Justice Frankfurter’s theory of decentralization and dispersal of control is completed by infusion of a geographic element. He wrote in 1930 that “this element of size is perhaps the single most important fact about our government and its perplexities.”¹ In a volume dedicated to studying the demands of modern society upon government, he outlined some of the difficulties that our federal system would face in the decades ahead. In general, the refusal, rather than the inability of state governments to cope with the myriad pressures of industrial life, was one of the causes forcing the federal government to assume greater burdens. Suggesting that perhaps the desire to protect regional interests would reinvigorate the feeling of state responsibility, and that such reinvigoration would be a healthy sign, he recognized that certain services and powers could only be handled in Washington.

Such a division of labor, while guided by the traditional breakdown between delegated and reserved powers, would not be limited by it. A pragmatic division based on day-to-day experience was what was needed. He had seen the destructive tendencies inherent in the too centralized enforcement of prohibition and had spoken against it: "I cannot help but wonder whether those who suggest [centralizing all administration in Washington] have ever had the slightest opportunity to gauge the absorptive power of the federal government in the assumption of increased burdens." This inarticulate fear of absorptive power led him in 1930 to advocate pragmatic-functional division of labor.

Professor Frankfurter thought that the Framers fortunately provided for just such an occurrence, having been aware that for federalism to retain its vitality, "the division of power between states and nation . . . should in the main not be spelled out with particularity, but be derived from the general political conceptions regarding the purposes of the Constitution and their achievement." These views were expressed before the New Deal came into being. Frankfurter probably did not foresee how completely the Nine Old Men would imperil state and federal attempts to deal with the economic crisis, thus triggering the Court Packing plan and leading eventually to the accretion of power in Washington. Questions that he raised in 1930 and before were picked up and amplified after the full impact of the New Deal became visible. He stands as a forerunner of and yet as a present-day participant in the movement that would re-examine the basic premises of federalism in order to retain as much of our traditional system as is feasible.

I

References to the fact that Justice Frankfurter is deeply concerned with maintaining the states as workable units of govern-


*Frankfurter, The Public and Its Government, p. 73.
ment are legion. Hardly a commentator passes up mention of this interest, and the Justice himself reiterates it in his opinions whenever possible. But why such an interest? Beyond his reverence for traditional ways lie other reasons. He is familiar with the pluralist approach to political organization, a familiarity perhaps gained in the early period of his friendship with Harold Laski. Pluralism basically holds that the state, while the most inclusive of all associations, is not the only nor even the prime group through which individual self-realization is reached. Smaller autonomous units must be present in order for a society to be deemed democratic. Frankfurter has absorbed much of this philosophy and has applied it in pure form. He has also exhibited a transcribed version of the pluralist creed in his accommodation of state and national interests, merely substituting states for the smaller autonomous units in the formula. The United States, then, is federalistically plural in outlook and structure. It is partially this dualism that Frankfurter's writings reflect.

His association with Laski probably only brought to fruition his inarticulated philosophic leanings. Growing to maturity when the pragmatism of James and Dewey was setting the tone for an age, Frankfurter could not have avoided, however unconsciously, making some of their teaching his own. In the Justice's opinions praising federalism as the system most adaptable to geographic division of function and competence, various strands of pluralism and pragmatism are interwoven. It is important that the semi-autonomous units known as states be maintained in order that governmental experimentation can be carried on. And for Frankfurter, government means primarily experimentation. Federalism depends upon local experience to provide the answers to local problems. Such an emphasis certainly did not originate with Frankfurter. Indeed, he would be happy to acknowledge an intellectual debt to Holmes and Brandeis on this matter.

While the romanticist would picture a defender of state integrity against the supposed predatory forays of the federal government as a defender of states' rights, the identification would be largely inaccurate. States are important in and of themselves and as areas for the necessary experimentation that may lead to the good society. In addition, however, they provide at a lower
level the fluidity that is necessary for unity at the national level. Federalism is one of the devices whereby the tensions of a heterogeneous society can be ameliorated and co-operation can take its place alongside of competition as a unifying force. With but one exception, compromises and adjustments have been worked out without rending the fabric of national life.

