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THAT "MOST REMARKABLE WORK" —
THE CONSTITUTION OF THE UNITED STATES

When the Constitution of the United States was a century old,¹ Gladstone² used the phrase "most remarkable work" in paying tribute to it. Were Gladstone alive in this year of its 165th anniversary, after nearly three-quarters of a century more in the life of our Constitution, he might well utter the same words with yet greater awe. For, no less than astonishing has been its elasticity in meeting the needs of the country in the years of its growth. While its basic tenets remain firm, their validity and wisdom have been demonstrated over and over again, as have been the validity and wisdom of the Ten Commandments.

When Gladstone sent his message, the thirteen original states situated along a narrow strip of the eastern coast of the continent, in which some three million people had lived in an agricultural economy, had grown to thirty-eight states stretching from border to border; had developed into an industrial nation with a population of some sixty million. That "most remarkable work" had withstood the early growing pains of the republic, and had met the changing and expanding needs of a people so multiplied as to numbers, so kaleidoscopically altered in economy, living geographically in a territory extended so many thousands of miles. It had survived a war among the states themselves.

The sixty-five years that have passed since the centennial have seen the population leap from sixty million to close to one hundred and sixty million. American enterprise and talent have brought the nation to what, to the writers of the

¹ The Constitutional Convention met on May 25, 1787 and the 39 delegates signed the completed Constitution on September 17, 1787. The anniversary of the Constitution is commonly dated from this latter date rather than from its ratification.
² Letter to the committee in charge of the celebration of the centennial anniversary of the American Constitution, July 20, 1887.
Constitution, would seem a miraculous age in industrial development and expansion. The social philosophy of the American people, as well, has matured and widened.

All this — and a Constitution written by men who lived one hundred and sixty-five years ago in time, and much, much longer ago in environment. What of its functioning over the years in a series of rapidly succeeding new days in the nation’s growth?

I

Last June in Youngstown Sheet & Tube Co. v. Sawyer, the “steel case,” the Supreme Court of the United States had before it a litigation which factually symbolized the complete difference in every aspect of the two eras, and the utterly new problems this difference presents. All the elements of the situation involved were unknown and undreamed of when the Constitution was written: a nation-wide industry supplying a product used directly or indirectly by many other nation-wide industries, which in turn supplied products, unvisualized in 1789, that had become literally indispensable to the way of living in 1952; a nation-wide industry supplying especially weapons of war, unknown and unimagined in the 18th century, and an industry-wide union. The latter were engaged in a dispute over wages and working conditions, which, if not resolved, would result in a work stoppage that would halt the operation of the industry. The President had by executive order directed the Secretary of Commerce to seize the plants of this industry and order their officers to operate them for the United States in accordance with his regulation and directions. The declared basis of the seizure order was that the work stoppage would jeopardize the national defense (we were in the second year of war in Korea). The question for the Court was — did the President have authority to issue that order?

\[3\] 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 817 (1952).
The Court measured this strictly 20th century problem by the 18th century Constitution and held that the basic principle in the Constitution of separation of powers was still good; that this principle was still, by 20th century Americans, deemed essential to freedom and welfare; that the principle could not be ignored by a 20th century President.

Delivering the opinion of the Court, Justice Black said:  

The President's power . . . to issue the order must stem either from an act of Congress or from the Constitution itself.

In the framework of our Constitution, the President's power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

He concluded his opinion with this:  

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

While, as Justice Jackson recognized,  

The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Nevertheless, the Court held to the basic plan for our government fashioned by the Constitution under which the executive has no legislative power.

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4 Id., 343 U.S. at 585, 587.
5 Id., 343 U.S. at 589.
6 Id., 343 U.S. at 653.
After one hundred and sixty-five years, the Court reiterated anew that the separation of powers among the departments of our government as laid down in the Constitution was the "essence" of "free government." In the final words of his opinion Justice Jackson said: ⁷

The essence of our free Government is "leave to live by no man's leave, underneath the law" — to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

II

The "steel case" presented the issue dramatically, and came at the end of a period during which there had been some decisions which might have suggested an outlook that would indicate a possible outcome in the "steel case" other than the one that was reached. Nevertheless, the decision should not have come wholly as a surprise. For through the flux and change of the years, notwithstanding the decisions finding constitutional authority for federal intervention in what had previously been regarded as the sphere of the states, and for governmental action in spheres where it had once not ventured, the constitutional theory of the relationship between the

⁷ Id., 343 U.S. at 654-5.
Federal Government and the states as conceived in the Constitution had never been denied or assailed in the decisions — nor had any of the other basic principles of the structure of the government laid down in the Constitution.

