INTRODUCTION TO THE 2002 EDITION

Fifty years ago, Professor Edward S. Corwin wrote an introduction to this treatise that broadly explored then existent trends of constitutional adjudication. In some respects – the law of federalism, the withdrawal of judicial supervision of economic regulation, the continued expansion of presidential power and the consequent overshadowing of Congress – he has been confirmed in his evaluations. But, in other respects, entire new vistas of fundamental law of which he was largely unaware have opened up. *Brown v. Board of Education* was but two Terms of the Court away, and the revolution in race relations brought about by all three branches of the federal government could have been only dimly perceived. The apportionment-districting decisions were still blanketed in time; abortion as a constitutionally protected liberty was unheralded. The Supreme Court's application of many provisions of the Bill of Rights to the States was then nascent, and few could anticipate that the expanded meaning and application of these Amendments would prove revolutionary. Fifty years has also exposed the ebb and flow of constitutional law, from the liberal activism of the 1960s and 1970s to a more recent posture of judicial restraint or even conservative activism. Throughout this period of change, however, certain movements, notably expansion of the protection of speech and press, continued apace despite ideological shifts.

This brief survey is primarily a suggestive review of the Court's treatment of the doctrines of constitutional law over the last fifty years, with a closer focus on issues that have arisen since the last volume of this treatise was published ten years ago. For instance, in previous editions we noted the rise of federalism concerns, but only in the last decade has the strength of the Court's deference toward states become apparent. Conversely, in this treatise as well as in previous ones, we note the rise of the equal protection clause as a central concept of constitutional jurisprudence in the period 1952-1982. Although that rise has somewhat abated in recent years, the clause remains one of the predominant sources of constitutional constraints upon the Federal Government and the States. Similarly, the due process clauses of the Fifth and Fourteenth Amendments, recently slowed in their expansion, remain significant both in terms of procedural protections for civil and criminal litigants and in terms of the application of substantive due process to personal liberties.

I

Issues relating to national federalism as a doctrine have proved to be far more pervasive and encompassing than it was possible to anticipate in 1952. In some respects, of course, later cases only confirmed those decisions already on the books. The foremost example of this confirmation has been the enlargement of congressional power under the commerce clause. The expansive reading of that clause's authorization to Congress to reach many local incidents of business and production was already apparent by 1952. Despite the abundance of new legislation under this power during the 1960s to 1980s, the doctrine itself was scarcely enlarged beyond the limits of that earlier period. Under the commerce clause, Congress can assert legislative jurisdiction on the basis of movement over a state boundary, whether antecedent or subsequent to the point of regulation; can regulate other elements touching upon those transactions, such as instruments of transportation; or can legislate solely upon the premise that certain transactions by their nature alone or as part of a class sufficiently *affect* interstate commerce as to warrant national regulation. Civil rights laws touching public accommodations and housing, environmental laws affecting land use regulation, criminal laws, and employment regulations touching health and safety are only the leading examples of enhanced federal activity under this authority.

Over the last decade, however, the Court has established limits on the seemingly irrevocable expansion of the commerce power. While the Court has declined to overrule even its most expansive rulings regarding "effects" on commerce, it has recently limited the exercise of this authority to the regulation of activities which were both economic in nature and which

had a nontrivial or "substantial" affect on commerce (although regulation of non-economic activity would still be allowed if it is an essential part of a larger economic regulatory scheme). The Court also seems far less likely to defer to Congressional findings of the existence of an economic effect. The relevant cases arose in an area of traditional state concern – the regulation of criminal activity – and the new doctrine resulted in the invalidation of recently-passed federal laws, including a ban on gun possession in schools and the provision of civil remedies to compensate gender-motivated violence.

The exercise of authority over commerce by the states, on the other hand, has over the last fifty years been greatly restricted by federal statutes and a broad doctrine of federal preemption, increasingly resulting in the setting of national standards. Only under Chief Justice Burger and Chief Justice Rehnquist was the Court not so readily prepared to favor preemption, especially in the area of labor-management relations. The Court did briefly inhibit federal regulation with respect to the States' own employees, but this decision failed to secure a stable place in the doctrine of federalism, being overruled in less than a decade. Also noteworthy has been a rather strict application of the negative aspect of the commerce clause to restrain state actions that either discriminate against or too much inhibit interstate commerce.

Much of the same trend toward national standards has resulted from application of the Bill of Rights to the States through the due process clause of the Fourteenth Amendment, a matter dealt with in greater detail below. The Court has again and again held that when a provision of the Bill of Rights is applied, it means the same whether a State or the Federal Government is the challenged party (although a small but consistent minority has argued otherwise). Some flexibility, however, has been afforded the States by the judicial loosening of the standards of some of these provisions, as in the characteristics of the jury trial requirement. Adoption of the exclusionary rule in Fourth Amendment and other cases also looked to a national standard, but the more recent disparagement of the rule by majorities of the Court has relaxed its application to both States and Nation.