A further reason for geographical dispersion is that, to paraphrase Lord Acton, centralization of power tends to corrupt, absolute centralization of power to corrupt absolutely. It has often been charged that Frankfurter has confidence in the disinterestedness and ability of all branches of the government except the judiciary. Such charges would have to be revised to take into account his hesitation about giving to any level of government complete power, no matter how disinterested or able it may prove itself. State power acts as a medicant, keeping the national government from becoming too corrupted or polluted by an overdose of power. This concern for the health of the national government, as well as that of the states, places Frankfurter not in the camp of states' righters but in the circle of those who desire a totally well-integrated body politic.

Fundamentally, this is the rationale behind geographic decentralization of function, competence, and control. In reality, of course, delicate gradations make applying theory to practice a hazardous business. One of Justice Frankfurter's favorite expressions is that "a line has to be drawn" somewhere indicating the difference between permissible or nonpermissible conduct, authorized or unauthorized exercise of power. Nowhere does the line have to be drawn with greater care or more exactness than in this area of state-federal competence relations. Precise formulation of issues and due regard for the present significance of past decisions would help to lessen the contest between centralization and local rule. After he came to the Court, Frankfurter told his brethren that "the autonomous powers of the states are those in the Constitution and not verbal weapons imported into it." 4 In the very difficult task of ruling on state power, constitutional provisions should be the basis for judgment and not the commentary that time has placed upon these provisions. Each case presents

varied circumstances and the demarcation line between permissive and nonpermissive conduct is variously drawn. There are no fixed points. Wherever the line is drawn, it is bound to appear arbitrary judged solely by the bordering cases. Rational considerations must determine where the line is to be placed. Drawing a line is, therefore, an exercise of judgment in each particular case. All that the judiciary must recognize is that the line "must follow some direction of policy, whether rooted in logic or experience. Lines should not be drawn simply for the sake of drawing lines."  

II

When Justice Frankfurter took his place on the Supreme Court, many of the most important cases dealing with New Deal legislation had already been litigated. The competence of the national government to shape economic destinies had been largely recognized. Of the important cases dealing with economic issues in the early part of his tenure he wrote the opinion of the Court in only one, the Fair Labor Standard Act case of Kirshbaum v. Walling. 6 Otherwise he acquiesced silently in the majority's vast extension of federal power to all fields and aspects of economic life. 7 By this early display, one would have been justified in assuming that he was a staunch supporter of increasing centralization. However, it is probably true for most of the justices who participated in these decisions that none was concerned with deliberately making a Goliath of the national government; they were instead either motivated by strictly legal competence considerations or by non-legal policy desires to see economic imbalance righted.

Diminution of state power had not been planned. It had come as the consequence and aftermath of interpretations given to federal legislation. The Court since the New Deal has been

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6 316 U.S. 517 (1942).
criticized for its handling of legislation directed at economic evils, but it must be remembered that the Court inherited many rulings on the statutes it was to apply. The Sherman Act and the Interstate Commerce Act were direct precursors of many New Deal enactments. Tentative approval had already been given much federal regulation. When statutes dealing with every conceivable subject under the sun were added to the vast array already on the books, it is small wonder that an incidental lessening of state competence ensued. Justice Frankfurter has not been entirely happy about the process. Recognizing that it was inevitable that the federal government would move into more fields, he has desired explicit congressional statement when state power was to be displaced. Pre-emption could be a dangerous weapon unless properly controlled. "To hold . . . that paralysis of state power is somehow to be found in the vague implications of the federal . . . enactments, is to encourage slipshodness in draftsmanship and irresponsibility in legislation."8 Justice Frankfurter is not as apt to think that Congress specifically desires state dislodgment as are some other members of the Court. His general insistence on legislative responsibility becomes even stronger when state powers are under attack.

