

INTRODUCTION TO THE 1992 EDITION

In the 1952 edition, Professor Corwin wrote an introduction that broadly explored the trends of constitutional adjudication then evident while other trends had become dormant. In some respects, the law of federalism, the withdrawal of judicial supervision of economic regulation, the continuing expansion of presidential power and the consequent overshadowing of Congress, among others, 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, by all three branches, could have been only dimly perceived. The Supreme Court's application of many provisions of the Bill of Rights to the States, then nascent, and its expansion of the meaning of those rights would prove revolutionary. The apportionment-districting decisions were still blanketed in time; abortion as a constitutionally protected liberty was unheralded. And with respect to the range of decisions which he did not anticipate, we have seen a Supreme Court move from the activism of the 1960s and 1970s to a posture of more judicial restraint, although in many areas, speech and press notably, little change has occurred as a result of a shifting of the Justices of the High Court.

This brief survey will primarily be a suggestive review of the Court's treatment of the doctrines of constitutional law. In previous editions, we have noted the rise of the equal protection clause as a central concept of constitutional jurisprudence in the period 1953-1982. That rise has somewhat abated in the period covered by this volume, but the clause remains one of the predominant sources of constitutional constraints upon the Federal Government and the States. The due process clauses of the Fifth and Fourteenth Amendments similarly have experienced an expansion, both in terms of procedural protections for civil and criminal litigants and in terms of the application of substantive due process to personal liberties and in some economic cases.

I

National federalism as a doctrine was proved to be far more pervasive and encompassing than it was possible to notice in 1953. In some respects, of course, later cases only confirmed what those decisions already on the books told. Foremost example of this confirmation has been the enlargement of national powers, of congressional powers, under the commerce clause. The expansive reading of that clause's authorization to Congress to reach many local incidents of business and production already apparent by 1953 was scarcely enlarged by those decisions of the period through the 1960s - 1980s, under which Congress asserted jurisdiction on the basis of an antecedent or subsequent movement over a state boundary of some element touching upon the transaction or 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 law coverage, and employment regulations touching health and safety as well as benefits are only the leading examples of enhanced federal activity. Conversely, state power to regulate commerce has been further restricted through the application of a doctrine of preemption which is increasingly aimed at one national standard, although under Chief Justice Burger and Chief Justice Rehnquist, the Court has not so readily as before seemed to favor preemption, especially in the area of labor-management relations. Only with respect to the State's own employees did the Court inhibit federal regulation and then with a decision which failed to secure a stable place in the doctrine of federalism, being overruled in less than a decade. Some immunity for States from federal laws aimed directly at them was implied from the Constitution, but its potency remains to be seen.

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.

Of much the same import has been the 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 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.

The Court of the last ten years has reinvigorated, to be sure, certain aspects of the old federalism. The Eleventh Amendment has been infused with new potency. The equity powers of the federal courts to interfere in on-going state court proceedings and to review state court criminal convictions under *habeas corpus* have been curtailed. A doctrine of comity and rules of prudential restraint in the exercise of federal judicial power have been invoked.

The overriding view is that the present Court where it has discretion will apply federalism concerns to limit federal powers. But the critical fact, the scope of congressional power, 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 those of self-restraint.

II

For much of this period, aggregation of national power in the presidency continued unabated and 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 if not to a greater extent than before. The President himself, most notably in the field of foreign affairs and national defense, assumed the existence of a substantial reservoir of inherent power to effectuate his policies as well. 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, most notably with respect to war powers and the declaration of national emergencies, but including as well the regulation of some domestic presidential concerns, as in the impoundment controversy.

Perhaps coincidentally, the Supreme Court effected a strong judicial interest in the adjudication of separation-of-powers controversies. Previously, even as it utilized separation of language, the Court little involved itself in actual controversies, save for the *Myers-Humphrey* litigations over the President's power to remove executive branch officials. But that restraint evaporated in 1976.