While the Tenth Amendment would appear to represent one of the most clear statements of a federalist principle in the Constitution, it has historically had a relatively insignificant role in limiting federal powers. Although the Court briefly interpreted the Tenth Amendment in the 1970s substantively to protect certain "core" state functions from generally applicable laws, this distinction soon proved unworkable, and was overruled a decade late. More recently, the Court reserved the question as to whether a law regulating only state activities would be constitutionally suspect, although a workable test for this distinction has not yet been articulated. However, limits on the process by which the federal government regulates the states, developed over the most recent decade, have proved more resilient. This becomes important when the Congress is unsatisfied with the most common methods of influencing state regulations – grant conditions or conditional imposition of federal regulations (states being given the opportunity to avoid such regulation by effectuating their own regulatory schemes). Only in those cases where the Congress attempts to directly "commandeer" state legislatures or executive branch officials, *i.e.* ordering states to legislate or execute federal laws, has the Tenth Amendment served as an effective bar.

The concept of state sovereign immunity from citizen suits has also been infused with new potency over the last decade, while exposing deep theoretical differences between the Justices. To four of the Justices, state sovereign immunity is limited to the textual restriction articulated in the Eleventh Amendment, which prevents citizens of one state from bringing a federal suit against another state. To five Justices, however, the Eleventh Amendment was merely a technical correction made by Congress after an erroneous approval by the Court of a citizen-state diversity suit in *Chisholm v. Georgia*. These justices prefer the reasoning of the post-Eleventh Amendment case of *Hans v. Louisiana*, which, using non-textual precepts of federalism, dismissed a constitutionally-based suit against a state by its own citizens. The true significance of this latter case was not realized until 1992 in *Seminole Tribe of Florida v. Florida*, where the Court made clear that suits by citizens against states brought under federal statutes also could not stand, at least if the statutes were based on Congress's Article I powers. The "fundamental postulate" of deference to the "dignity" of state sovereignty was also the basis for the

Court's recent decisions to prohibit federal claims by citizens against states in either a state's own courts or federal agencies.

The Court has ruled that Congress can abrogate state sovereign immunity under section 5 of the Fourteenth Amendment. The Court, however, has also recently shown a significant lack of deference to Congress regarding this Civil War era power, requiring a showing of "congruence and proportionality" between the alleged harm to constitutional rights and the legislative remedy. Thus, states have been found to remain immune from federal damage suits for such issues as disability discrimination or patent infringement, while the Congress has been found to be without any power to protect religious institutions from the application of generally applicable state laws. Further, where Congress attempted to create a federal private right of action for victims of gender-related violence, alleging discriminatory treatment of these cases by the state, the Court also found that Congress exceeded its mandate, as the enforcement power of the 14th Amendment can only be applied against state discrimination. In all these case, the Court found that Congress had not sufficiently identified patterns of unconstitutional conduct by the States.

The overriding view of the present Court is that where it has discretion, even absent constitutional mandate, it will apply federalism concerns to limit federal powers. For instance, the equity powers of the federal courts to interfere in ongoing state court proceedings and to review state court criminal convictions under *habeas corpus* have been curtailed, invoking a doctrine of comity and prudential restraint. But the critical fact, the scope of congressional power to regulate private activity, remains: the limits on congressional power under the commerce clause and other Article I powers, as well as under the power to enforce the Reconstruction Amendments, remain principally those of congressional self-restraint.

II

For much of the latter half of the 20th century, aggregation of national power in the presidency continued unabated. The trend was not much resisted by congressional majorities, which, indeed, continued to delegate power to the Executive Branch and to the independent agencies at least to the same degree or greater than before. The President himself assumed the existence of a substantial reservoir of inherent power to effectuate his policies, most notably in the field of foreign affairs and national defense. Only in the wake of the Watergate affair did Congress move to assert itself and to attempt to claim some form of partnership with the President. This is most notable with respect to war powers and the declaration of national emergencies, but is also true for domestic presidential concerns, as in the controversy over the power of the President to impound appropriated funds.

Perhaps coincidentally, the Supreme Court during the same period effected a strong judicial interest in the adjudication of separation-of-powers controversies. Previously, despite its use of separation-of-powers language, the Court did little to involve itself in actual controversies, save perhaps the *Myers* and *Humphrey* litigations over the President's power to remove executive branch officials. But that restraint evaporated in 1976. Since then there have been several Court decisions in this area, although in *Buckley v. Valeo* and subsequent cases the Court appeared to cast the judicial perspective favorably upon presidential prerogative. In other cases statutory construction was utilized to preserve the President's discretion. Only very recently has the Court evolved an arguably consistent standard in this area, a two-pronged standard of aggrandizement and impairment, but the results still are cast in terms of executive preeminence.