In 1928 he had written to Justice Stone complimenting him on one of his opinions. The behavior of the Court was worrying the scholar, however. He feared that "the due process clause will be used as an instrument of restriction upon the area of discretionary power of the states over local matters, and whatever may not be susceptible of curbing through the due process clause will be restrained by the requirement of equal protection of the laws."9 The decade of the 1930's gave ample proof that his fears were well grounded. After he traded his academic gown for the jurist's robe, he found that members of the Court were still using due process and equal protection to invalidate state action. He has called the veto that the Supreme Court exercises over the socio-economic legislation of states through the due process clause the most vulnerable aspect of undue centralization. Not only does it

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prevent an increase in social knowledge but it also turns what are really policy determinations into false legal issues by having the Court rule on matters outside its field of special competence. Frankfurter has, of course, joined in striking down state legislation based on due process claims and perhaps at times he has done it merely because of personal notions as to the wisdom or unwisdom of the legislation. On theoretical grounds, however, he has upheld the principle that geographic dispersal of competence and function should not be disturbed. Thus he has approved state schemes for regulation of insurance, liquor, marketing agreements, and prices, against the charge that regulation violated due process of law.

On the whole, claims brought to the Court declaring that equal protection of the laws has been denied have received short shrift from the Justice. They have not warranted the attention given to due process allegations. Equal protection considerations are often tied to schemes of classification used by the states. Frankfurter has been lenient in his treatment of those schemes, thinking that sectional or state practices should be accepted unless a definite infringement of constitutional rights was involved. Equal protection could not be used to force unnecessary conformity. He has warned time and time again that "the equal protection clause was not designed to compel uniformity in the face of difference" and that "the Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy...are often tougher and truer law than the dead words of the written text."

Classification of persons, occupations, etc. on a rational basis by state legislatures, while affecting the concept of geographic dispersal of function and control but indirectly, does bring into question state competence, which is tied very closely to the dis-

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persal argument. Early in his judicial career Justice Frankfurter set forth with some bluntness his conception of the equal protec­tion guarantee.

... laws are not abstract propositions. They do not relate to ab­tract units A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.13

The treatment that the equal protection clause should receive would be pragmatic and empirical to the core. As in due process, there are minimal limits below which state action cannot descend and still be acceptable, but the descent has to be judged one step at a time. In this way invalidating state legislation can often be avoided and the pristine geographic division maintained. Ac­cording to Justice Frankfurter neither due process nor equal protection should be allowed to stifle experimentation within the states that does not run counter to very explicit and expressed constitutional prohibitions—otherwise the real worth of the fed­eral system will be lost.

III

Of all the clauses in the Constitution that have provided the legal bases upon which an adjustment between federal-state func­tional relations are carried out, those dealing with interstate commerce and taxation are cited most frequently. It is perhaps fitting that Justice Frankfurter's first opinion for the Court, Hale v. Bimco,14 discussed interference with interstate commerce. Florida had provided that all cement imported into the state should be inspected and that the firms affected pay an inspection fee. No such requirement was set up for Florida producers. The Court struck down the statute as being discriminatory. Ironically, in his debut, Justice Frankfurter thus found himself on the side of those who denied rather than upheld state competence. The

opinion in the Hale case was not very long, barely four pages, but either the issues involved or the fact that he was performing for the first time as a member of the Court intrigued the Justice enough so that on opinion Monday he delivered his initial offering verbatim without looking at any notes.\textsuperscript{15}

Frankfurter's interest in issues growing out of the commerce clause has been one of long-standing. As a teacher he wrote a notable volume on \textit{The Commerce Clause Under Marshall, Taney and Waite}. Devoted to a study of the changing patterns of interpretation that the clause had received and to a discussion of the fluctuations in the nation's economic life that motivated such changes, this book may give the fullest account of his own conceptions of this important constitutional provision. Fortunately the Justice has the ability, when he so desires, to condense the essence of material into very limited space. The following quotation amply catches the mood and meaning of his study.

The history of the commerce clause . . . is the history of imposing artificial patterns upon the play of economic life whereby an accommodation is achieved between the interacting concerns of states and nation. The problems of the commerce clause are problems in this process of accommodation, however different the emphasis or preference of interest, and however diverse the legal devices by which different judges may make these accommodations.\textsuperscript{16}

Frankfurter wrote his study on the commerce clause in 1937, scarcely two years before he took his place on the Supreme Court and joined in the statecraft which that body fashioned. For him, any accommodation between nation and states has been premised upon mutual respect growing out of the geographic and functional division of labor.

