).

⁴ The Court recently held unconstitutional several sections of the Uniform Code of Military Justice as these have been applied to the trial of civilians. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957). *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), effectively removed previous distinctions between capital and non-capital offenses committed by civilian dependents accompanying the armed forces overseas. The Court also held unconstitutional the peacetime application of a Uniform Code provision for trial by courts martial of civilian employees of the armed services abroad. *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

⁵ *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

repudiated its power to review on the basis of due process claims or, strictly speaking, on the basis of the contract clause. But such intrusions upon state power are negligible today. The views expressed by Mr. Justice Stone in the *Carolene Products* case⁶—a case involving federal economic regulation—have applied in full measure to the states. Stone, in denying a challenge to an act of Congress as violative of the fifth amendment, adhered to the Holmesian doctrine that “the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”⁷

Mr. Justice Black, in a concurring opinion,⁸ even took exception to this assertion and dissented in the contemporaneous case of *Polk Co. v. Glover*⁹ on the ground that he would extend both to state and federal economic enactments a *conclusive* presumption of constitutionality. When, in *Federal Power Comm’n v. Natural Gas Pipeline Co.*,¹⁰ Stone repudiated the long-challenged judicial rule of *Smyth v. Ames*¹¹ in public utility valuation cases, Black, joined by Douglas and Murphy, objected to the Court’s assumption that “regardless of the terms of the statute, the due process clause of the fifth amendment grants it power to invalidate an order as unconstitutional because it finds the charges to be unreasonable.” Black, in terms, sought a forthright renunciation of the existence of any such judicial power:

The doctrine which makes of “due process” an unlimited grant to courts to approve or reject policies selected by legislatures in accordance with the judges’ notion of reasonableness had its origin in connection with legislative attempts to fix the prices charged by public utilities. And in no field has it had more paralyzing effects.¹²

Theoretically, an argument may be made for the view that the Stone and Black approaches represent divergencies of opinion pointing to a fundamental cleavage in the Court’s application of the due process clause. In practice, there is general agreement that due process, in the area of economic regulation, is a

⁶ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁷ *Id.* at 152. Steps in the development of the new concept of due process are traced in WOOD, *DUE PROCESS OF LAW, 1932-1949: THE SUPREME COURT’S USE OF A CONSTITUTIONAL TOOL* 103-89 (1951).

⁸ 304 U.S. at 155.

¹⁰ 315 U.S. 575 (1942).

⁹ 305 U.S. 5 (1938).

¹¹ 169 U.S. 466 (1898).

¹² In *Smyth v. Ames*, 169 U.S. 466 (1898), the Court had interpreted due process to require that rates, to be valid, must bring a fair return on a fair valuation of property. The Court abandoned the doctrine of *Smyth v. Ames* in the instant case, *Federal Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). Mr. Justice Black’s criticisms, noted above, appear in a concurring opinion. *Id.* at 599, 601. For a critical account of the “fair value” rule and its development, see HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 461-500 (1952).

relic of a constitutional mistake perpetuated in a much-berated past.¹³ The Stone formula makes possible judicial intervention, but only an extreme measure would seem capable of translating the potentiality into a reality. Indeed, more recent due process pronouncements leave little doubt concerning the expansive scope of state and federal police powers. Mr. Justice Douglas, speaking for a unanimous Court in a 1954 urban redevelopment case, rejected due process claims in sweeping terms:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . .

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.¹⁴

The cases cited, and others which could be introduced, serve to establish a pattern which has become commonplace to observers of the Court's activities during the last two decades. Out of the turbulence of the 1930's there has emerged a policy of ostensible self-abnegation which seemingly shifts the balance in the direction of legislative supremacy—federal and state. The invalidation of legislation on constitutional grounds is virtually unknown; instead, on the face of the decisions, the Court has retreated to a position connoting a role little more impressive than that of a tribunal of statutory construction. What, then, is the basis of the antagonisms which have developed toward the present-day Court? Does such emotionalism attach to a body whose functions are essentially those of an ordinary law court?

The key to this constitutional riddle lies in an understanding of the impact of recent interpretations bearing upon some of the most sensitive and controversial issues in contemporary society. Strict construction of the Smith Act,

¹³ Criticism of the older due process philosophy is reflected in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949); *AFL v. American Sash Co.*, 335 U.S. 538 (1949); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

¹⁴ *Berman v. Parker*, 348 U.S. 26, 32 (1954). Efforts to attack state statutes in the economic or social field on the basis of equal protection objections have been generally unsuccessful. See, for example, the Court's refusal to invalidate such measures in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), and *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334 (1959). Although a recent decision, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), struck down a state regulatory statute as an unconstitutional burden on interstate commerce, the Court reasserted vigorously its adherence to the broad principle of deference: "These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. . . ." *Id.* at 524.

for example, has resulted in a concerted effort to secure remedial legislation in Congress.¹⁵ Corrective measures have been introduced or enacted to counteract the effects of other similarly distasteful decisions reached in the general area of "civil liberties" on non-constitutional grounds.¹⁶ But the most vehement opposition to the Court has stemmed from its treatment of federal-state issues. The Conference of State Chief Justices, meeting in August 1958, adopted a critical report urging "the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it."¹⁷ The vote was thirty-six to eight, with two members abstaining and four not present. While the report provides a cursory examination of a broad range of questions,¹⁸ cases involving state anti-subversive statutes, first amendment guarantees, and the fifth amendment protection against self-incrimination are singled out for special attention. Undoubtedly this document ranks as the most serious exposition of anti-Court sentiment of the post-World War II era, considering the unusual tenor of the language employed and the strength of its appeal to an overwhelming majority of some of the most eminent jurists in the nation.¹⁹

Of what validity are the charges leveled by the chief justices? Do they reflect a proper assessment of current strengths and weaknesses in the federal system? Any effort to answer these questions requires a thoroughgoing inquiry into and evaluation of the status of present-day federalism in terms of at least five areas which must be considered basic: preemption; non-economic due process; federal enforcement of state-created rights; intergovernmental immunities; and state taxing powers and the commerce clause.²⁰ Each relates to

¹⁵ One of the grounds for reversal of convictions against a group of West Coast Communist leaders related to the construction of the term "organize" in the Smith Act. See *Yates v. United States*, 354 U.S. 298 (1957).

¹⁶ See, e.g., the majority opinions in *Cole v. Young*, 351 U.S. 536 (1956); *Jencks v. United States*, 353 U.S. 657 (1957); *Watkins v. United States*, 354 U.S. 178 (1957).

¹⁷ COMM. REP. ON FEDERAL STATE RELATIONS AS AFFECTED BY JUDICIAL DECISIONS: TENTH ANNUAL MEETING OF THE CONFERENCE OF CHIEF JUSTICES 23 (1958). An effective reply to the charges leveled at the Court appears in Lockhart, *Comment: A Response to the Conference of State Chief Justices*, 107 U. PA. L. REV. 802 (1959).

¹⁸ The scholarly papers prepared for the Committee's use appear in a Special Supplement to the *University of Chicago Law Record* (December 1958). Several of these papers have been reprinted: Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213 (1959); Cramton, *The Supreme Court and State Power to Deal with Subversion and Loyalty*, 43 MINN. L. REV. 1025 (1959); Kurland, *The Supreme Court, the Due Process Clause, and in Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations* (pts. 1-2), 59 COLUM. L. REV. 6, 269 (1959).

¹⁹ The 1959 Conference of State Chief Justices avoided any attack upon the Supreme Court comparable to the public broadside which characterized the meeting of the previous year. N.Y. Times, August 24, 1959, p. 11, col. 3.

²⁰ Other important areas of federalism—procedural requirements in state criminal proceedings (particularly as such requirements have been affected by habeas corpus actions before

doctrines set forth by the Court presumably in the hope of solving problems which have had divisive effects since the founding of the republic under the present Constitution. Each, as will be noted, involves venerable principles readily recognizable despite the introduction of modern embellishments.

PREEMPTION

The doctrine of preemption represents the most controversial of the recent standards adopted by the Court. Questions of federal supersession of state legislation arise when Congress, exercising a power not exclusively federal, acts in an area which the states have entered or may enter. Has Congress, therefore, "occupied the field" to the exclusion of concurrent state legislation under the supremacy clause of article VI? There is relatively little difficulty in deciding such questions when state legislation is repugnant to a federal act, where a uniform national system of regulation is required, or in areas of paramount national interest and concern. More nebulous are the points of concurrence at which a determination of congressional intent is necessary. Congressional design may manifest itself in the terms of the act itself. But when such a declaration of purpose is not apparent, the Court must make a choice on the basis of the available evidence and the standards which a majority considers applicable to the circumstances of the case.

The preemption doctrine traditionally has been developed on the basis of varying and sometimes inconsistent patterns in the general area of commerce clause litigation. A classic enunciation of standards may yet be found in *Cooley v. Board of Wardens*.²¹ Mr. Justice Curtis, speaking for the Court in this early case, set forth a deceptively simple formula:

[T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States . . . ; and some . . . as imperatively demanding that diversity, which alone can meet the local necessities. . . .²²

The current standards derive from Mr. Justice Douglas's majority opinion in the 1947 case of *Rive v. Santa Fe Elevator Corp.*²³ which held that the Federal Warehouse Act was not merely paramount over state law in the event of conflict but completely superseded it except to the extent that the federal statute failed to cover the field or made express exceptions in favor of state law. In reaching this conclusion, the Court formulated and applied a number of "objective tests" of supersession:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the

federal courts) and in personam jurisdiction over non-residents—exhibit continuing and relatively consistent patterns. The work of the Warren Court has not yet contributed any startling deviations.

²¹ 53 U.S. (12 How.) 298 (1852).

²² *Id.* at 319.

²³ 331 U.S. 218.

Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the Federal statute. . . .²⁴

The supersedure doctrine was first applied to an area unrelated to the commerce clause or its derivatives more than a decade ago in *Hines v. Davidowitz*,²⁵ which held unconstitutional a state law requiring the registration of aliens. At issue was a Pennsylvania act of 1937 which required every alien 18 years of age or over, with specified exceptions, to register once each year and to comply with other regulations. In 1940, Congress enacted a Federal Alien Registration Act which created a different, and less rigorous, code for aliens. Mr. Justice Black, speaking for the Court, held that the federal statute indicated the clear intention of Congress to establish a "single integrated and all-embracing system" of alien registration. As a consequence, the "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. . . ." Any concurrent state power that may exist in this area "is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax."²⁶ Stress was placed upon federal supremacy in the general conduct of foreign affairs and the need for a uniform national system.²⁷

A dramatic application of the preemption doctrine occurred in the 1956 case of *Pennsylvania v. Nelson*.²⁸ The defendant, an admitted Communist, had been convicted in a local court on several counts charging violations of the state's sedition act. The Supreme Court of Pennsylvania reversed on the narrow issue of supersession of the state law by federal legislation which had "occupied the field."²⁹ The United States Supreme Court, affirming, followed

²⁴ *Id.* at 230. Justice Frankfurter predicted that the Court's decision would open the "gates of escape from deeply rooted State requirements . . . although Congress itself has not authorized federal authority to take over the regulation of such activities. . . ." *Id.* at 247 (dissenting opinion).

²⁵ 312 U.S. 52 (1941).

²⁶ *Id.* at 66-67.

²⁷ *Id.* at 68. Mr. Justice Stone, dissenting, attacked the Court's assumption that Congress, by "occupying the field," had excluded from it all state legislation: "Every act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. . . . The Judiciary of the United States should not assume to strike down a state law which is immediately concerned with the social order and safety of its people unless the statute plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern." *Id.* at 74.

²⁸ 350 U.S. 497, 502 (1956). See Hunt, *State Control of Sedition: The Smith Act as the Supreme Law of the Land*, 41 MINN. L. REV. 287 (1957).

²⁹ *Commonwealth v. Nelson*, 377 Pa. 58, 104 A.2d 133 (1954).

closely the reasoning of the state court. It held that three federal statutes—the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954—had effectively preempted all state programs. Taken as a whole, they “evinced a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it.”³⁰ Chief Justice Warren, speaking for a majority, applied in full measure the “tests of supersession” adapted from the *Rice* case.

The Court’s action seemed to have the effect of invalidating the anti-sedition statutes of forty-two states, Alaska, and Hawaii. Its sole concession lay in a statement upholding the right of the states to protect themselves “at any time against sabotage or attempted violence of all kinds.”³¹ However, the Court’s ruling has been narrowed considerably by the recent decision in *Uphaus v. Wyman*.³² Mr. Justice Clark, for a majority, held that any interpretation of *Nelson* as rendering ineffective state sedition laws “sweeps too broad.” He rejected the notion that the Court had stripped the states of the right to protect themselves in a broad sense. The opinion emphasized that “a State could proceed with prosecutions for sedition against the state itself; that it can legitimately investigate in this area follows *a fortiori*.”³³

In recent years, the preemption doctrine has had a disturbing effect in the field of labor-management relations. The Court’s decision in *NLRB v. Jones & Laughlin Steel Corp.*,³⁴ interpretive of the Wagner Act of 1935, afforded Congress almost unlimited power to regulate labor relations in the United States. Consequently, the national government came to exercise an authority principally of interest to the states which, prior to the act and the decision, had been left entirely to state control. But the allocation of control remained a vexatious question which, in a number of vital areas, led to the creation of a power vacuum.

Intrusions upon residual state powers in the field of labor relations have reached their peak in the Warren Court.³⁵ From faltering beginnings in the

³⁰ 350 U.S. at 504.

³¹ 350 U.S. at 500.

³² 360 U.S. 72 (1959).

³³ Justice Clark limited the scope of supersession to Chief Justice Warren’s opening statement in *Nelson*: “The ‘precise holding of the court (Supreme Court of Pennsylvania), and all that is before us for review, is that the Smith Act . . . supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct*.’ ” 360 U.S. at 76. (Emphasis supplied by the Court, quoting from *Pennsylvania v. Nelson*, 350 U.S. 497, 499 (1956)).

³⁴ 301 U.S. 1 (1937).

³⁵ Justice Frankfurter protested against this trend during the early, developmental years: “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. . . . Any 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.” *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947). He reiterated this admonition, in almost identical language, as a part of a dissenting opinion in a non-labor case decided some twelve years later. *Farmers Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 540-41 (1959).

immediate post-World War II period, the tendency to deny state jurisdiction continued to expand and, in *Guss v. Utah Labor Relations Bd.*,³⁶ a new extreme in supersedure was attained. Mr. Chief Justice Warren, speaking for a majority of the Court, ruled that a state labor relations board does not acquire jurisdiction merely because the National Labor Relations Board, by reference to its own standards, refuses to assert the authority presumably conferred by Congress. The national government has preempted the field and only an explicit cession of power by the national board—under a section of law never utilized—will serve to remedy the existing void. A no-man's-land has resulted, but the Court recognizes no alternative: "Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land."³⁷ Two more recent cases seemed to indicate a changing attitude on the part of the Court—a realization that the doctrine of *Guss* had carried preemption to well-nigh disastrous heights.³⁸ Nevertheless, its application in less compelling circumstances—that is, where an urgent power void is not created—appears to have become fixed.³⁹

A recent "landmark" case, *San Diego Building Trades Council v. Garmon*,⁴⁰ reasserted principles previously formulated and, in many respects, extended the scope of the rationale which underlay the long series of decisions in the area of labor preemption. At issue was the question whether a state court had jurisdiction to award damages arising out of peaceful union activity which it was precluded from enjoining on the basis of the decision in *Guss*. Mr. Justice Frankfurter, speaking for the Court and departing from his traditionally cautious approach to the doctrine of preemption, held that the state's jurisdiction had been wholly displaced. The ostensible form of the preventive relief—a remedy defined by the traditional law of torts—was deemed not controlling since "even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."⁴¹ State jurisdiction could prevail only when there were evidences of conduct marked by violence and imminent threats to the public order. Frankfurter stressed the need for deference to the exclusive competence of the National Labor Relations Board

³⁶ 353 U.S. 1 (1957). A review of earlier cases appears in Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950).

³⁷ 353 U.S. at 10, 11.

³⁸ See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *UAW v. Russell*, 356 U.S. 634 (1958).

³⁹ *Hotel Employees v. Sax Enterprises*, 358 U.S. 270 (1959); *Teamsters Union v. Oliver*, 358 U.S. 283 (1959).

⁴⁰ 359 U.S. 236 (1959).

⁴¹ *Id.* at 247.

when an activity was arguably subject to the provisions of the federal statute. He conceded that state submission to the primary jurisdiction of the National Board did not ensure Board adjudication of the status of a disputed activity. In fact, he intimated, the states may even be powerless to act when the activities are clearly "neither protected nor prohibited" under federal law.⁴² Should such an extension of the preemption doctrine come to pass, Justice Harlan warned in a concurring opinion, "then indeed state power to redress wrongful acts in the labor field will be reduced to the vanishing point."^{42a}

NON-ECONOMIC DUE PROCESS

The Court has applied the due process clause of the fourteenth amendment in several areas related to state civil proceedings. Aside from the controversial segregation issue which, despite its political implications, bears little direct relation to the development of the present-day concept of due process,⁴³ the recent cases fall into three categories: dismissals of public employees; deprivations of professional or vocational status; and disqualifications for public benefits.

In general, the Court has upheld loyalty-oath requirements as requisite to the holding of positions alleged to be "sensitive." However, it has placed procedural safeguards about the public employee where the state seeks to effect his dismissal. In the much-discussed case of *Slochower v. Board of Higher Education*⁴⁴ the Court held that the summary dismissal of an employee because of his invocation of the fifth amendment before a legislative investigating committee was arbitrary and resulted in a denial of due process of law. Previously, in *Wieman v. Updegraff*,⁴⁵ the Court had condemned as an "assertion of arbitrary power," violative of due process, a state's efforts "to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged."⁴⁶

The Court has extended the protection of the due process clause to deprivations of professional status by state agencies. Such intervention has been most pronounced with respect to state denials of admission to the bar of candidates whose previous records disclosed subversive affiliations. *Schwartz v.*

⁴² *Id.* at 246.

^{42a} *Id.* at 254.

⁴³ *Brown v. Board of Education*, 347 U.S. 483 (1954), representing the culmination of a long series of public education cases, was decided on the basis of the equal protection clause of the fourteenth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case relating to the segregation issue in the District of Columbia, by implication fused the due process and equal protection concepts: "The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." *Id.* at 499.

⁴⁴ 350 U.S. 551 (1956).

⁴⁵ 344 U.S. 183 (1952).

⁴⁶ *Id.* at 190-91.

*Board of Bar Examiners*⁴⁷ presented the question whether a state could deny an applicant permission to take a bar examination solely on the basis of its interpretation of what constitutes good moral character. The Court, speaking through Mr. Justice Black, found nothing in the record which suggested that Schwere had engaged in any conduct which reflected adversely on his character. Instead, it held that New Mexico had deprived him of due process in denying him the opportunity to qualify for the practice of law. Mr. Justice Frankfurter, in a concurring opinion joined by Justices Clark and Harlan, refused to concede that it was the Court's function to act as overseer of a particular result of the procedure established by a state for admission to its bar. Nevertheless, he agreed with the majority on the narrow ground that the significance accorded Schwere's early affiliations was a consideration offensive to due process.⁴⁸

*Konigsberg v. State Bar*⁴⁹—the most controversial of these cases—raised the issue whether a state committee of bar examiners could refuse to certify Konigsberg on the ground that he failed to prove good moral character and non-advocacy of the overthrow of the federal or state governments by unconstitutional means. In this instance, the applicant had refused, on the basis of alleged assertions of privilege grounded on the first and fourteenth amendments, to answer questions concerning his present and past membership in the Communist Party. Mr. Justice Black, writing for a bare majority of five, held that the exclusion violated due process since there was no evidence in the record which rationally justified the findings in the state court. The state, Black concluded, could not exercise its power "in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association."⁵⁰ Mr. Justice Harlan, joined by Mr. Justice Clark, dissented from the majority holding on the merits. In a bristling opinion, he charged that the Court was acting as a "super state court of appeals" in attempting "to impose on California its own notions of public policy and judgment. . . . today's decision represents an unacceptable intrusion into a matter of state concern."⁵¹

A wholly new area, comprising disqualifications for public benefits, was recently added. This extension of due process safeguards has been occasioned by an increasingly large number of state statutes requiring a loyalty oath as a condition of eligibility for tax exemptions, unemployment insurance, and low-

⁴⁷ 353 U.S. 232 (1957).

⁴⁹ 353 U.S. 252 (1957).

⁴⁸ *Id.* at 250-51.

