ture at a point where few have attempted and fewer have achieved a penetration. Professor Huntington has broken new ground, and no one who is seriously concerned with civil-military relations in the modern state should fail to read his book.

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THE SUPREME COURT. By Bernard Schwartz. New York: The Ronald Press, 1957. Pp. vii, 429. $6.50.

THE Constitution, Mr. Justice Jackson observed shortly before his death, provides the President and the Congress with "a fairly formidable political power over the Supreme Court, if there were a disposition to exert it."[1] Recent history suggests that, however successful in the nineteenth century, attempts to change the number of Justices, narrow the Court's appellate jurisdiction, ignore its mandates or sharply reduce its appropriations today would probably offend what appears to be entrenched popular sensitivity to threats to the Court's independence. More important, any growing impetus to serious consideration of such curbs is usually dissipated by a Court that maintains respect for its authority by responding, sooner or later, to felt public needs. The Supreme Court must in the long run operate within the limits of popular acceptance, and this fact imposes a heavy obligation upon those whose task is to mediate between the Court and the man in the street. Editors, columnists, commentators and articulate community leaders of course do more than reflect the public's attitude; they shape it. Their criticism must be informed, thoughtful and responsible if the Court is to function in a climate that is compatible with the exercise of enlightened judicial conscience and is in turn productive of it.

Such criticism presupposes understanding. Professor Schwartz, troubled by what he deems to be unwarranted abuse of the Court, has written this book in an effort to explain the Court to the opinion-molders. He "has sought to deal with all the important areas of the Court's work, while at the same time seeking to avoid the arid pedantry all too often characteristic of the legal treatise."[2] The substance of the book is an effort to show, by particularized analysis of legal issues, the Court's relationship to the Congress, the President, the administrative agencies and the states. The author's special focus is upon the past twenty years.

The "central theme" is the Court's dramatic abandonment in 1937 of its post-Civil War inclination to act as a "super-legislature" that freely invalidated laws whose wisdom was disputed by five of the nine Justices. In the broad perspective of Professor Schwartz's study, deference to the elected representa-

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1. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 11 (1955).

2. P. iv.

tives of the people, which the author finds was manifested by the Marshall Court, is said again to have become recognized as the appropriate attitude for the judiciary in our democracy. With an almost touching respect for verbal formulae, he states repeatedly that the Court now "decides only, following the approach earlier urged by Justice Holmes, whether a rational legislator could have adopted the statute at issue."[3]

Enthusiastic in his endorsement of judicial deference to legislation regulating property interests, the author does not shrink from judicial deference to legislation that affects other personal rights. He properly rejects the contention that a statute said to restrict freedoms protected by the First Amendment is presumptively invalid. It does not follow, however, that speech and property are of the same constitutional magnitude. Although he quotes with apparent approval Mr. Justice Frankfurter's observation that speech comes to the Court "with a momentum for respect" lacking in property,[4] the author's effort to refute the "preferred position" formulation gives the reader the misleading impression that the present Court does and should weigh the former no more heavily than the latter.

Yet Professor Schwartz believes that the post-'37 Court has in certain instances carried deference to an extreme and has thereby facilitated undue assertions of power by other organs of government. He is critical, for example, of decisions under the commerce power [5] and taxing power [6] that permit control by the national government of practically the entire spectrum of local activities. Here, he maintains, judicial self-restraint should have yielded to a concern for preserving state responsibility in our federal system. Similarly, he has grave doubts about the Court's refusal to invalidate the many congressional delegations of power that have failed to provide administrative agencies with precise standards for the exercise of such power.[7]

In those instances the Court passed upon the claim that the statute in question offended the constitutional scheme. The author is more outspoken in his criticism of occasions when, out of respect for the elected branches, both federal and state, the Court invoked doctrines or practices that effectively insulated their action from challenge. He charges that the post-'37 Court has too strictly construed the requirement that a litigant have "standing" to obtain review,[8] has been guilty of unwarranted ducking in characterizing as a non-justiciable "political question" the problem of apportionment of electoral strength among

3. P. 27.

4. Kovacs v. Cooper, 336 U.S. 77, 95 (1949).

5. The cases singled out for particular discussion are: United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Oklahoma *ex rel.* Phillips v. Atkinson Co., 313 U.S. 508 (1941); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

6. See, *e.g.*, United States v. Kahriger, 345 U.S. 22 (1953).

7. See, *e.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

8. Doremus v. Board of Educ., 342 U.S. 429 (1952); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939).

a state's political subdivisions [9] and has made "niggardly use . . . of its power to grant review by certiorari . . . to avoid decision on many of the most important constitutional problems presented to it."[10] Finally, his belief that the procedures followed by the federal government in loyalty-security investigations are violative of due process causes the author to find fault, by implication, with the Court's failure to reach the constitutional question in *Peters v. Hobby*.[11]