His 1937 statement of principle is valuable because of its proximity to the time of his appointment and because of the fullness of its nature. But it is merely the culmination and compilation of previous views. Exactly a decade before he had warned


that members of the Supreme Court must be not just statesmen but "industrial statesmen." 17 Wisdom in political adjustment would no longer be enough. An understanding of economic and industrial facts was also necessary. Frankfurter wrote that perhaps no greater responsibility had ever confronted a judicial tribunal, but the responsibility was unavoidable, given the nature of industrialized American life in the twentieth century. The Court had always been faced with the political problems of federalism and the consequent need to protect the integrity of both nation and states. Now it was called upon to arbitrate more subtle conflicts. And again the integrity of both levels of government had to be maintained. After he took his place on the bench, Frankfurter continued to stress the fact that decisions concerning the commerce clause ultimately depend on judgment in balancing considerations as to whether a particular field of legal control could best be cared for by state or national action. No automatic answer in favor of either side was available. When "the requirements of an exclusive nationwide regime" do not have overriding backing in law and fact, "respect for the allowable area within which the forty-eight States may enforce their diverse notions of policy" 18 must be granted.

To make the words "interstate commerce" encompass all aspects of business transactions was to turn the concept into a shibboleth. The geographic division of function and competence that underlay the federal system precluded complete centralization unless the system itself was to be sabotaged. "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." 19 In interpreting the interstate commerce clause, Justice Frankfurter has not always avoided the "scholastic reasoning" that he criticized. His voting record could be used either to prove or disprove that he was deeply committed to geographical decentralization and maintenance of the states as useful and necessary units of government. Justice Frankfurter's jurisprudence generally, however, is characterized

by a balance of interest approach. In the weighing of claims of state and national governments under the commerce clause, this approach is visible in one of its most pronounced forms.

Many state claims to competence are put forward under the traditional plea for state police power. Frankfurter has treated this concept as a fertile doctrinal source for accommodation of local interest with those of national importance as included within the rubric of interstate commerce. As the commerce clause is not a static but a dynamic section of the Constitution, so police power, because of the dynamic qualities, eludes attempts at definition. Only a case-by-case treatment can indicate even its broadest contours. Justice Frankfurter has found that "even in matters legal some words and phrases, though very few, approach mathematical symbols and mean substantially the same to all who have occasion to use them. Other law terms like 'police power' are not symbols at all but labels for the results of the whole process of adjudication." The results at which he has arrived in police power litigation show him sympathetic to local responsibility for vast areas of public health and welfare. While the concept has gradually diminished in scope under the impact of problems national in dimension—and some even predict its total demise—it has weathered the storm and remains as a vital ingredient in Justice Frankfurter's recipe for maintaining geographic dispersion of function and control.

Appeals to state police power, while in the finest tradition of American constitutional development, are often last ditch efforts to prevent complete centralization of some activity in Washington or to forestall federal negation of an activity particularly important to a state or local community. Frankfurter is perhaps outstanding in his willingness to heed such appeals. Certainly in his early years on the bench this was so. As the terms have passed, he has become more sensitive to the idea that interstate commerce needed some protection and that automatic appeals to police power arguments would not bring automatic solutions for value clashes.21

21 For a discussion of this change in emphasis, see Louis Jaffe, "The Judicial World of Mr. Justice Frankfurter," Harvard Law Review, lxii (January, 1949), 395.
IV

Running a close second to the commerce clause as a source of conflict between nation and states are the portions of the Constitution dealing with taxation. Excise, use, and sales taxes have joined with levies on income to present a confusing array of categories under which the theory of taxation is discussed in Supreme Court opinions. Justice Frankfurter certainly is not an expert in the intricacies of tax law and does not write as many opinions in this field as do some of his brethren. He is, however, interested in the philosophy behind the taxing power as this affects competence relations of national and state governments. There should be a general view as to the purposes of taxation and the ends to which the fruits thereof will be used before a ruling can be made on the particular exercise of the power.