⁵⁰ *Id.* at 273.

⁵¹ *Id.* at 312. Subsequent decisions in *Beilan v. Board of Public Education*, 357 U.S. 399 (1958); *Lerner v. Casey*, 357 U.S. 468 (1958); and *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960), have compromised the effectiveness of the holdings in *Konigsberg* and *Slochower*. Collaterally, the Court, in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), decried a state's inquiry into the political beliefs of a university professor. It held that his contempt conviction violated due process requirements. The broad scope of the ruling in *Sweezy* was narrowed, if not overruled, in *Uphaus v. Wyman*, 360 U.S. 72 (1959).

cost housing. During the 1957 Term, the Court had its first opportunity to examine such statutes in *Speiser v. Randall*⁵² and *First Unitarian Church v. County of Los Angeles*.⁵³ In both cases, the Court was confronted with constitutional and statutory requirements that tax exemptions be denied to persons who advocate the unlawful overthrow of the government by force or who would support a foreign power engaged in hostilities with the United States. Claimants had to sign a statement on the tax return certifying non-engagement in the proscribed advocacy. Mr. Justice Brennan wrote the prevailing opinion for the Court without reaching the question of the validity of the state constitutional provision. Instead, he held that the implementing statute denied freedom of speech without due process safeguards "through procedures which place the burdens of proof and persuasion on the taxpayer. . . ."⁵⁴ Mr. Justice Black, concurring, termed the levy "a tax on belief and expression . . . a palpable violation of the First Amendment."⁵⁵ Mr. Justice Douglas, expressing substantial agreement with the majority opinion, averred that enforcement of the condemned statute would have enabled the state government to become a "monitor of thought."⁵⁶

FEDERAL ENFORCEMENT OF STATE-CREATED RIGHTS

State Law, Diversity, and the Erie Doctrine

Perplexing problems of federal-state relations continue to stem from the Court's decision in *Erie R.R. v. Tompkins*.⁵⁷ Mr. Justice Brandeis, speaking for a majority in this famous case, abandoned the century-old doctrine of *Swift v. Tyson*⁵⁸ that the federal courts in diversity of citizenship cases were free to exercise an independent judgment in fashioning a federal common law applicable to the adjudication of state-created rights. In *Erie* the Court held that judicial decisions, like statutory law, were "the laws of the several states" within the meaning of the Rules of Decision Act. The shattering of the "general law" philosophy of *Swift v. Tyson* imposed a responsibility upon the federal courts, and ultimately upon the Supreme Court, to formulate methods of accommodation attuned to the new approach. Two decades have supplied some of the answers but, within the context of the American federal system, many and varied problems remain.⁵⁹

On balance, the Warren Court has been receptive to an expansion of state-law applications in diversity cases although a majority has not sought to enlarge substantially upon the potential implicit in the *Erie* doctrine. Justice

⁵² 357 U.S. 513 (1958).

⁵³ 357 U.S. 545 (1958).

⁵⁴ *Speiser v. Randall*, 357 U.S. 513, 529 (1958).

⁵⁵ *Id.* at 529-30.

⁵⁶ *Id.* at 538.

⁵⁷ 304 U.S. 64 (1938).

⁵⁸ 41 U.S. (16 Pet.) 1 (1842).

⁵⁹ See generally HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1953); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958).

Frankfurter suggested in 1954 that steps be taken to terminate the "mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."⁶⁰ The subject-matter of diversity cases is essentially state litigation and, in his view, "little excuse is left for diversity jurisdiction now that *Erie R.R. v. Tompkins* . . . has put a stop to the unwarranted freedom of federal courts to fashion rules of local law in defiance of local law."⁶¹ Undoubtedly, Mr. Justice Frankfurter's sentiments, bluntly stated, are shared by other members of the Court. The increasingly heavy burden placed upon the federal judiciary in diversity actions is unmistakable. But the Court is not prepared to surrender all aspects of federal supervision arising out of the diversity relationship.

In *Bernhardt v. Polygraphic Co.*⁶² the Court reaffirmed the outcome-determinative concept by refusing to draw rigid distinctions between substance and procedure in relation to the application of the *Erie* doctrine. It reversed a holding by the court of appeals that the arbitration provision of an employment contract was procedural and, therefore, governed by federal rather than state law. Mr. Justice Douglas followed the opinion in *Guaranty Trust Co. v. York*⁶³ that a federal court enforcing a state-created right in a diversity case was "only another court of the State." The heart of the *Erie* doctrine, as the majority interpreted it, was that the choice of a forum—federal or state—should not be permitted to lead to a substantively different result. Mr. Justice Frankfurter, concurring, pointed out that the "differences between arbitral and judicial determination of a controversy under a contract sufficiently go to the merits of the outcome, and not merely because of the contingencies of different individuals passing on the same question, to make the matter one of 'substance' in the sense relevant for *Erie R.R. v. Tompkins*."⁶⁴

A more recent case, *Byrd v. Blue Ridge Rural Elec. Coop.*,⁶⁵ casts serious doubt upon the vitality of the holding in *Bernhardt*. In effect, it belies assumptions that the substantive-procedural dichotomy has been solved and that continued federal intrusion in diversity cases derives solely from the constitutional requirement. *Byrd* arose from a diversity action instituted in a federal court by an employee claiming damages allegedly sustained as a result of negligence where benefits had previously been provided for under the South Carolina Workmen's Compensation Law. The company interposed the state law as its defense on the ground that the statute was the sole remedy available. The Court, in remanding, directed that the factual issue of the employee's inclusion within the terms of the statute be decided by a jury, although South

⁶⁰ *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (concurring opinion).

⁶¹ *Id.* at 56.

⁶² 350 U.S. 198 (1956).

⁶³ 326 U.S. 99 (1945).

⁶⁴ *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 207-08 (1956).

⁶⁵ 356 U.S. 525 (1958).

Carolina decisions on this point vested the determination of such questions in a judge. In reviewing the post-*Erie* cases, there is no indication that the Court considered *Bernhardt* to be controlling. The outcome-determinative test was modified by the adoption of a formula founded upon a weighing of interests between state practice on the one hand and "affirmative countervailing considerations" of federal policy on the other.⁶⁶ Significantly, the Court reasserted the distinctive character of diversity jurisdiction as a part of an "independent system for administering justice to litigants who properly invoke its jurisdiction." It cited with approval the pre-*Erie* decision of *Herron v. Southern Pac. Co.*⁶⁷ which held that state statutes and constitutional provisions could not alter the essential nature or function of a federal court.⁶⁸

A series of cases decided during the 1958 Term have revealed cleavages with respect to the application of the doctrine of equitable abstention in the exercise of diversity jurisdiction. The doctrine was formulated initially as a judicial device to sanction the avoidance of unnecessary constitutional decisions on the assumption that a prior resolution of pertinent state law questions, in the absence of a settled body of decisional law, might obviate the need for further adjudication.⁶⁹ Subsequently, the Court expanded the doctrine to include postponement on grounds of comity with the states where state administrative processes might be disrupted or where needless friction in federal-state relationships might result. The extent to which the abstention doctrine has been applied reflects, in large measure, a conscious effort on the part of the federal courts to reduce competition between the federal and state judicial systems. This self-imposed restraint on the exercise of jurisdiction is a part of the general doctrine of deference and, undoubtedly, stems from similar policy considerations.

In two eminent domain cases based upon diversity of citizenship, the Court reached opposite conclusions concerning the proper application of the doctrine of equitable abstention. In *Louisiana Power & Light Co. v. City of Thibo-*

⁶⁶ Justice Brennan, for the majority, posed the question "... whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." *Id.* at 538. See 43 MINN. L. REV. 580 (1959).

⁶⁷ 283 U.S. 91 (1931).

⁶⁸ Compare *Magenau v. Aetna Freight Lines*, 360 U.S. 273 (1959), another diversity proceeding, in which the Court applied the *Byrd* doctrine to an action for recovery for wrongful death. Justice Clark, speaking for a majority, held that, in a federal court, all disputed issues of fact necessary to a determination of the decedent's status within the meaning of the Pennsylvania Workmen's Compensation Act had to be submitted to a jury regardless of the practice in the state courts. Justice Harlan, dissenting, contended that a retrial would be justified under *Byrd* only if the state's practice treating factual issues under the Workmen's Compensation Act as for the court, instead of for the jury, "is merely a 'form and mode' of procedure rather than 'an integral part' of the rights created by the Act." *Id.* at 286.

⁶⁹ For an early statement of the doctrine, see *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). A recent survey of applicable cases appears in Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749 (1959).

*daux*⁷⁰ the Court sustained a stay of proceedings by the district court to afford an opportunity for state construction of a statute hitherto judicially uninterpreted. Mr. Justice Frankfurter, writing the majority opinion, stressed that application of the doctrine reflected a "deeper policy derived from our federalism." He pointed out that a differentiating characteristic of eminent domain was its intimate involvement with sovereign prerogative. Hence, since a determination of the nature of the delegation of the power of eminent domain affects the apportionment of governmental powers between state and local units, there is need to avoid "the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities."⁷¹ The second, *County of Allegheny v. Frank Mashuda Co.*,⁷² was distinguished on the ground that the controlling state decisional law was clear and factual issues alone had to be resolved. Mr. Justice Brennan, author of a dissenting opinion in *Louisiana Power & Light Co.* and of the majority opinion in *Mashuda*, rejected contentions previously expressed by Mr. Justice Frankfurter that a state's power of eminent domain was so "mystically involved with 'sovereign prerogative' " as to justify abstention.

Harrison v. NAACP,⁷³ another in the series, was instituted on the basis of diversity, the civil rights statutes, and the presence of a federal question. Mr. Justice Harlan, speaking for a majority, once again applied the abstention doctrine to stay the hand of the district court in passing upon the constitutionality of five Virginia statutes enacted in 1956 as segments of the state's general plan of "massive resistance" against desegregation. Postponement, the Court made plain, was not intended to intimate any determination with respect to the validity of the acts. The sole purpose was to facilitate a federal judgment based on "something that is a complete product of the state, the enactment as phrased by its legislature and as construed by its highest court."⁷⁴ Mr. Justice Douglas, dissenting in *Harrison*, denounced the Court's action as a step tending to dilute the stature of the federal district courts "making them secondary tribunals in the administration of justice under the Federal Constitution" despite the fact that, in his view, any reasons for showing deference to local institutions had vanished.⁷⁵ In *Martin v. Creasy*,⁷⁶ a state condemnation proceeding, Douglas took exception to what he termed a growing trend toward "the judicial intolerance of diversity jurisdiction." The Court's approach, he contended, appeared to be spreading to other aspects of federal jurisdiction and, in effect, negating the responsibility of the federal courts for the exposition of federal law.⁷⁷

While the recent cases suggest that the doctrine of equitable abstention may

⁷⁰ 360 U.S. 25 (1959).