As to the amendments to the Constitution, without question none has altered the fundamental outlines of our governmental system in any respect or degree.

In fact, all things considered, it is a commentary on the wisdom of those who conceived our plan of government and of the belief of the American people that it is good and should not be touched, that in 165 years the Constitution has actually been amended only eleven times. The first ten amendments may be deemed as one and contemporary with the ratification of the original document, for they were proposed as one and ratified by the legislatures of ten of the original states between November 1789 and December 1791. The 11th Amendment dealing with suits against a state and the 12th dealing with the method of choosing the President and Vice President came in 1798 and 1804 respectively. The 13th, 14th and 15th Amendments were the aftermath of the Civil War, and became part of the Constitution more than one half a century after the 12th Amendment. In 1913 the 16th Amendment was adopted making possible a federal income tax. The same year the 17th Amendment was ratified providing for the direct election of United States Senators. The 18th Amendment in 1919 was the prohibition amendment and the 21st in 1933 repealed it. The 19th Amendment in 1920 gave women the suffrage. In 1933 the 20th Amendment eliminated "lame duck" Presidents and "lame duck" Congresses. The last amendment, the 22nd, ratified in 1951, embodied in the Constitution what had until 1940 been regarded as an unwritten rule, that no President should have more than two terms.

Thus, the written Constitution, as it stands today, contains the fundamental pattern of our form of government as it
was set down in the original document. That pattern was written in the fear of concentrated power; born of the knowledge of the fate of the individual under a government where power rests in one man or a group of men; and was centered on a system of checks and balances: checks and balances among the departments of the Federal Government, and a withholding of power from a central government by giving it only certain delegated authority and retaining all other in the states and in the people.

Thomas Jefferson voiced the fear of governmental power and particularly power in a central government when he said: ⁸

I consider the foundation of the Constitution as laid on this ground — that all powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states, or to the people. To take a single step beyond . . . is to take possession of a boundless field of power.

On another occasion, he said, "In questions of power let no more be heard of confidence in man, but bind him down, from mischief by the chains of the Constitution." ⁹

III

After ensuring the diffusion of authority to the end that Americans shall not be subject to arbitrary governmental power, the intent and purpose of those who wrote the Constitution was to embody but the broad foundation principles of the government therein. Said Alexander Hamilton: ¹⁰

Constitutions should consist only of general provisions; the reason is that they must necessarily be permanent, and that they cannot calculate for the possible change of things.

The very characteristics in which the brief principles of the Constitution are stated — broad and general in terms,

⁹ The Kentucky Resolutions 133 (Nov. 1798).
sparing in detail — have permitted scope in development, evolvement and adaptability.

That there would be controversy as to the meaning of constitutional provisions was soon realized in *McCulloch v. Maryland.* Chief Justice Marshall said, speaking of the "acknowledged" principle that the Federal Government was one "of enumerated powers":

That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

Marshall might have made the same prophesy as to virtually every other provision of the Constitution.

The "change of things" which Alexander Hamilton foresaw as a statesman and which Marshall foresaw as a jurist have over the years demanded much resiliency from the Constitution. Changing times have compelled the stretching of constitutional provisions to include the new. In other instances, "change" has compelled the Court on re-appraisal to pull back. Perhaps that was fulfillment of Alexander Hamilton's declaration that the Judiciary would serve as a "safeguard against the effects of occasional ill humors in the society," and Chief Justice Taft's comment that "constitutions are checks upon the hasty action of the majority."