Justice Frankfurter had been acquiring such a view many years before he became a member of the Supreme Court:

Taxation is perhaps the severest testing ground for the objectivity and wisdom of a social thinker. The numerous increases in the cost of society and the extent to which wealth is now represented by intangibles, the profound change in the relation of the individual to government and the resulting widespread insistence on security, are subjecting public finance to the most exacting demands. To balance budgets, to pay for the costs of progressively civilized standards, to safeguard the future and to divide these burdens fairly among different interests in the community, put the utmost strain on the ingenuity of statesmen.22

In dealing with federal and state taxation schemes, the Justice has voted for adequate latitude of power. He has been sympathetic to experimentation within constitutional limits. As with the commerce clause, local issues and needs may dictate any number of different types of schemes, each unique and yet each within the bounds of competence. With the nation moving further into the twentieth century, heavier demands have been placed upon

all governments. To finance services, revenues must be obtained; to obtain revenue, legislative plans of taxation must be drawn up; to validate these plans, the judiciary must show an understanding of the world in which it operates. Thus runs his reasoning in most taxation cases and thus his motivation for approving most governmental action in this field.

The federal government, through the Sixteenth Amendment and other constitutional provisions, has an obvious advantage over the states in gaining revenue. Unless the states have as much latitude in tapping sources of income as is in any way permissible, they may become captives of Washington. Grants-in-aid programs, while judicially approved, cause many people today to fear that the traditional geographic division of function and competence has already been fatally undermined. Justice Frankfurter is certainly not among the group who fear federal aid to the states on principle, but he is, and has been, concerned to see that state taxing power remains as a source of strength against undue federal financial encroachment. Early in his career on the Court he wrote that "each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the Federal Constitution." 23 Once again the parallel between treatment of commerce clause cases and those involving taxation becomes evident. When the federal government wishes to replace state competence in gathering revenue, the displacement must be very explicit. It will not do for the Court to say that there is a conflict between state policy and that proclaimed by Congress unless Congress has made the pronouncement unavoidable.

But even the importance of geographic decentralization and of maintaining state taxing power will not excuse action that is clearly violative of some specific federal function. As the commerce and taxation clauses are usually the sources of greatest conflict between state and national authorities, so there can be conflict between the two concepts themselves. The Court can be called upon to decide, not whether some particular area of taxation is foreclosed either to state or national authorities, but whether state taxation interferes with interstate commerce. Just-

tice Frankfurter has made it very plain that "a burden on inter-state commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." 24 His dispersal of control theory makes overruling state claims difficult; yet when particular occasions arise, his personal preferences fall before the greater claims of national competence. The theory of intergovernmental tax immunity has also provided him some basis for calling the states to account. States, in their zeal to garner all revenue possible, have often tried to bring within their taxing powers operations that were performed under the auspices of the federal government and that therefore should have remained immune. 25 Valid intergovernmental tax immunity, especially for the national government, represents for him a very important part of our federal system.

Justice Frankfurter has recognized the provisional nature of all attempts completely to define spheres of competence. Commerce and taxation are not terms like "jury of twelve" "bill of attainder," which can be given a specific meaning. He is reluctant to admit that individual philosophic leanings have such a large part in constitutional determinations, and he tries to cover up this fact in some of his opinions, but in his more forthright moments this understanding is articulated. In a case involving Nebraska's ad valorem property tax on an airline doing business within the state but not having its home base there nor being incorporated within the state, the Court upheld the tax against claims that the due process clause of the Fourteenth Amendment had been violated. Justice Frankfurter dissented and, after recounting all the factors that he thought necessary for consideration, closed his opinion with the observation that "I am not unaware that there is an air of imprecision about what I have written. Such is the intention." 26 Complete precision and definition would foreclose future experimentation, thus defeating one of the major purposes for geographic dispersal of governmental authority. Thomas Reed Powell, one of the Justice's most outspoken sup-

25 For a recent example, see Detroit v. Murray Corp., 355 U.S. 489 (1958).
porters, agreed that “imprecision is better than a delusive effort at precision, or than competing and contradictory delusive efforts for absolutes and generalities where particulars are so variegated in various respects.” In preference for imprecision in cases involving commerce and taxation, Justice Frankfurter’s deepest philosophic leanings are evidenced.