⁷⁴ *Id.* at 178.

⁷¹ *Id.* at 28.

⁷⁵ *Id.* at 180.

⁷² 360 U.S. 185 (1959).

⁷⁶ 360 U.S. 219 (1959).

⁷³ 360 U.S. 167 (1959).

⁷⁷ *Id.* at 228.

well have attained a high level of acceptability, possible extensions remain uncertain. Undoubtedly, cases predicated principally upon diversity will continue to be treated with deference to local authority on the assumption that, in reality, they are state rather than federal proceedings.⁷⁸ There is unanimity among the members of the Court that the exercise of the diversity power may be "so utterly disruptive of federal-state relations as to make it undesirable."⁷⁹ However, when diversity is combined with some aspect of federal question jurisdiction, the future of the abstention doctrine holds less promise. In cases arising from civil rights violations, for example, the federal courts have not been inclined to apply the abstention doctrine consistently. Instead, they have followed a somewhat sporadic course of discretionary refusal to exercise jurisdiction only when proper remedies appear to be available in the state courts.⁸⁰

Application of State Law in Federal Question Cases

Initially, the *Erie* doctrine was limited to cases arising from the diverse citizenship of the parties. However, by congressional action and by judicial interpretation, aspects of *Erie* have been extended to the broader area of federal question jurisdiction. In a number of instances, the adoption of state law by Congress had been a pragmatic device designed to fill a void created by the lack of a readily available body of federal law. Since 1825, for example, resort has been made to state criminal laws for the punishment of crimes committed within federal enclaves and not otherwise proscribed. More recently Congress has made state law expressly applicable in actions instituted under the Federal Tort Claims Act. In varying degrees, judicial decisions have extended recourse to state law as a basis for the determination of rights and obligations in admiralty, in proceedings involving federal taxation, and in litigation relating to government bonds and other commercial paper. Where the outcome of a federal question case has been dependent upon judicial construction of legislative intent, the utilization of state law represents a knowing effort to ensure state participation in a working federalism—an effort akin to the post-1937 turn-about in the interpretation of the due process clause.

Successive assimilative crimes acts provide one of the earliest and, perhaps, the most enduring areas of federal competence in which state law has been made applicable. Since the first decades of the nineteenth century, Congress

⁷⁸ See, e.g., *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959); *Government & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364 (1957); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

⁷⁹ *Martin v. Creasy*, 360 U.S. 219, 228 (1959) (dissenting opinion of Douglas, J.). While Justice Douglas appears to agree that extremes in the exercise of diversity jurisdiction may have adverse effects on a working federalism, he has refused to forego federal supervision in a number of critical areas. For a recent exposition of his views see *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 227-28 (1960).

⁸⁰ Refusals to abstain have been common in school segregation litigation. E.g., *Romero v. Weakley*, 131 F.Supp. 818 (S.D. Cal. 1955), *reversed*, 226 F.2d 399 (9th Cir. 1955). *But see Bryan v. Austin*, 148 F.Supp. 563 (E.D.S.C.), *vacated as moot*, 354 U.S. 933 (1957).

has chosen to utilize the criminal statutes of the states for the punishment of offenses perpetrated within federal enclaves.⁸¹ Prior to the amendments introduced in 1948, the statutes generally provided for the application of state laws in force "now" and at the time of the commission of the offense. The 1948 act omitted the "now in force" stipulation and substituted the provision "in force at the time of such act or omission."⁸² At issue in *United States v. Sharpnack*⁸³—the principal case in this area to come before the Warren Court—was the application of a state criminal statute in force when the crime was committed, but not effective at the time of passage of the Assimilative Crimes Act of 1948. The act was challenged as an invalid delegation of legislative power to the states and as an abdication on the part of Congress of essential federal functions. The Court rejected allegations of non-delegability and held that the federal policy constituted a continuing process of adoption by Congress for federal enclaves of unpreempted state offenses and punishments.

State law also plays a vital role in adjudications under the Federal Tort Claims Act. The statute permits claims against the government under circumstances where the United States, "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."⁸⁴ The Warren Court has reduced the scope of state-law applications principally as a means of broadening the liability of the United States. For example, federal liability for tortious conduct does not cease merely because local law immunizes public bodies from such liability.⁸⁵ The Court also has held that, in specified circumstances, damages are not limited to the maximum recoverable under state law.⁸⁶

The exercise of admiralty powers has presented special problems in several cases which have come before the Warren Court. In *Madruza v. Superior Court*,⁸⁷ the Court upheld the concurrent jurisdiction of the state courts to order partition of ships against claims that proceedings of this character were within the exclusive domain of the federal courts. Mr. Justice Black,

⁸¹ It is settled that state acts cannot operate to enlarge or otherwise modify definitions of crimes explicitly provided for in the federal criminal code. *Williams v. United States*, 327 U.S. 711 (1946).

⁸² 18 U.S.C. § 13 (1958).

⁸³ 355 U.S. 286 (1958). See Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685 (1957).

⁸⁴ See 28 U.S.C. § 1346(b) (1958).

⁸⁵ *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

⁸⁶ The question related to the interpretation of a 1947 amendment to the federal act providing that where the law of the place permits "damages only punitive in nature," the United States should be liable for "actual or compensatory damages, measured by the pecuniary injuries resulting from such death." 28 U.S.C. § 2674 (1958), as construed in *Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128 (1956).

⁸⁷ 346 U.S. 556 (1954).

speaking for seven members of the Court, construed broadly the so-called saving clause in admiralty which reserves to suitors "in all cases all other remedies to which they are otherwise entitled."⁸⁸ *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*⁸⁹ presented the question whether state or federal law governed the validity and scope of warranties in a marine insurance contract dispute. The Court held that, in the absence of an established federal admiralty rule, state law was applicable; it rejected suggestions that controlling federal rules should be formulated.⁹⁰

Where, in *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*,⁹¹ a question arose with respect to litigation involving government bonds, the Court once again held that state law was controlling. At issue was an action to recover the value of bearer bonds issued by the Home Owners' Loan Corporation and allegedly stolen and cashed. Mr. Justice Frankfurter, speaking for the Court, rejected contentions that a "federal law merchant" was applicable to all transactions involving the commercial paper of the United States. The *Clearfield* doctrine⁹² was affirmed; that is, federal law was held to govern the

⁸⁸ 28 U.S.C. § 1333 (1958).

⁸⁹ 348 U.S. 310 (1955). See MacChesney, *Marine Insurance and the Substantive Admiralty Law*, 57 MICH. L. REV. 555 (1959).

⁹⁰ In *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), the application of state law was upheld in an admiralty proceeding to determine rights arising from death in state territorial waters. Despite the fact that the statute, in the circumstances peculiar to this case, had not been construed authoritatively by the state courts, the Court declined to apply the doctrine of equitable abstention. *Accord*, *United New York & New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959). Compare *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 623 (1959), where injury occurred aboard a ship upon navigable waters. See also *Hess v. United States*, 361 U.S. 314 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960).

In another recent case a purported clash between two types of remedies—the one available under the Federal Longshoremen's and Harbor Workers' Compensation Act, the other under a state workmen's compensation statute—was resolved in favor of the state. The Court held that a waterfront employee whose injury had occurred within the "twilight zone" of the federal act's coverage could elect to base recovery either on the federal law or on negligence action under the state act. *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959). See Note, *Admiralty—"Twilight Zone" in Workmen's Compensation—Pursuit of State Common Law Action Against Employer*, 57 MICH. L. REV. 1241 (1959).

⁹¹ 352 U.S. 29 (1956).

⁹² *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). In the *Clearfield* case, suit was instituted by the United States against a Pennsylvania bank which had accepted a government check upon a forged endorsement and made collection from the United States. The district court ruled that the rights of the parties were to be determined by the law of Pennsylvania and that since the United States unreasonably delayed in giving notice of the forgery to the bank it was barred from recovery under applicable state precedents. The Supreme Court, affirming the court of appeals in its reversal of the district court's disposition of the case, held that *Erie* was inapplicable, that legal questions involved in controversies over commercial paper issued by the United States must be resolved by resort to federal rather than local law, and that, in the absence of a controlling act of Congress, federal courts were required to fashion the governing rules. For applications of the *Clearfield* doctrine, see *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945); *Priebe & Sons v. United States*, 332 U.S. 407 (1947).

interpretation of the nature of the rights and obligations.⁹³ *Parnell* was distinguished as "purely between private parties" and not touching the "rights and duties of the United States."⁹⁴

State law has served on numerous occasions as an essential component of federal tax determinations. In two cases decided in 1958 the Court affirmed the application of state law as a basis for the determination of the substantive liability of a taxpayer's widow who, as transferee of her husband's property, had been assessed for his unpaid income tax deficiencies. Mr. Justice Brennan, writing for a majority, rejected contentions that a body of federal decisional law should be created and applied to establish the existence and extent of liability. "That effort is plainly not justified," he held, "when there exists a flexible body of pertinent state law continuously being adapted to changing circumstances affecting all creditors."⁹⁵ Once again, in the absence of an express congressional mandate to the contrary, the Court followed *Erie* on the assumption that "uniformity is not always the federal policy."

A notable exception to the generally consistent trend favoring state-law applications occurred in the controversial case of *Textile Workers Union v. Lincoln Mills*.⁹⁶ At issue was the application of Section 301 of the Taft-Hartley Act which provides that suits for breach of collective bargaining agreements may be instituted in the federal district courts without regard to the usual diversity requirements.⁹⁷ A labor union in this instance had sought specific performance of an arbitration clause. Mr. Justice Douglas, speaking for the Court, held that the statute was not merely jurisdictional but authorized the federal courts to formulate a body of substantive law in this area. "The range of judicial inventiveness," Justice Douglas averred, "will be determined by the nature of the problem." But federal interpretation of the federal law will prevail.⁹⁸

⁹³ A recent case, *United States v. 93.970 Acres*, 360 U.S. 328 (1959), reaffirms the principle that where "essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable."