The "change of things" which the Constitution has had to meet has been both physical and philosophical or sociological. On the physical side, the change has been to make adjustments in step with the advancements in science and mechanics. Thus, the progress that has brought new instrumentalities of transportation and communication, unknown at the time of the writing of the Constitution, and business enterprises and methods of conducting them, then unknown,

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11 *4 Wheat. 316, 4 L. Ed. 579* (U.S. 1819).
12 *Id., 4 L. Ed. at 601.
13 *The Federalist,* No. 78 at 509 (Modern Library ed.).
14 A veto message, August 15, 1911, when Chief Justice Taft was President.
has extended the coverage of the Commerce Clause\textsuperscript{16} to them. In 1877, Chief Justice Waite wrote: \textsuperscript{16}

The powers thus granted [to the Congress by the commerce clause] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth.

A generation later the Court said \textit{In re Debs:} \textsuperscript{17}

Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel; yet in its actual operation it touches and regulates transportation by modes then unknown, — the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

To the instrumentalities enumerated in those cases there have since been added motor carriers,\textsuperscript{18} airplanes,\textsuperscript{19} natural gas pipe lines,\textsuperscript{20} radio and television.\textsuperscript{21}

\textsuperscript{15} U.S. Const. Art. I, § 8, cl. 3.
\textsuperscript{16} Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1, 24 L. Ed. 708, 710 (1877).
\textsuperscript{17} 158 U.S. 564, 15 S. Ct. 900, 909, 39 L. Ed. 1092 (1895).
To see that the principle that Congress shall have power to regulate commerce between the states would extend from the means of conducting such commerce in 1787 to new means as they were invented and discovered is a relatively simple matter, clear, plausible and obviously within the anticipation of the drafters of the Constitution when their own writings are read.

IV

When the field of the physical and concrete is left and the field of the abstract and conceptual is entered, the very elasticity of constitutional provisions has made possible decisions at times stemming from responsiveness to transitory currents of opinion. The caution with which the Judiciary should accede to these in reaching its determinations has been translated into the rule that the courts are not concerned with the wisdom of legislation but must accept that of the enacting bodies unless unquestionably unreasonable. In reading for us the rights and guarantees of the Constitution, any other approach by the Court would render the essential anchorage these constitutional provisions give, insecure indeed, for

The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory


provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.

The danger of easy yielding by the courts to the "public" policy of the moment, without regard to the "constitutional" policy, has been perceived by the Justices of the Supreme Court down the years. As Justice Sutherland observed, "The public policy of one generation may not, under changed conditions, be the public policy of another." 24 Later, Justice Douglas noted that: 25

In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. [Citations omitted]. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.

In the "steel case," Justice Douglas in substance was repeating this view when he said: 26

If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency.

That is not to say that the "wisdom, necessity and validity" of laws — both federal and state — are not decided in the light of existing conditions. It could not well be otherwise.

Home Building & Loan Ass'n v. Blaisdell 27 is illustrative. There the constitutionality of a Minnesota mortgage moratorium act was in question. The Court upheld it in an opinion by Chief Justice Hughes, in which he said in part: 28

27 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934).
28 Id., 290 U.S. at 425, 426, 442-3.
Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.

While emergency does not create power, emergency may furnish the occasion for the exercise of power.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — "We must never forget that it is a constitution we are expounding" (McCulloch v. Maryland, 4 Wheat. 316, 407) — "a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Id., p. 415.

Similarly, in Euclid v. Ambler Realty Co., 29 where the validity of a local building zone ordinance was before the Court, the opinion cited that building zone laws were "of modern origin," having sprung in the preceding twenty-five years 30 of the transition of urban life from the "comparatively simple" to the more complicated in communities with increased and concentrated population and the attending problems. The constitutionality of government regulation must then be judged in the setting of conditions. Said the Court in that case: 31

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been con-

29 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).
30 The Court was writing in 1926.
demned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

The Court added the admonition: 32

But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The last, as we have seen and shall see further, is the constitutional principle to which the Court adheres today. It is the “elasticity” in application that has provoked sharp dispute concerning some decisions among the Justices, and in some cases beyond the walls of the Supreme Court building.

“Interpreting” and “applying” the clauses of the Constitution over the years in the “conditions” and “outlook” that those passing years have produced, the Court has found power in the Constitution, on the one hand, for the Federal Government in spheres that in the circumstances and views of an earlier day might well have been deemed properly belonging to the states. On the other hand, the Court similarly has found constitutional authority for state governments that once might have been regarded as outside the perimeter of any governmental authority.