In the first half of his service on the Supreme Court, he hesitated to substitute the New Deal concept of liberal nationalism for the dual federalism of Justice George Sutherland and other members of the earlier conservative group. He, and to some extent Justice Black, protected state power for two reasons. In the first place, liberalizing the Supreme Court meant that progressive state programs would not automatically be struck down. Since progressive state programs could be obtained, one of the main reasons for advocating national action was no longer valid. In the second place, most members of the Supreme Court accepted the idea that the states could regulate certain aspects of economic life, not by right, but by sufferance, with the judiciary holding arbitral control. While Frankfurter’s receptivity to state claims has not been greatly altered, there has been a growing awareness on his part that, in a limited number of instances, the federal government needed protection from the states.

As is his wont, he often cites authorities among past members of the Court to bolster his own position. In dividing taxation competence he has relied heavily upon Justice Joseph Bradley, “whose penetrating analysis, particularly in this field, were in my view second to none.” Bradley was very conscious of the need for federal action in the post-Civil War period. Perhaps Frankfurter has absorbed more of Bradley’s positions than he realizes or perhaps the press of circumstances over the past decade has made him more pliable when federal claims arise. In order to have geographic dispersal, both the major and minor governments must be retained, and this retention assumes financial solvency on the part of both.

V

During recent arguments before the Court, Justice Frankfurter complained that "lawyers always want to deal in abstractions." He then went on to warn counsel that in dealing with the concept of state competence they should remember that "our federalism does not stop a state from being benighted." Praising state competence in abstract terms did nothing to clarify the issues under consideration. The issue here was whether the state of Washington could challenge the city of Tacoma's right to condemn fish-hatcheries under a license issued by the Federal Power Commission. Because the question of municipal incapacity had not been raised adequately below, the Court refused to consider it. The basic point under the technical ruling was that a state could not interfere with the national policy of power development that was incorporated in the Federal Power Act and that the FPC administered. Justice Frankfurter concurred in the majority opinion, agreeing in this instance that the state of Washington had been "benighted." Not so many years previously, however, he had written:

. . . the national policy for water power development formulated by the Federal Power Act explicitly recognizes regard for certain interests of the States as part of that national policy. This does not imply that general, uncritical notions about so-called "States rights" are to be read into what Congress has written. It does not mean that we must adhere to the express Congressional mandate that the public interest which underlies the FPA involves the protection of particular matters of intimate concern to the people of the States in which proposed projects requiring the sanction of the Federal Power Commission are to be located.

These views are more in line with his general philosophic position. The control of power and other public utilities, while of necessity national in scope to some degree, should be decentralized.

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29 Heard in courtroom, April 30, 1958.
wherever feasible. His connection with the drafting of the Public Utilities Act has been mentioned. The philosophy of that Act, with its insistence on dispersal of control among private utility companies, reflects the general desire to avoid centralization. Making the states partially responsible for power control reflects the desire to avoid geographic centralization. In his book on *The Public and Its Government*, Professor Frankfurter devoted considerable space to examining the function of public utilities and the ways to supervise them. He concluded that “local administration should be charged with responsibility for such matters of essentially local concern as the regulation of local public utilities.”

Interference by the federal courts, and especially the Supreme Court, would do little to make the states conscious of their responsibilities and obligations. Control of public utilities in some ways touches the very heart of twentieth-century economic life. Infusing a sense of responsibility here would not solve all the problems of a federalistically plural society, but it would be a long step along the road.

The privileges and immunities clause of the Constitution has often been thought of as an untapped source of strength in bringing orderliness out of the supposed chaos of individualized state practice. Justice Frankfurter has not been openly hostile to use of the clause in litigation, but he has resisted attempts to enforce conformity just for the sake of conformity.

It is not conceivable that the framers of the Constitution meant to obliterate all special relations between a State and its citizens. This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between States. A State may care for its own . . .