⁹⁴ *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33 (1956). Justices Black and Douglas, dissenting, called for the application of a uniform federal law. *Id.* at 35.

⁹⁵ *Commissioner v. Stern*, 357 U.S. 39 (1958), and a companion case, *United States v. Bess*, 357 U.S. 51 (1958). See Note, *The Role of State Law in Federal Tax Determinations*, 72 HARV. L. REV. 1350 (1959). In *Aquilino v. United States*, 363 U.S. 509 (1960), and *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960), the threshold question was whether and to what extent a defaulting taxpayer had property rights to which a federal lien could attach. In resolving this issue, the Court held, the nature and extent of the property rights had to be ascertained under state law in accordance with the ruling in *Bess*. In *United States v. Brosnan*, 363 U.S. 237 (1960), the Court sanctioned the adoption as federal law of state law governing divestiture of federal tax liens on the assumption that "the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures." *Id.* at 242.

⁹⁶ 353 U.S. 448 (1957).

⁹⁷ 29 U.S.C. § 185 (1958).

⁹⁸ 353 U.S. at 457.

Despite strong overtones of federal preemption, there is no explicit indication that state jurisdiction is completely precluded. Compatible state law, the Court has declared, "may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."⁹⁹ In a concurring opinion Mr. Justice Burton, joined by Mr. Justice Harlan, rejected the contention of the majority that the substantive law to be applied was federal law. Instead he interpreted section 301 as a congressional grant to the federal courts of "protective jurisdiction" alone. State law, therefore, would apply supplemented, where necessary, by federal remedial law.¹⁰⁰ Mr. Justice Frankfurter, dissenting, denied that the law directed the courts to fashion a "federal common law of labor contracts." In his view, section 301 was merely a jurisdictional statute which exceeded the scope of permissible judicial power that might be exercised under article III of the Constitution.¹⁰¹

The application of state law in federal question cases—to a far greater extent than in diversity proceedings—will be a recurring and important problem in the development of federalism. Here the Court is not confronted with the essential artificiality of a federal adjudication where state issues are exclusive or at least paramount. Instead, it must come to grips with the hard-core elements of cases arising under the Constitution, the federal statutes, or the administrative regulations of national agencies. State law underlies many questions which require determination in a variety of such contexts. Generally, there has been a tendency to avoid recourse to state procedural rules in federal question litigation although the influence of *Erie* on substantive matters has been widespread.¹⁰²

INTERGOVERNMENTAL IMMUNITIES AND STATE POWER

Doctrines of intergovernmental immunity have been developed on an *ad hoc* basis in the form of judicially erected rules designed, presumably, to avoid the potentialities of friction implicit in federalism. Specific clauses of the Constitution have been invoked, if at all, either indirectly or sporadically. Historically, the immunity doctrine first appeared in the famous case of *McCul-*

⁹⁹ Professor Meltzer, assessing the impact of the Court's decision in *Lincoln Mills*, suggests that the reverse of the problems arising from the *Erie* doctrine in the federal judiciary may be transferred to the state courts. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 COLUM. L. REV. 269 (1959). See also Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

¹⁰⁰ 353 U.S. at 460.

¹⁰¹ *Id.* at 466 & 469. The choice-of-law issue had remained in doubt following an earlier ruling in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). Justice Frankfurter, announcing the judgment of the Court and an opinion in which Justices Burton and Minton joined, construed section 301 as a mere procedural provision affording a federal forum for state law.

¹⁰² See Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955).

*loch v. Maryland*¹⁰³ as a means of protecting the activities of federal instrumentalities from interference by the states. Mr. Chief Justice Marshall, deriving his argument in part from the supremacy clause, held unconstitutional the imposition by Maryland of a tax upon a branch office of the Bank of the United States, a federal agency incorporated by Congress in 1816. From these early beginnings, the cloak of immunity was extended to exempt the salaries of federal and state officers from taxation by an "alien" sovereign.¹⁰⁴ Immunity reached its high point in the Court of the 1920's and early 1930's. The prevailing trend was reversed, however, in a series of cases decided in 1938 and subsequent years. Of great importance was the destruction of the reciprocal exemption of state and federal employees from income taxation¹⁰⁵ followed, in the mid-1940's, by reaffirmation of the principle that immunity could not be applied to the performance of non-essential state functions.¹⁰⁶ As a consequence, the immunity doctrine no longer had to be taken as a substantial limitation on the federal taxing power although the scope of state authority to tax federally related activities was not made equally broad.

A long-standing and continuing issue in the area of intergovernmental immunities relates to state taxation of federal contractors and lessees. The 1941 case of *Alabama v. King & Boozer*¹⁰⁷ established the principle that a tax was not rendered invalid by the fact that its economic burden ultimately had to be borne by the government. However, the validity of this doctrine was seriously compromised when the Court, some thirteen years later, held in *Kern-Limerick, Inc. v. Scurlock*¹⁰⁸ that a state's gross receipts tax law could not be applied to purchases by a private contractor designated by the Navy Department to act as its purchasing agent. *King & Boozer* was distinguished on the ground that "though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States."¹⁰⁹ By contrast, the Court ruled, the state in *Kern-Limerick* actually was levying a tax on an instrumentality of the United States, which was not permissible in the absence of express consent by Congress.

The decision in *Kern-Limerick* created much consternation among state and local officials. Remedial legislation was introduced in Congress to eliminate claims of immunity from such taxes by contractors performing work for and

¹⁰³ 17 U.S. (4 Wheat.) 316 (1819). See generally POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 88 (1956).

¹⁰⁴ *Dobbins v. Comm'rs of Erie County*, 41 U.S. (16 Pet.) 435 (1842); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870). The doctrine was considerably enlarged in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895).

¹⁰⁵ *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Graves v. O'Keefe*, 306 U.S. 466 (1939).

¹⁰⁶ *New York v. United States*, 326 U.S. 572 (1946), affirmed the doctrine established in the 1905 case of *South Carolina v. United States*, 199 U.S. 437 (1905).

¹⁰⁷ 314 U.S. 1 (1941).

¹⁰⁸ 347 U.S. 110 (1954).

¹⁰⁹ *Id.* at 122.

acting as agents of the federal government. Hearings were held before a subcommittee of the Senate Government Operations Committee in 1957.¹¹⁰ However, the effort seemed pointless when, in the spring of 1958, the Court decided several cases which, on different bases, seemed to portend a return to standards more favorable to the exercise of state taxing powers.

Three cases—*United States v. City of Detroit*,¹¹¹ *United States v. Township of Muskegon*,¹¹² and *City of Detroit v. Murray Corp. of America*¹¹³—effectively destroyed tenuous distinctions in the area of immunity between privilege and property taxes. Earlier decisions had upheld the constitutionality of state privilege taxes upon the value of federal property in private hands. However, the Court, in *United States v. County of Allegheny*¹¹⁴ had condemned an *ad valorem* tax on the property itself on the assumption that "Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."¹¹⁵

Has the Court broken new ground in the 1958 Michigan cases pointing toward the further extension of limitations upon federal immunity from state taxation? If *United States v. City of Detroit* and *United States v. Township of Muskegon* are considered alone, the taxes imposed undoubtedly are reconcilable with the letter, if not the spirit, of *Allegheny*. *Detroit* presented the question of the constitutionality of a Michigan statute which subjected to taxation otherwise exempt real property being used by a private party as a lessee of the United States in a business conducted for profit. *Muskegon* posed the same basic issues with the factual difference that the taxpayer held under a permit rather than a lease and that the property was being used in the performance of government contracts on a rent-free basis. In both cases, a majority, speaking through Mr. Justice Black, argued effectively that the taxes imposed were for the beneficial use of property, as distinguished from levies on the property itself. Neither the lessee nor the permit holder, the Court held, was "so assimilated by the Government as to become one of its constituent parts."¹¹⁶

¹¹⁰ *Hearings on S. 6 before a Subcommittee on the Elimination of Claims of Immunity from State and Local Taxes of the Senate Committee on Government Operations*, 85th Cong., 1st Sess. (1957). The principal measure under consideration was passed by the Senate in March 1958. 104 CONG. REC. 3363 (1958).

¹¹¹ 355 U.S. 466 (1958).

¹¹² 355 U.S. 484 (1958).

¹¹³ 355 U.S. 489 (1958).

¹¹⁴ 322 U.S. 174 (1944).

¹¹⁵ *Id.* at 189.

¹¹⁶ 355 U.S. at 486. In *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253 (1956), the Court affirmed the imposition of state personal property taxes upon a government lessee who was providing housing accommodations on an Air Force base in Nebraska. Justice Frankfurter, writing for a majority, denied contentions that the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949, taken together, conferred a status akin to that of a managing agent upon the lessee corporation and thereby clothed it with immunity.

A more striking deviation from previous standards—a departure so marked as to represent, in effect, the overruling of *Allegheny*—is discernible in *City of Detroit v. Murray Corp. of America*.¹¹⁷ At issue was the constitutionality of state taxes levied, in part, on the value of materials and work in process being held by a government subcontractor but to which the United States had legal title. The applicable Michigan statutes characterized the taxes as assessments against property rather than privilege or use taxes. Indeed, the pleadings had formally admitted allegations that one of the levies was an *ad valorem* tax on personal property. The Court, however, found that the practical effects of the taxes in question were identical to those upheld in the two companion cases on the assumption that there is “no essential difference so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends.”¹¹⁸

Justices Frankfurter and Harlan, in separate opinions, expressed agreement with the majority view in *Detroit* and *Muskegon* that the lessee's and user's taxes, construed by the state courts to be levies on the privilege of using tax-exempt property, fell within acceptable constitutional bounds. Both objected, however, to the Court's holding in *Murray* which, in Mr. Justice Frankfurter's view, “would outright reject the doctrine of constitutional immunity from taxation of the Government and its property.”¹¹⁹ Mr. Justice Whittaker, who wrote a dissenting opinion in each of the three Michigan cases, prepared a particularly cogent and carefully reasoned attack upon the Court's approach in *Murray*.¹²⁰

The permissiveness of the Court's declarations in the area of taxation does not mean that federal immunities have been abandoned on a general basis. Indeed, on the very day of decision in the Michigan cases, the Court, in *Public Util. Comm'n v. United States*,¹²¹ reaffirmed and extended traditional immunity doctrines deriving from the supremacy clause of the Constitution. The Government, in a suit for declaratory relief, had sought a ruling that a California statute was unconstitutional to the extent that it prohibited carriers from transporting Government property at rates other than those approved by a state commission. Mr. Justice Douglas, in the majority opinion, shunted aside the contractor cases “as their impact at most is to increase the costs of the operation.”¹²² Instead, the Court focused on what it concluded was a constitutionally fatal conflict between the federal policy of negotiated rates, reflected in the procurement statutes and rules, and the state policy of regulation. Mr. Justice Harlan, joined in a dissenting opinion by Mr. Chief Justice Warren and Mr. Justice Burton, charged that the Court had acted prematurely

¹¹⁷ 355 U.S. 489 (1958).