The interpretation of specific powers in the Constitution to permit their utilization for policing the life of a nation which was growing rapidly more complex and more far flung commenced before the Constitution had reached its centennial.33 As far as the Federal Government is concerned, the Commerce Clause especially has been the touchstone. In it

32 Ibid.
has been found authority for the Federal Government to prohibit interstate transporation of diseased livestock,\textsuperscript{34} of lottery tickets,\textsuperscript{35} of articles condemned under the Pure Food and Drugs Act\textsuperscript{36} and of intoxicating liquors.\textsuperscript{37} The Lindbergh kidnapping act \textsuperscript{38} likewise has its authority in the Commerce Clause.\textsuperscript{39}

Price fixing by Congress of products and services which transcend state lines has been upheld. The Packers and Stockyards Act of 1921 permitting the Secretary of Agriculture to determine the charges to be made by brokers selling livestock in interstate commerce has been held a valid exercise of the commerce power.\textsuperscript{40} So also, the fixing of the minimum price of milk; \textsuperscript{41} the price fixing provisions of the Bituminous Coal Act of 1937; \textsuperscript{42} the Grain Futures Act; \textsuperscript{43} the tobacco marketing quotas of the Agricultural Adjustment Act of 1938; \textsuperscript{44} the Tobacco Inspection Act; \textsuperscript{45} and the Sugar Act of 1948,\textsuperscript{46} which authorized the Secretary of Agriculture to make allotments of sugar quotas which may be marketed in the United States, all have rested on the power of Congress

\begin{footnotes}
\item 34 Reid v. Colorado, 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (1902).
\item 35 Champion v. Ames (Lottery Case), 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903).
\item 36 Hipolite Egg Co. v. United States, 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911).
\item 37 Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1917).
\item 42 Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940).
\item 43 Board of Trade of Chicago v. Olsen, 262 U.S. 1, 43 S. Ct. 470, 67 L. Ed. 839 (1923).
\item 46 Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S. Ct. 403, 94 L. Ed. 381 (1950).
\end{footnotes}
to regulate interstate commerce. This clause, too, has been the basis of the national labor laws.\textsuperscript{47}

When the purpose of federal legislation had been candidly regulatory, not of interstate commerce, but of the activity engaged in interstate, it was inevitable that the argument would be made that a wholly intrastate activity affected the interstate commerce and should be included in the regulatory measure. This argument has frequently been successful. Thus, a rate clerk employed by an interstate motor transportation company,\textsuperscript{48} and maintenance employees of a building whose tenants engaged principally in the production of goods for interstate commerce\textsuperscript{49} have been held to be engaged in interstate commerce. Similarly, the Agriculture Marketing Agreement Act, regulating the price of milk moving in interstate commerce, was held to extend to the regulation of the price of intrastate milk which competed with interstate milk.\textsuperscript{50}

As a corollary, state laws or local ordinances governing intrastate transactions have at times been held invalid as a burden on interstate commerce.\textsuperscript{51}

The Sherman Anti-Trust Act, adopted in 1890, also under the Commerce Clause, has been held, in recent years, to apply

\footnotesize{\textsuperscript{47} United States v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941); National Labor Relations Board v. Fainblatt, 306 U.S. 601, 59 S. Ct. 668, 83 L. Ed. 1014 (1939); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).}

\footnotesize{\textsuperscript{48} Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942).}

\footnotesize{\textsuperscript{49} A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942).}

\footnotesize{\textsuperscript{50} United States v. Wrightwood Dairy Co., 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726 (1942).}

\footnotesize{\textsuperscript{51} Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389, 72 S. Ct. 421, 96 L. Ed. 364 (1952), holding a state tax in Mississippi on the solicitation of business for a laundry licensed in Tennessee invalid; Dean Milk Co. v. Madison, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951), holding a city ordinance, which forbade the sale of milk as pasteurized unless it was pasteurized within five miles of the city, to be discriminatory against interstate commerce. The Court, as a general proposition, has held, nevertheless, that same business was subject to regulation by the Federal Government in its interstate aspects and the state governments in its intrastate aspects. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944), see note 52 infra.}
to businesses previously held not to be interstate commerce, such as the insurance business.\footnote{United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944); cf. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 257 (1869); Hooper v. California, 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (1895).}