The larger conflict has been political, and the Court resisted many efforts to involve it in litigation over the use of troops in Vietnam. In the context of treaty termination, the Court came close to declaring the resurgence of the political question doctrine to all such executive-congressional disputes. Nevertheless, a significant congressional interest in achieving a new and different balance between the political branches appears to have survived cessation of the Vietnam conflict. Future congressional assertion of this interest may well involve the judiciary to a much greater extent, and, in any event, the congressional branch is not without effective weapons of its own in this regard.

III

The Court's practice of overturning economic legislation under principles of substantive due process in order to protect "property" was already in sharp decline when Professor Corwin wrote his introduction in the 1950s. In a few isolated cases, however, especially regarding the obligation of contracts clause and perhaps the expansion of the regulatory takings doctrine, the Court demonstrated that some life is left in the old doctrines. On the other hand, the word "liberty" in the due process clauses of the Fifth and Fourteenth Amendment has been seized upon by the Court to harness substantive due process to the protection of certain personal and familial privacy rights, most controversially in the abortion cases.

Although the decision in *Roe v. Wade* seemed to foreshadow broad constitutional protections for personal activities, this has not occurred, as much due to conceptual difficulties as to ideological resistance. While early iterations of a right to "privacy" or "to be let alone" seemed to involve both the notion that certain information should be "private" and the idea that certain personal "activities" should only be lightly regulated, the logical limits of these precepts were difficult to discern. Most recently, the Court has rejected the proposition that all "private" conduct, *e.g.,* sexual activities between members of the same sex, is constitutionally protected. In effect, the privacy cases appear to have been limited to issues of marriage, procreation, contraception, family relationships, medical decision making and child rearing.

Whereas much of the Bill of Rights is directed toward prescribing the process of how governments may permissibly deprive one of life, liberty, or property – for example by judgment of a jury of one's peers or with evidence seized through reasonable searches – the First Amendment is by its terms both substantive and absolute. While the application of the First Amendment has never been presumed to be so absolute, the effect has often been indistinguishable. Thus, the trend over the years has been to withdraw more and more speech and "speech-plus" from the regulatory and prohibitive hand of government and to free not only speech directed to political ends but speech that is totally unrelated to any political purpose.

The constitutionalization of the law of defamation, narrowing the possibility of recovery for damage caused by libelous and slanderous criticism of public officials, political candidates, and public figures, epitomizes this trend. In addition, the government's right to proscribe the advocacy of violence or unlawful activity has become more restricted. Obscenity abstractly remains outside the protective confines of the First Amendment, but the Court's changing definitional approach to what may be constitutionally denominated obscenity has closely confined most governmental action taken against the verbal and pictorial representation of matters dealing with sex. The association of the right to spend for political purposes with the right to associate together for political activity has meant that much governmental regulation of campaign finance and of limitations upon the political activities of citizens and public employees had become suspect if not impermissible. Commercial speech, long the outcast of the First Amendment, now enjoys a protected if subordinate place in free speech jurisprudence. Freedom to picket, to broadcast leaflets, and to engage in physical activity representative of one's political, social, economic, or other views, enjoy wide though not unlimited protection.

It may be that a differently constituted Court would narrow the scope of the Amendment's protection and enlarge the permissible range of governmental action. But, in contrast to other areas in which the present Court has varied from its predecessor, the record with respect to the First Amendment has been one of substantial though uneven expansion of precedent.

IV

Unremarked by scholars of some fifty years ago was the place of the equal protection clause in constitutional jurisprudence – simply because at that time Holmes' pithy characterization of it as a "last resort" argument was generally true. Subsequently, however, especially during the Warren era, equal protection litigation occupied a position of almost predominant character in each Term's output. The rational basis standard of review of different treatments of individuals, businesses, or subjects remained of little concern to the Justices. Rather, the clause blossomed after *Brown v. Board of Education*, as the Court confronted state and local laws and ordinances drawn on the basis of race. This aspect of the doctrinal use of the clause is still very evident on the Court's docket, though in ever new and interesting forms.