¹²⁰ *Id.* at 511.

¹¹⁸ *Id.* at 493.

¹²¹ 355 U.S. 534 (1958).

¹¹⁹ *Id.* at 502.

¹²² *Id.* at 543.

in passing on the issue of constitutionality without requiring the government to proceed through the state commission in the first instance. He objected to the extreme character of the majority opinion and, citing *Murray* in particular, found it anomalous that "the very Term which witnesses a further diminution of the doctrine of implied intergovernmental tax immunities should produce this decision."¹²³

Viewed in retrospect, the emerging pattern of intergovernmental immunities reveals seemingly incongruous elements which make it less decisive than that which has developed in other areas of present-day federalism. The Warren Court, on the one hand, has avoided the sacrifice of essential spheres of federal supremacy to regulatory inroads by the states. If *Public Util. Comm'n* serves as an index, the Court has shown such zeal in the protection of federal activities from state intrusions as to raise serious questions of anticipatory adjudication under the guise of the declaratory judgment procedure. But, at the same time, the Court has accepted the general doctrine of deference as its dominant motif. This theme is expressed most forcefully in the recent contractor cases although *Murray*, representing a true break with precedent, remains the exception and not the rule. The Court's intent, fundamentally, is confined to placing the stamp of constitutionality on state efforts to realize revenues from private enterprises which seek federal immunity while engaging in profit-making ventures. There does not appear to be any inclination to yield ground with respect to the taxation of other federally related instrumentalities or functions.¹²⁴

THE COMMERCE CLAUSE AND STATE TAXING POWER

The exercise of taxing power by the states, within the constitutional context provided by the commerce clause, touches upon one of the most sensitive components of modern federalism. Theoretically, at least, the immunity of interstate commerce from direct interference has long been accepted as a guiding principle of federal-state relations.¹²⁵ In the area of multistate taxation, the

¹²³ *Id.* at 552. Traditional immunities, not grounded on tax considerations, continue to serve as a judicial buffer against possible state intrusions upon the performance of essential federal functions. See, e.g., *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956), in which the Court struck down efforts to subject a federal contractor to state licensing requirements. The rationale of *Johnson v. Maryland*, 254 U.S. 51 (1920) was followed. For an analysis of related questions governed by the law of legislative jurisdiction, see the *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* (Washington: Government Printing Office, 1956-57).

¹²⁴ For example, the Court has refused to sustain an Ohio tax levied against mutual savings banks on the ground that the property values on which the tax was computed included United States bonds. *Society for Sav. v. Bowers*, 349 U.S. 143 (1955). The Court also has struck down as discriminatory a Texas tax upon a lessee of real property owned by the United States where businesses with similar state leases are not taxed. *Phillips Chemical Co. v. Dumas School Dist.* 361 U.S. 376 (1960).

¹²⁵ Justice Frankfurter, speaking for the Court in *Freeman v. Hewit*, 329 U.S. 249 (1946), rejected "the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not

inclusiveness of the commerce rule often is merged with due process requirements based upon the attainment of a taxable situs within the state imposing the levy. The two constitutional concepts, applied separately or fused, represent a formidable basis for the invalidation of state tax laws. Their effectiveness, however, has been undermined by the Court's recent adoption of a generally deferential pattern looking toward the minimization or removal of judicial interference in the economic policies of the states. To be sure, practical considerations, stemming from the unending search by the states for additional sources of revenue, have continued to provide a cogent impetus.¹²⁶

Implicit in the adjudication of state taxation cases are recurring political and economic issues which cannot be obscured by elaborate displays of constitutional legalism. In each instance, the Court must balance anew competing demands for the preservation of state fiscal autonomy against the need for the maintenance of a free trade community throughout the nation. To what extent are such goals compatible or mutually exclusive? How best is an accommodation of federal-state fiscal policy to be achieved? Which is the proper forum—judicial or legislative—for the formulation of possible solutions? Traditionally, the Court has applied a formal standard in determining the validity of a state tax imposed on a local activity related to interstate commerce. Direct burdens are forbidden while remote or indirect burdens may be permitted in the circumstances of a particular case. For a brief period extending from 1938 to the early 1940's, Mr. Justice Stone attempted to substitute a "multiple burden" test in place of the mechanistic direct-indirect formula based upon incidence. In *Western Live Stock v. Bureau of Revenue*¹²⁷ he urged the adoption of a measure grounded on "practical rather than logical distinctions," while two years later he buttressed his argument for flexibility on the basis of "reason and of a due regard for the just balance between national and state power."¹²⁸ These efforts proved to be short-lived, however, and in a series of cases decided in 1944 and the years immediately following, the Court reverted to a formalistic approach.¹²⁹

because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. . . . For not even an 'internal regulation' by a State will be allowed if it directly affects interstate commerce." *Id.* at 256-58. For an excellent guide to the entire area, see HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* (1953). A useful review of earlier cases appears in Hellerstein & Hennefeld, *State Taxation in a National Economy*, 54 HARV. L. REV. 949 (1941).

¹²⁶ For a recent review, see Studenski & Glasser, *New Threat in State Business Taxation*, 56 HARV. BUS. REV. 77 (1958).

¹²⁷ 303 U.S. 250 (1938).

¹²⁸ *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

¹²⁹ A return to formalism became evident in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944), and continued to be reflected in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), and *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

The Warren Court, in its first test of the application of the commerce clause to state taxation, held unanimously that a state levy violated the constitutional proscription. At issue in *Michigan-Wisconsin Pipe Line Co. v. Calvert*¹³⁰ was a Texas tax on the occupation of "gathering gas" measured by the entire volume of gas "taken" as applied to an interstate natural gas pipeline company. Mr. Justice Clark, who delivered the opinion, found that the activity was such an integral part of the interstate process that it could not realistically be separated from it. Despite the pedestrian character of the result, the opinion is distinguishable in tenor from previous cases in which the "direct burden" test was applied. Clark, who consistently has supported a latitudinarian view of state taxing powers, avoided the narrow assumptions of a mechanical formula.¹³¹ He asserted in positive terms that, in the absence of congressional action, interstate commerce and its instrumentalities were not immune from state taxation. Indeed, Clark avouched the state's "rightful desire" to require that interstate business bear its share of the costs of local government. Obviously, the tone of such declarations was not indicative of a mere re-espousal of formalism. Instead, it augured a return to a more flexible approach based upon considerations of constitutional policy having reference to substantial effects.

In *Railway Express Agency v. Virginia*,¹³² a closely divided Court struck down a state tax on express companies, measured by gross receipts from intra-state business, as applied to a firm engaged exclusively in interstate business. The statutory language had termed the exaction a privilege tax which traditionally was suspect as a "direct burden" on interstate commerce.¹³³ Mr. Justice Jackson, speaking for a majority, held that local incidents which constituted an integral part of interstate commerce were not adequate grounds for a state license, privilege, or occupation tax. Mr. Justice Clark, in a dissenting opinion joined by Mr. Chief Justice Warren and Justices Black and Douglas, would have accepted the judgment of the state court that the tax was an *ad valorem* levy on intangible property. He denounced the Court's approach as one based wholly upon semantics: "If the label makes the tax invalid, the label is accepted; if the label validates the tax, the Court will pierce the label."¹³⁴ The most recent version of *Railway Express Agency v. Virginia*¹³⁵ reveals con-

¹³⁰ 347 U.S. 157 (1954).

¹³¹ See, for example, his previous dissent in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 610 (1951).

¹³² 347 U.S. 359 (1954).

¹³³ The State Corporation Commission and the Supreme Court of Appeals of Virginia upheld the validity of the levy as a property tax measured by gross income and laid on the intangible value of good-will or going-concern status. The United States Supreme Court adhered to the characterization of the legislature on the ground that gross revenue as a measure "is consistent with a tax on the privilege of doing a volume of business which would yield that revenue. . . ." *Id.* at 367.

¹³⁴ *Id.* at 371.

¹³⁵ 358 U.S. 434 (1959).

sideration of essentially the same issues but in an atmosphere more receptive to state power. Here, the Court upheld what the state legislature now designated a "franchise tax" on express companies, measured by gross receipts from operations within the state, in lieu of all other property taxes on intangibles and rolling stock. Mr. Justice Clark, speaking in this instance for a majority, maintained that commerce clause objections had been eliminated by the new law since the tax was levied expressly on property rather than on privilege. The state legislature, he averred, "has made crystal-clear that the tax is now a franchise tax . . ."¹³⁶

Restrictions stemming from the due process clause of the fourteenth amendment have served to impose additional limitations upon the power of the states to tax. Indeed, territorial restraints were recognized as fundamental prior to the adoption of the amendment. Establishment of an adequate nexus between the state and the taxed commerce currently is required if due process is to be satisfied. Problems of extraterritoriality often arise and, to some extent, these may be solved in terms of an apportionment formula allocating to the taxing state its "fair share" of the tax imposed on a multistate enterprise. It is possible, in this connection, that a levy may meet the minimum standards implicit in the concept of due process and yet be invalidated on commerce grounds.

In *Miller Bros. v. Maryland*¹³⁷ the Court was required to determine the liability of a Delaware merchandising corporation for the collection and payment of a Maryland use tax. The extent of the store's contacts with the taxing state comprised advertising which reached Maryland customers, the mailing of occasional sales circulars, and deliveries to purchasers in Maryland. Were these sufficient, in a constitutional sense, to provide the nexus necessary to meet due process requirements? Justice Jackson, speaking for a majority, refused to sustain the liability asserted by the state on the ground that there had not been established an acceptable minimum connection between the state and the transaction which it sought to tax. The majority distinguished previous decisions in *General Trading Co. v. State Tax Comm'n*¹³⁸ and *Nelson v. Sears, Roebuck & Co.*¹³⁹ involving "active and aggressive operation within a taxing state" as wholly unlike the instant case where there "was no invasion or exploitation of the consumer market."¹⁴⁰

¹³⁶ *Id.* at 438.