There were several Court decisions in this area, although in evincing a renewed interest in separation of powers, as in *Buckley v. Valeo*, and subsequent cases, the Court appeared to cast the judicial perspective favorably upon presidential prerogative and in a few cases statutory construction was utilized to preserve unto the President certain discretion that was in dispute. 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 abroad in Vietnam, coming close as well to declaring, in a treaty termination context, the resurgence of the political question doctrine to all such executive-congressional disputes. Nevertheless, there does appear to have survived cessation of the Vietnam conflict a significant congressional interest in achieving a new and different balance between the political branches, an interest the assertion of which may well involve the judiciary to a much greater extent, and, in any event, one which the congressional branch is not without weapons to effectuate.

III

The demise of substantive due process, apparent in the 1950s, is a fact today insofar as the validity of economic legislation is concerned, although in a few isolated cases, involving the

obligation of contracts, and perhaps expanding in the regulatory takings area, the Court has demonstrated that some life is left in the old doctrines. Yet, the word “liberty” in the due process clauses of the Fifth and Fourteenth Amendments was seized upon by the Court in harnessing substantive due process to the protection of certain rights having to do with personal and familial privacy, most controversially in the abortion cases.

Whereas much of the Bill of Rights is directed to prescribing how government may permissibly deprive one of life, liberty, or property—by judgment of a jury of one’s peers or with evidence seized only through reasonable searches, for example—the First Amendment is in terms absolute and while its application has never 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 that totally unrelated to any political purpose.

Thus, the constitutionalization of the law of defamation with the narrowing possibilities of recovery for libelous and slanderous criticism of public officials, political candidates, and public figures epitomizes the trend. 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 pornography has closely confined most governmental action taken against the verbal and pictorial representation of matters dealing with sex. The encompassing of the right to spend for political purposes and 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, 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 will view matters differently, will 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 forty 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. Today, equal protection litigation occupies a position of almost predominant character in each Term’s output. Then, the rational basis standard of review of different treatments of individuals, businesses, or subjects little concerned the Justices. The clause blossomed in the Court’s confrontation after *Brown v. Board of Education* with state and local laws and ordinances drawn on the basis of race and this aspect of the doctrinal use of the clause is still very evident on the Court’s docket, though in ever new and interesting form.

Of worthy attention has been the application of the doctrine, 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 in adjudication under the clause of a concept of “fundamental” rights as to which a government must if it acts so as to restrict the exercise of one of these rights show not merely a reasonable basis for its actions but a justification based upon necessity, compelling necessity. 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) received under the clause a special dispensation that required the invalidation of all but the most simple qualifications, most barriers to ballot access by individuals and parties, and the practice of apportionment of state legislatures on any basis other than population. Wealth distinctions in the criminal process were viewed with hostility and generally invalidated.

XII

INTRODUCTION

Again, a reconstituted court made some tentative rearrangements with respect to these doctrinal developments. The suspicion of wealth classifications 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 has been 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. At the same time, the Court constructed new teeth for the guarantees. For example, the privilege against self-incrimination was given new and effective meaning by requiring that at the police interrogation stage it be observed and furthermore that criminal suspects be informed of their rights under it. It 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 out of evidence material obtained in violation of the suspect's search and seizure, self-incrimination, and other rights.

During the last two decades, the Court has drawn the line differently here. The exclusionary rule has been cabined and redefined in several limiting ways. Search and seizure doctrine has been revised to enlarge police powers. The self-incrimination and counsel doctrines have been eroded in part although in no respect has the Court returned to the constitutional jurisprudence prevailing before the 1960s.

Moreover, substantive as well as procedural guarantees were developed. The law of capital punishment has been a course of meandering development, with the present Court almost doing away with it and then approving its revival by the States.

Undergirding the 1960s procedural and substantive development was a series of expansion of the *habeas corpus* powers of the federal courts, with the sweeping away of 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 came a retraction of federal *habeas* powers since the 1970s.

VI

The last four decades were among the most significant in the Court's history. They were as well the scene of 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. But one cannot doubt either that the Court still enjoys the respect and reverence of the bar and the public generally, that its decisions generally are accorded uncoerced acquiescence, and that 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 discretion and choice strengthens the Court as an institution to the degree that it explains and justifies the exercise of discretion and choice 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 good faith search for answers. As the Court's workload continues to increase, a greater and greater proportion of its cases taken are "hard" cases and 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.