While the Commerce Clause has been the basis for interstate regulation in the case of federal legislation, the states, on the other hand, have utilized the "police power" to counter the challenge to their legislation under the due process provision of the Constitution. The New York emergency housing laws of 1920 were sustained as a permissible exercise of the State's police power and, accordingly, not invalid as violating due process.\footnote{Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S. Ct. 265, 65 L. Ed. 877 (1921); Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922).} Regulation by a state of the milk industry\footnote{Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934).} and the myriad state and local laws and ordinances governing the conduct of business, the professions, labor relations and the use of property have also been sustained on that theory.\footnote{Peterson Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 940 (1934) (regulating size and weight of bread); Radice v. New York, 264 U.S. 292, 44 S. Ct. 325, 68 L. Ed. 690 (1924) (forbidding night work by women); Bratton v. Chandler, 260 U.S. 110, 43 S. Ct. 43, 67 L. Ed. 157 (1922) (regulating real estate brokers); McCloskey v. Tobin, 252 U.S. 107, 40 S. Ct. 306, 64 L. Ed. 481 (1920) (prohibiting solicitation of claims by one not an attorney); St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, 39 S. Ct. 274, 63 L. Ed. 599 (1919) (regulating billboards); N.Y. Central R.R. v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917) (establishing workmen's compensation system); Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S. Ct. 217, 61 L. Ed. 480 (1917) (regulating stock sales); Brazee v. Michigan, 241 U.S. 340, 36 S. Ct. 561, 60 L. Ed. 1034 (1916) (regulating employment agencies); Armour & Co. v. North Dakota, 240 U.S. 510, 36 S. Ct. 440, 60 L. Ed. 771 (1916) (regulating size and character of packages in which goods are sold); Sturges & Burn Mfg. Co. v. Beauchamp, 233 U.S. 320, 34 S. Ct. 60, 58 L. Ed. 243 (1913) (prohibiting child labor); Adams v. Milwaukee, 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971 (1913) (requiring tuberculin test for fluid milk); Shallenberger v. First State Bank of Holstein, 219 U.S. 114, 31 S. Ct. 189, 55 L. Ed. 117 (1911) (prohibiting any but corporations to engage in banking business); Muller v. Oregon, 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908) (regulating hours of labor by women); Booth v. Illinois, 184 U.S. 425, 22 S. Ct. 425, 46 L. Ed. 623 (1902) (prohibiting sale of stock or grain on margin); Gundling v. Chicago, 177 U.S. 183, 20 S. Ct. 363, 44 L. Ed. 725 (1900) (regulating sale of cigarettes); Holden v. Hardy, 169 U.S. 366, 18 S. Ct. 383, 42 L. Ed. 780 (1888) (prescribing hours of labor); Dent v. West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889) (regulating practice of medicine); Powell v. Pennsylvania, 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253 (1888) (prohibiting manufacture or sale of oleomargarine).}
The interpretation of the Bill of Rights has provided over the years perhaps the greatest fluctuation in accordance with the "conditions" and "outlook" of the times. This has been particularly so in the quarter century since World War I. In the years immediately following that conflict, the Court balanced the case for the public as against the rights of the individual under the Bill of Rights. Later came the period when the tendency was to give the Bill of Rights the widest construction for the protection of the individual as to all utterances.

In the last two years the Court has reverted to a balancing of the freedom of expression by the individual under the Bill of Rights with the interests of the community as a whole.