¹³⁸ 322 U.S. 335 (1944).

¹³⁷ 347 U.S. 340 (1954).

¹³⁹ 312 U.S. 359 (1941).

¹⁴⁰ 347 U.S. at 347. In view of the negative due process holding, the Court found it unnecessary to determine whether the statute imposed an unjustifiable burden upon interstate commerce. Mr. Justice Douglas, joined by Chief Justice Warren and Justices Black and Clark, dissented on the basis of the general principles announced in the *General Trading* case. The due process clause, he contended, should not prevent the state from exercising jurisdiction since "this is not a case of minimal contact between a vendor and the collecting State." *Id.* at 358. The principles enunciated in the *General Trading* case were reaffirmed and *Miller Bros.* was distinguished in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

A perplexing due process issue—novel in conception and in application—has arisen from recent state formulas for the taxation of interstate air carriers. The Court, in its first approach to the problem in *Northwest Airlines, Inc. v. Minnesota*,¹⁴¹ could offer no clear-cut solution based upon precedent. Mr. Justice Frankfurter, announcing the conclusion and judgment of a divided Court, upheld a property tax levied by the domiciliary state upon all of the carrier's flight equipment. In the circumstances of the case, he held, there was no indication that the airline had attained a tax situs which would have subjected it to taxation in any other state. The Court, therefore, left unanswered the central question whether future decisions should be based upon an apportionment theory derived from the railroad rolling-stock cases or upon the older "home port" theory of the ship cases where sole taxing authority was conferred on the domiciliary state.¹⁴² Mr. Justice Black, concurring, refused to foreclose consideration of the taxing rights of states other than the home state. Mr. Justice Jackson, on the other hand, condemned the apportionment theory as a "mongrel one, a cross between desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce."¹⁴³ The physical basis of the state's relationship to the rolling stock of railroads, he contended, was wholly lacking with respect to airplanes. The best analogy, in Jackson's view, was the "home port" theory applied to ships.¹⁴⁴

The Court reconsidered the due process aspects of air transportation in *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*.¹⁴⁵ At issue was the constitutionality of an apportioned *ad valorem* property tax levied by Nebraska on the flight equipment of an interstate carrier. The line was not incorporated in the state nor was its principal place of business or home port located in Nebraska. Its sole connection consisted of eighteen daily in-state stops of short duration. The question, therefore, was whether a sufficient nexus existed, measured by due process standards, for the imposition of the tax. Mr.

¹⁴¹ 322 U.S. 292 (1944).

¹⁴² Seagoing vessels traditionally have been taxable at the domicile or "home port" of the owner. Until the late 1940's, a similar standard governed the taxability of vessels moving in interstate commerce along the inland waterways unless an actual situs had been acquired in another state by continuous employment there. *Southern Pac. Co. v. Kentucky*, 222 U.S. 63 (1911). This general rule was modified in *Ott v. Mississippi Barge Line Co.*, 336 U.S. 169 (1949), where the Court applied the apportionment principle to inland water transportation. The formula approved was comparable to that which *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891), first applied to railroad cars in interstate commerce.

¹⁴³ 322 U.S. at 306.

¹⁴⁴ Mr. Chief Justice Stone, in a dissenting opinion in which he was joined by Justices Roberts, Reed, and Rutledge, denounced the tax sustained by the Court as "so obviously disproportionate to the protection afforded to the taxed property by the taxing state as to place a constitutionally intolerable burden on interstate commerce." He called for an apportionment based upon the principles formerly enunciated in the railroad cases. *Id.* at 325.

¹⁴⁵ 347 U.S. 590 (1954).

Justice Reed, writing for a majority, dispelled many of the doubts which had been raised by Mr. Justice Frankfurter's plurality opinion in *Northwest*. He dismissed allegations that the tax was precluded by federal regulation of air transportation or that it constituted an unwarranted burden on interstate commerce. Instead, Mr. Justice Reed focused attention upon the situs issue and found that the contacts were adequate to sustain the exercise of the state's taxing power. The indecisive approach of *Northwest* was abandoned when the Court, in terms, adhered to the apportionment formula of the railway car cases. By rejecting the home port theory of the ocean vessel decisions, it placed air commerce within a taxing framework more closely analogous to that applied to other high-speed instrumentalities of multistate transportation.¹⁴⁶

In a dramatic and unprecedented action during the past term the Court upheld the constitutionality of state net income tax levies on out-of-state corporations whose activities were "exclusively in furtherance of interstate commerce."¹⁴⁷ Despite findings in the state courts that the taxes violated the commerce and due process clauses of the Constitution, the Court, in almost all respects, treated the cases as though intrastate rather than interstate commerce were at issue. Mr. Justice Clark, writing for the Court in *Northwestern States Portland Cement Co. v. Minnesota*,¹⁴⁸ applied time-honored standards of discrimination, burden, and nexus and, on all counts, found no constitutional infirmity. The incidence of the taxes, he concluded, afforded "a valid 'constitutional channel' which the States have utilized to 'make interstate commerce pay its way.'"¹⁴⁹ Mr. Justice Frankfurter, dissenting, took issue with the majority determination of the question on the basis of precedents applicable to intrastate commerce. The decision, in his view, served to break new ground in an area essentially nonjudicial in nature.¹⁵⁰

This latitudinarian approach to state taxing powers, dramatically evident recently, has not been limited to the commerce and due process clauses. In *Youngstown Sheet & Tube Co. v. Bowers*,¹⁵¹ the Court upheld the application of state taxes to materials imported from abroad for use in manufacturing and

¹⁴⁶ Justice Frankfurter, in a dissenting opinion which served to amplify earlier views expressed in *Northwest*, condemned the tendency to transfer doctrines developed for one set of circumstances to another. He admitted that the connection with the taxing state in this instance was not so tenuous as to offend due process. However, he asserted that the incidence of the levy violated the commerce clause. Frankfurter urged that a constructive adjustment of competing considerations in this area was beyond the scope of the judicial process and could be achieved only by congressional action. *Id.* at 603.

¹⁴⁷ *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450 (1959). The two cases were consolidated for decision.

¹⁴⁸ *Supra* note 147.

¹⁴⁹ *Id.* at 464.

¹⁵⁰ *Id.* at 470.

¹⁵¹ 358 U.S. 534 (1959). For a discussion of the case in the light of the "original package" doctrine, see Note, 57 MICH. L. REV. 1246 (1959).

stored temporarily. Since such stocks were irrevocably committed to supply and were actually being used to meet the daily requirements of manufacturing plants, Mr. Justice Whittaker, who wrote the prevailing opinion, ruled that all phases of the importation process had ended and the materials had lost their distinctive character and immunity as imports. Mr. Justice Frankfurter, dissenting with Mr. Justice Harlan, charged that the Court's interpretation of the import-export clause contravened precedents that had established the constitutional immunity from state taxation of goods awaiting sale or manufacture.¹⁵²

It is clear, in assessing the current judicial approach to the taxation of multistate enterprises, that the Court has turned from a position of what might be termed formalistic negativism to one of outright deference to state power. The decision in *Northwestern States* removes the long-standing barrier to state taxation of activities exclusively in interstate commerce. Nor does the due process clause of the fourteenth amendment any longer serve to preclude the taxation of multistate businesses with minimal contacts on the basis of insufficiency of nexus.¹⁵³ Absent the recent reversal of this trend by congressional action, the broad interdictions of the commerce and due process clauses might have come to have little effect upon the revenue policies of the states. What the states achieved in 1959 by judicial action was a status akin to that which they were afforded during the late 1930's in the control of other aspects of their internal economies.

Why did the Court execute a retreat from the traditional standards to which it had adhered in a long series of cases involving the taxation of multistate enterprises? Perhaps the new approach reflected a feeling of judicial incompetence in the determination of the economic effects of state levies upon the stream of commerce. Or, conceivably, it may have been designed to precipitate an exercise of broad policy-making powers indisputably vested in Congress by the commerce clause.¹⁵⁴ In any event, the Court did not wholly abandon the discrimination and burden rules which it had utilized so effectively in the past. Instead, it reaffirmed their applicability. The novelty of the *Northwestern States* decision lies in its obliteration of the ill-defined boundaries which separate intrastate from interstate commerce.¹⁵⁵

¹⁵² 358 U.S. at 551.

¹⁵³ This aspect may have been influenced by the liberalization of extraterritorial jurisdiction under the due process clause in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). At issue in *McGee* was the amenability of a defendant corporation to the process of the state in an *in personam* action.

¹⁵⁴ See text at pages 85-86 *infra*.

¹⁵⁵ A marked degree of consistency is evident in decisions involving state or local taxes which impose a discriminatory burden on interstate commerce. Where such cases have arisen, the Court has been virtually unanimous in striking down "privilege" taxes "having a substantial exclusory effect on interstate commerce." See *West Point Grocery Co. v. Opelika*, 354 U.S. 390 (1957).

CONGRESS, THE COURT, AND THE FEDERAL SYSTEM

Despite a generally broad application of the judicial doctrine of deference in all of the crucial areas defining the federal-state relationship, the Warren Court continues to be the object of criticism for an attitude which, paradoxically, is alleged to be hostile to the "legitimate" exercise of state functions and to traditional concepts of federalism. Moreover, detractors of the Court contend that, since most of the controversial decisions have been grounded on the plane of statutory construction, Congress is peculiarly suited to provide a corrective counterpoise in the current struggle. Presumably, the national legislature may interpose its powers to modify or, if need be, to reverse anti-state holdings. But, the questions remain: To what extent has Congress been willing to assume a revisionary role dedicated to a purported restoration of the federal-state balance? In what areas has legislative action achieved positive results?