Some of these judgments seem fundamentally at odds with the philosophy of judicial self-restraint and its underlying spirit of humility. When Congress, as part of its effort to cope with the grave national problem of wheat overproduction, found it necessary to regulate wheat consumed on the farm where grown, how could a Court that was not a "super-legislature" have held that such regulation was an exclusive preserve of the states? Is it so clear, as the author suggests, that federal power under the commerce clause must not extend to the control of non-navigable streams, when such a view would hinder congressional plans for badly needed regional flood control and hydroelectric power projects, projects that the states were either unable or unwilling to sponsor? In view of the rapidly changing nature of the communications field and the close political scrutiny to which administrative agencies are subjected, what would have qualified the Court to say that a rational legislator could not have made an imprecise delegation of power to the FCC? And can we be confident that judicial invalidation of state electoral systems would have proved an effective cure for disproportionate representation? A Court that embarks on such excursions is no longer "conscious of the fallibility of the human judgment."[12]

A few of the author's criticisms would have merited fuller discussion. In dealing with the Court's refusal to review a number of constitutional questions each term, he might have indicated that certiorari may be denied in some instances because other problems in the case make it unlikely that the Court would reach the issue worthy of the grant. Even if such an issue is unavoidably present, the Court may reasonably believe that review should be postponed in certain cases until several lower tribunals have passed upon the question and the Court can have the benefit of their consideration. And there may be occasions when the writ is denied for reasons of "judicial statesmanship." It would be interesting to know the author's position on the Court's refusal to review, in the wake of the school desegregation litigation, the validity of a state's anti-

9. South v. Peters, 339 U.S. 276 (1950); Colegrove v. Green, 328 U.S. 549 (1946).
10. P. 151.
11. 349 U.S. 331 (1955).
12. "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 COOLEY, CONSTITUTIONAL LIMITATIONS 332 (8th ed. 1927), as quoted by Mr. Justice Brandeis, concurring in Ashwander v. TVA, 297 U.S. 288, 345 (1936).

miscegenation law.[13] Moreover, each year, in addition to passing on other significant issues, the Court does decide many issues of power, and these demand the most profound deliberation. The statement is not altogether accurate that "the wholesale use of denials of certiorari in the past decade has, in fact, cut down the work-load of the recent Court to a twentieth-century low."[14] Some two thousand litigants sought Supreme Court review during the 1956 Term, compared with roughly half that number a generation ago; and the task of screening these applications absorbs at least one-third of the Court's resources. Whatever the circumstances that enabled the Hughes Court to average more than twice as many full opinions as the Warren Court, and one must not overlook its exceptionally able roster and the relative brevity of its opinions, this reviewer believes that the present Court takes too many cases to permit adequate reflection. Occasional errors in applying the necessarily "niggardly" criteria of the Court's certiorari practice should not lead one to underestimate either the complexity of that practice or its relation to the deliberative process.

Because the book is permeated by tension between the need for deference to the elected branches and the need to subject their action to judicial review, one might have expected some treatment of the Court's frequent but far from consistent practice of avoiding constitutional questions whenever possible to decide a case on other grounds. Laymen and all too many lawyers have found this among the more puzzling aspects of the Justices' behavior. Yet, apart from the author's impatience with the Court's refusal to decide the due process question in *Peters*, we are left to guess where he stands in this regard and why.

These criticisms should not obscure the fact that the book represents a net addition to popular literature on the Court. It provides the non-lawyer with a healthy antidote to studies that overemphasize the role of the irrational in the judicial process. And, although at times the author appears to take the language of opinions with the seriousness of a political scientist, he strives mightily to divest the layman of the illusion that problems can be decided by invoking such shibboleths as "government employment is a privilege, not a right," "there must be a wall of separation between Church and State," and "picketing is free speech." He is generally careful to indicate the conflicting policies that confront the Court, the manner in which it has tried to reconcile them and some sensible standards for appraising the judicial product. The reader will emerge with a picture, not of heroes and villains, but of nine men trying to bear what Charles Evans Hughes called "the heaviest burden of severe and continuous intellectual work that our country knows."[15]

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13. Jackson v. Alabama, 37 Ala. App. 519, 72 So. 2d 114, *cert. denied*, 348 U.S. 888 (1954). See also Naim v. Naim, 350 U.S. 891, 985 (1955), where the Court refused to review the merits of an appeal on the ground that the case was "devoid of a properly presented federal question."

14. P. 151.

15. HUGHES, THE SUPREME COURT OF THE UNITED STATES 55 (1928).

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