A state by caring for its own may incidentally appear to discriminate against others. This, however, is one of the prices we must pay for our federalism. The privileges and immunities clause, because of its checkered history, would not be used by Justice

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Frankfurter to solve difficulties that could be handled by other constitutional provisions. The concept is so indefinite and has been rejected by previous Courts on so many occasions that only misunderstanding can come from its use. It is far better to acknowledge openly our pluralist heritage and to remedy faults that may stem from it in a pragmatic manner, than to try for absolute perfection through defining privileges and immunities.

Discussion of Justice Frankfurter's concept of the role of the Supreme Court as mediator between states and nation may lead to the mistaken conclusion that his desire to retain both types of government as viable units would make him unduly hesitant to call them to account for any reason. While he is certainly reticent about intervening when substantive policy decisions are at stake, he has advocated making all governments, both state and national, legally responsible for their actions. Neither functional nor geographic competence need be threatened by making government liable for its misdeeds. Finding the doctrine that the United States or the states cannot be sued without their consent "an anachronistic survival of monarchical privilege" which "runs counter to democratic notions of the moral responsibility of the State," he has warmly praised the liberalizing tendencies of the Federal Tort Claims Act. Consent to be sued does not have to depend on some ritualistic formula, however. He quite readily recognizes that "courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief . . . that 'it is a wholesome sight to see "Crown" sued and answering for its tort.'" One is not left in any doubt that Frankfurter is wholeheartedly in agreement with Maitland.

Interweaving the various strands of Justice Frankfurter's theory of decentralization and dispersal of control as reflected in its geographic element is a difficult task, for so many of the topics that must be mentioned—commerce, taxation, public utilities—can be treated as specific problems demanding attention in their own right. Nevertheless, certain characteristics stand out. Justice

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33 See his concurrence in Edwards v. California, 314 U.S. 160 (1941).
Frankfurter has emphasized responsible action on the part of Congress, administrative agencies, lower courts, and state governments. He has bowed before the concept of expertise in the many ways in which it makes itself manifest. In the division of competence between national and state governments, expertise appears in treating local or sectional questions with intimate knowledge and feeling. This explains Justice Frankfurter’s willingness to back state solutions unless explicitly prohibited by the Constitution. The experimentation that can be carried on in the states is partner in the geographical area to the fluidity that administration and the national legislature can provide in contradistinction to the rather limited answers that the judiciary can provide. Underlining all the accommodations that geographic division of competence entails is, of course, Justice Frankfurter’s implicit faith in the pluralistic society that is the United States.

In reaching the accommodations necessitated by geographic decentralization, the Justice is guided basically by a pragmatic philosophy. At any given time, a specific adjustment may be arrived at for a specific problem, but no all-encompassing solution valid for all time and any situation can be obtained. The commerce and taxation clauses, for example, are so indefinite that no final answers to the central issue of federalism can be worked out through them for posterity. The issues raised under these clauses are continuous, on-going problems. For Justice Frankfurter, the best method of dealing with them is to arrive at the balance best suited to the time, leaving as much state power intact as is at all possible. Such a course would protect not only the state but, ultimately, the federal government as well.

In a 1925 article, Professor Frankfurter put forth some of his fundamental notions concerning the nature of our federalistically plural system. Basically he felt that

The combined legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action. . . . Political energy has been expended on sterile controversy over supposedly exclusive alternatives instead of utilized for fashioning new instruments adapted to new situations.36

With just slightly different emphasis, he wrote in a 1959 opinion that

Diffusion of power has its corollary of diffusion of responsibilities with its stimulus to cooperative effort in devising ways and means for making the federal system work. That is not a mechanical structure. It is an interplay of living forces of government to meet the evolving needs of a complex society. 37

What Justice Frankfurter proposes, therefore, in his insistence on geographic dispersal and decentralization, is a co-operative venture in democratic government by both state and national authorities. Stylistically, he is one of the few writers who frequently capitalizes the word "State." Such capitalization is more than an effective literary device; it is a telling sign of the importance that he gives to states as partners in the search for the Good Society.