The Jenner-Butler "omnibus bill" of the 85th Congress represented the most ambitious anti-Court proposal to reach the floor of either chamber. The Jenner bill, in its original form, would have stripped the Supreme Court of jurisdiction to hear appeals in five types of cases.¹⁵⁶ As amended and reported by the Senate Judiciary Committee, however, the bill's effect upon federal-state controversies was limited to the reversal of *Konigsberg*¹⁵⁷ and *Schware*¹⁵⁸ and to undermining the holding in *Nelson*.¹⁵⁹ It would have denied the Court jurisdiction to review state decisions relating to admissions to the practice of law and would have included a legislative declaration that the federal anti-sedition laws were not to be construed as prohibiting state enforcement of otherwise valid state acts.¹⁶⁰ A companion House measure of comparable

¹⁵⁶ The original version of S. 2646 would have precluded Supreme Court review in any case where there was drawn into question the validity of contempt convictions arising out of investigations by congressional committees; proceedings involving the dismissal of federal employees on security grounds; state laws and regulations relating to the control of subversion; rules or bylaws of a school board concerning subversive activities in its teaching body; and state regulation of admissions to the bar. Senator Jenner indicated in his testimony before the Senate Internal Security Subcommittee that the measure was designed to overcome the effect of the Court's decisions in *Watkins v. United States*, 354 U.S. 178 (1957); *Service v. Dulles*, 354 U.S. 363 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); and *Cole v. Young*, 351 U.S. 536 (1956). See *Hearings Before Senate Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, on the Limitation of Appellate Jurisdiction of the United States Supreme Court*, 85th Cong., 1st Sess., ser. 17 (1957), and 85th Cong., 2d Sess. ser. 18 (1958).

¹⁵⁷ *Konigsberg v. State Bar*, *supra* note 156.

¹⁵⁸ *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

¹⁵⁹ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

¹⁶⁰ See SEN. REP. NO. 1586, 85th Cong., 2d Sess. (1958).

scope was lacking and, in the closing days of the 1958 session, the Senate tabled the Jenner-Butler bill.¹⁶¹

The most persistent "corrective" measure relates wholly to the doctrine of preemption. During the past half-decade, numerous bills have been introduced to modify the Court's "nationally-oriented" approach by providing a rule of statutory construction indicative of legislative intent not to preclude state jurisdiction. However, serious consideration has been accorded only one, H.R. 3,¹⁶² which has borne this designation in three successive Congresses. The proposal stipulates that federal laws are not to be construed as superseding state enactments unless Congress has specifically stated that it wishes to preempt the field or unless there is such direct and positive conflict between the federal act and the state law that the two cannot be reconciled. The current version includes a second section designed expressly to reverse the Court's interpretation of the Smith Act in the *Nelson* case. Indeed, it was *Nelson* which provided the essential impetus facilitating passage of H.R. 3 by the House in both the 85th and 86th Congresses.¹⁶³ On both occasions, the measure failed to receive Senate approval although affirmative action on a bill limited to the enforcement of state sedition statutes was narrowly averted by a dramatic move on the part of the Senate leadership in the 85th Congress.¹⁶⁴ Undoubtedly, the Court's recent decision in *Uphaus* has effectively staved off action by the upper house in the 86th Congress.

Aside from these abortive efforts and others where consideration of bills never proceeded beyond the committee stage, there have been three areas in which statutes have altered the Court's role in federal-state relations. None has involved any action remotely approaching the drastic restrictions envisioned by those hostile to the Court. None might properly be characterized as "ripper legislation." In one area, judicial decisions have been modified not to redress the balance in favor of the states but because the Court has read state powers too broadly.

The "no-man's-land" section of the recently enacted labor reform bill¹⁶⁵ represents the most significant congressional effort to provide a remedy where a jurisdictional void formerly existed. The act does not purport to reverse traditional holdings of the Court in commerce clause litigation. Instead, it is limited to a definition of legislative intent covering a relatively narrow area in which the Court itself has intimated that legislative action was sorely

¹⁶¹ See 104 CONG. REC. 18687 (1958).

¹⁶² See generally *Hearings Before House Committee on the Judiciary on Establishing Rules of Interpretation Governing Questions of the Effect of Acts of Congress on State Laws*, 84th Cong., 2d Sess., ser. 9 (1956), 85th Cong., 2d Sess., ser. 15 (1958), and 86th Cong., 1st Sess. (1959).

¹⁶³ See 104 CONG. REC. 14162 (1958); 105 CONG. REC. 11808 (1959).

¹⁶⁴ The bill was recommitted by a 41 to 40 roll-call vote. 104 CONG. REC. 18928 (1958).

¹⁶⁵ 73 Stat. 519, 29 U.S.C. § 401 (Supp. I, 1959).

needed.¹⁶⁶ The act reaffirms the discretionary power vested in the National Labor Relations Board to decline to assert jurisdiction over any labor dispute where the effect on commerce is not sufficiently substantial to warrant the exercise of the Board's authority. However, the Board is not permitted to broaden, beyond existing limits, the area in which it refuses to take jurisdiction. Significantly, the act contains an express congressional disclaimer removing any legal barriers to the assumption of state jurisdiction over labor disputes which fall within the Board's non-jurisdictional category.¹⁶⁷

The 86th Congress acted to curb rather than to broaden state powers in the field of taxation. The immediate problems created by the Court's decision in *Northwestern States*,¹⁶⁸ coupled with fears that the decision constituted a major step toward the abolition of a nation-wide "common market," touched off a flurry of activity to provide stop-gap relief.¹⁶⁹ The "corrective" measure, as finally enacted, effects a temporary "freeze" until recommendations for permanent legislation can be made. It prohibits state taxation of the income of out-of-state firms which do not maintain places of business within its boundaries.¹⁷⁰ Ultimately, Congress will be required to fashion a "balance of interests" formula capable of meeting the revenue needs of the states without placing an undue burden on interstate commerce.

The least controversial of the recent measures was an act increasing from \$3,000 to \$10,000 the amount necessary to confer jurisdiction on the district courts in federal question litigation and in cases arising out of the diversity of citizenship of the parties. In addition, the Judicial Code was amended to provide that a corporation should be deemed a citizen of the state in which its principal place of business is located as well as of the state of incorporation.¹⁷¹ The underlying purpose of the legislation was to reduce the current backlog of cases pending on the court calendars and to facilitate a reduction in future workloads. Whether the act will effect a notable transfer of cases to the state court dockets is highly doubtful. In view of the magnitude of present-day damage claims, the new jurisdictional minimum of \$10,000 would seem to be of little, if any, deterrent value.¹⁷²

If recent congressional performance may be taken as an indicator of future action under like circumstances, the Court will continue to emerge unscathed

¹⁶⁶ See H. R. REP. NO. 741, 86th Cong., 1st Sess. 17-19 (1959).

¹⁶⁷ 73 Stat. 541, 29 U.S.C. § 164(c) (Supp. I, 1959). Claims of federal preemption under the statute are considered in *De Veau v. Braisted*, 363 U.S. 144 (1960).

¹⁶⁸ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

¹⁶⁹ See *Hearings Before the Senate Select Committee on Small Business, on State Taxation on Interstate Commerce*, 86th Cong., 1st Sess. (1959).

¹⁷⁰ 73 Stat. 555, 15 U.S.C. § 381 (Supp. I, 1959).

¹⁷¹ 72 Stat. 415, 28 U.S.C. §§ 1331, 1332(c) (1958).

¹⁷² See the comment concerning the possible effects of the statute in 72 HARV. L. REV. 391 (1958).

from attacks upon its appellate jurisdiction—at least in the exercise of its traditional supervisory role in the federal system. Even staunch supporters of the judiciary can find little fault with the legislative product thus far revealed. Judged by any reasonable standard, the statutes reflect a remedial rather than a punitive approach. Perhaps the greatest threat to the powers of the Court arose and was overcome during the 85th Congress when, by close votes, proposals of broad scope were debated and shunted aside. To be sure, similar bills were introduced in the 86th Congress, but proponents of these measures were unable to secure any positive action in either house. In familiar, time-honored fashion, subtle changes in the Court's treatment of controversial issues and ever-shifting majorities seem once again to have contributed intangibly, but dramatically, to a reduction of legislative pressures.

JUDICIAL TRENDS IN FEDERAL-STATE RELATIONS: A SUMMING UP

What general inferences emerge from this examination of the principal judicial pivots upon which modern federalism hinges? How may a balance sheet be drawn to indicate the relative strengths and weaknesses of state and nation? The following observations, in summary form, serve to describe the current status of the developing pattern:

1. The Warren Court has not been an innovator of the preemption or "new" due process doctrines. Instead, a shift in emphasis is the major distinguishing characteristic. The Court has applied old doctrines in areas—sedition, for example—where they were hitherto unknown although the principle of supersedure outside commerce clause litigation had been established more than a decade earlier.

2. With respect to economic relationships, the Court has continued, if not expanded, a policy of deference to state legislation. There are no indications that due process will be revived to strike down any experimental social programs which may be instituted. Presumably, the doctrine of preemption could be substituted for or made complementary to due process if, as seems unlikely, the Court should embark on a course reminiscent of that followed during the 1920's and early 1930's.

3. A permissive pattern has emerged from cases defining the scope of state powers of taxation. When judged by the standards current a generation ago, recent decisions fall little short of a revolution in judicial attitudes. Long-established barriers have been removed in such controversial areas as interstate commerce and intergovernmental immunities.

4. Deference to state decisional law has developed in federal question cases involving open choice-of-law questions and in those arising out of the traditional diversity relationship. Expansion of the *Erie* doctrine, sometimes overlooked as a "technical revision" of the 1930's, has had a profound effect upon the federal-state balance. The related doctrine of equitable abstention, present-

ly limited in its application, remains an important indicator of a federal policy to defer to the primacy of state adjudications wherever feasible.

5. There is little doubt that the balance in the federal system has turned against the states in most areas where individual liberties are at issue. Behind the legal facade of preemption and due process lie the strong predilections of a majority of the Justices in favor of a vigorous "civil rights" approach. The labor-management cases, which had created a power vacuum in the absence of congressional action, also seemed to turn on the assumption that a totality of federal control would be more beneficial to the rights of labor than any measure of state regulation.

6. The Court, as a coordinate branch of government, is on stronger ground today than it was during the constitutional crisis of the 1930's. Its decisions—particularly in the application of supersedure techniques—are unassailable as perpetually binding pronouncements (though political attacks upon them have been rife) since Congress may provide corrective measures at will. Nevertheless, the Court has lost little of the preeminence which it formerly enjoyed in the constitutional adjudication of federal-state problems. Experience has indicated that congressional majorities to overturn Supreme Court decisions are not easily obtained.

7. The Court's role as "umpire" in federal-state relations remains secure. Its position will change little even if a broadly conceived and potentially expansive bill is enacted expressing congressional intent to establish interpretive rules governing questions of the effect of federal acts upon state laws. In the final analysis, the success or failure of any such general statute would rest largely on the construction given to it by the Court.