In some instances broad construction of constitutional provisions has brought decisions which, if the line were pursued, would come close to weakening the structure of our governmental position as designed in the Constitution — a

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union of states with a central government of specifically delegated powers only. These decisions have been in the field of taxation particularly.\(^{50}\) Traditionally, the instrumentalities of state governments had been held immune from taxation by the Federal Government,\(^ {60}\) as the instrumentalities of the Federal Government are immune from taxation by the states.\(^ {61}\) The first breach came with *Helvering v. Gerhardt*,\(^ {62}\) holding that the salaries of state employees were subject to taxation by the Federal Government.\(^ {63}\) In 1946 came the decision, *New York v. United States*,\(^ {64}\) which would pose a great threat to the financial and, therefore, governmental strength of the states if there were any further decisions along the same line. The Court there held that the sale by the State of New York of waters from the mineral springs located at Saratoga Springs, owned and operated by the State, was subject to federal tax. Plainly, to leave open to federal tax the sources of state revenue would make it impossible for the states to provide necessary facilities for the people. The strong dissent of Justice Douglas, in which Justice Black concurred, showed an appreciation of this fact and encouragement that there would be vigorous opposition in the Court to any further similar encroachments. That dissent emphasized the sovereignty of the states in our scheme of government and immunity from federal taxation as an essential

\(^{50}\) In the same vein, however, has been the construction of the 14th Amendment as incorporating the Bill of Rights and making them applicable to the states.


\(^{62}\) 304 U.S. 405, 58 S. Ct. 969, 82 L. Ed. 1427 (1938).

\(^{63}\) The following year (1939) the Court held, as it was logically bound to, that the salaries of federal employees were taxable by the states. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939).

\(^{64}\) 326 U.S. 572, 66 S. Ct. 310, 90 L. Ed. 326 (1946).
concomitant of that sovereignty. Justice Douglas quoted from Woodrow Wilson as follows: 65

... "the States of course possess every power that government has ever anywhere exercised, except only those powers which their own constitutions or the Constitution of the United States explicitly or by plain inference withhold. They are the ordinary governments of the country; the federal government is its instrument only for particular purposes."

The opinion quoted from an early decision of the Court 66 as follows: 67

"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."

Justice Douglas then went on to caution: 68

A tax is a powerful, regulatory instrument. Local government in this free land does not exist for itself. . . . Local government exists to provide for the welfare of its people. . . . If the federal government can place the local governments on its tax collector's list, their capacity to serve the needs of their citizens is at once hampered or curtailed. The field of federal excise taxation alone is practically without limits. Many state activities are in marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched. In any case, the repercussions of such a fundamental change on the credit of the States and on their programs to take care of the needy and to build for the future would be considerable. . . . The power to tax lightly is the power to tax severely. The power to tax is indeed one of the most effective forms of regulation. And no more powerful instrument for centralization of government could be devised.

65 Id., 326 U.S. at 592.
68 Id., 326 U.S. at 593-5.
The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy.

The immunity of the States from federal taxation is no less clear because it is implied. The States on entering the Union surrendered some of their sovereignty. It was further curtailed as various Amendments were adopted. But the Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution is a compact between sovereigns. . . . If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have. They are relegated to a more servile status. They become subject to interference and control both in the functions which they exercise and the methods which they employ. They must pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution. . . .

Conclusion

In reflective birthday spirit, this article on the 165th anniversary of the Constitution has surveyed — most sketchily to be sure — the shape and outlines of its growth. We have seen the ways in which the framework has been filled in by construction and interpretation. We have also seen that no pressure of changing times or crucial events has persuaded the Court that the essential framework was wrong or lacking in any respect. We have seen its elasticity meeting changing times and changing modes. With it all, its basic structure has maintained its firmness.

Events have shown need for flexibility and continuity when applied to constitutional documents, so that the law may be able to adjust itself to the exigencies arising out of the ever changing circumstances and situations in life. 69

In law particularly, there must be a balance between stability and change, between the stability required by the economic

order and the change involved in the life which law is to
govern. Law must be firm enough to assure stability and flex-
ible enough to adapt itself to change.

Justice McReynolds' wail that, "The Constitution is
gone," 70 was a deepseated mistake. Those who regard a
static constitution as a necessity lack faith in the enduring
power of a flexible document; an "immovable body" may
well prove less secure than they believe. "Indeed the ever-
changing Tiber has outlasted all the buildings that once
stood motionless along its banks." 71

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70 The essence of this statement was made from the bench by Justice McReynolds at the time he delivered the dissenting opinion in the Gold Clause cases. N.Y. Times, Feb. 19, 1935, p. 1, col. 7; Id. at p. 16, col. 5. See also Jaffe, The Supreme Court Today, 174 Atlantic Monthly 76 (Dec. 1944).