Of worthy attention has been the application of equal protection, now in a three-tier or multi-tier set of standards of review, to legislation and other governmental action classifying on the basis of sex, illegitimacy, and alienage. Of equal importance was the elaboration of the concept of "fundamental" rights, so that when the government restricts one of these rights, it must show not merely a reasonable basis for its actions but a justification based upon compelling necessity. Wealth distinctions in the criminal process, for instance, were viewed with hostility and generally invalidated. The right to vote, nowhere expressly guaranteed in the Constitution (but protected against abridgment on certain grounds in the Fifteenth, Nineteenth, and Twenty-sixth Amendments) nonetheless was found to require the invalidation of all but the most simple voter qualifications; most barriers to ballot access by individuals and parties; and the practice of apportionment of state legislatures on any basis other than population. Recently, in the controversial decision of *Bush v. Gore*, the Court relied on the right to vote in effectively ending the disputed 2000 presidential election, noting that the Florida Supreme Court had allowed the use of non-uniform standards to evaluate challenged ballots. Although the Court's decision was of real political import, it was so limited by its own terms that it carries no doctrinal significance.

In other respects, the reconstituted Court has made some tentative rearrangements of equal protection doctrinal developments. The suspicion-of-wealth classification was largely though not entirely limited to the criminal process. Governmental discretion in the political process was enlarged a small degree. But the record generally is one of consolidation and maintenance of the doctrines, a refusal to go forward much but also a disinclination to retreat much. Only very recently has the Court, in decisional law largely cast in remedial terms, begun to dismantle some of the structure of equal protection constraints on institutions, such as schools, prisons, state hospitals, and the like. Now, we see the beginnings of a sea change in the Court's perspective on legislative and executive remedial action, affecting affirmative action and race conscious steps in the electoral process, with the equal protection clause being used to cabin political discretion.

V

Finally, criminal law and criminal procedure during the 1960s and 1970s was doctrinally unstable. The story of the 1960s was largely one of the imposition of constitutional constraint upon federal and state criminal justice systems. Application of the Bill of Rights to the States was but one aspect of this story, as the Court also constructed new teeth for these guarantees. For example, the privilege against self-incrimination was given new and effective meaning by requiring that it be observed at the police interrogation stage and furthermore that criminal suspects be informed of their rights under it. The right was also expanded, as was the Sixth Amendment guarantee of counsel, by requiring the furnishing of counsel or at least the opportunity to consult counsel at "critical" stages of the criminal process – interrogation, preliminary hearing, and the like – rather than only at and proximate to trial. An expanded exclusionary rule was applied to keep material obtained in violation of the suspect's search and seizure, self-incrimination, and other rights out of evidence.

In sentencing, substantive as well as procedural guarantees have come in and out of favor. The law of capital punishment, for instance, has followed a course of meandering development, with the Court almost doing away with it and then approving its revival by the States. More recently, awakened legislative interest in the sentencing process, such as providing enhanced sentences for "hate crimes," has faltered on holdings that increasing the maximum sentence for a crime can only be based on facts submitted to a jury, not a judge, and that such facts must be proved beyond a reasonable doubt.

During the last two decades, however, the Court has also redrawn some of these lines. The self-incrimination and right-to-counsel doctrines have been eroded in part (although in no respect has the Court returned to the constitutional jurisprudence prevailing before the 1960s). The exclusionary rule has been cabined and redefined in several limiting ways. Search and seizure doctrine has been revised to enlarge police powers. And, most recently, for instance, the exception for "special needs" has allowed such practices as suspicionless, random drug-testing in the workplace and at schools.

An expansion of the use of *habeas corpus* powers of the federal courts undergirded the 1960s procedural and substantive development, thus sweeping away many jurisdictional restrictions previously imposed upon the exercise of review of state criminal convictions. Concomitantly with the narrowing of the precedents of the 1950s and 1960s Court, however, came a retraction of federal *habeas* powers, both by the Court and through federal legislation.

VI

The last five decades were among the most significant in the Court's history. They saw some of the most sustained efforts to change the Court or its decisions or both with respect to a substantial number of issues. On only a few past occasions was the Court so centrally a subject of political debate and controversy in national life or an object of contention in presidential elections. One can doubt that the public any longer perceives the Court as an institution above political dispute, any longer believes that the answers to difficult issues in litigation before the Justices may be found solely in the text of the document entrusted to their keeping. Despite cases such as *Roe v. Wade* and *Bush v. Gore*, however, the Court still seems to enjoy the respect of the bar and the public generally. Its decisions are generally accorded uncoerced acquiescence, and its pronouncements are accepted as authoritative, binding constructions of the constitutional instrument.

Indeed, it can be argued that the disappearance of the myth of the absence of judicial choice strengthens the Court as an institution to the degree that it explains and justifies the exercise of discretion in those areas of controversy in which the Constitution does not speak clearly or in which different sections lead to different answers. The public attitude thus established is then better enabled to understand division within the Court and within the legal profession generally, and all sides are therefore seen to be entitled to the respect accorded the search for answers. Although the Court's workload has declined of late, a significant proportion of its cases are still "hard" cases; while hard cases need not make bad law they do in fact lead to division among the Justices and public controversy. Increased sophistication, then, about the Court's role and its methods can only redound to its benefit.