THE DARTMOUTH COLLEGE CASE—THEN AND NOW

By Hugh Evander Willis

Anyone who would like a thorough understanding of the background behind the Dartmouth College Case should read Senator Beveridge's great discussion of this case in his *Life of John Marshall.*[1] In his discussion Beveridge gives the history of the founding by a missionary named Wheelock of the Little Indian School in the state of New Hampshire; how Wheelock sent one of his Indian youths and another missionary to England to raise funds for his enterprise; how the Earl of Dartmouth and others responded to their appeal; how Governor Wentworth of New Hampshire in the name of the Sovereign granted a charter to Wheelock for his school, establishing a Board of twelve trustees, giving a majority of seven of them the power to do anything and everything they might think proper, and giving Wheelock, made President, the power by his last will to appoint whomever he might choose to succeed himself as President; how Wheelock by his will made his son his successor as President of the College; how theological differences divided the young President and one of the strongest and most newly appointed members of his Board of Trustees; how a church quarrel in Hanover entered into the college situation; how the trustees removed young Wheelock from office; how the Federalists came to support the cause of the trustees and the Republicans that of Wheelock; how the Republicans elected a new governor of New Hampshire and the legislature of New Hampshire passed an act changing the name of Dartmouth College to Dartmouth University, increasing the number of trustees from twelve to twenty-one, providing for a board of twenty-five overseers with the veto power over the acts of the trustees, and giving the governor and council of the state the power to appoint the overseers and to fill up the existing number of trustees to the number of twenty-one, thereby annulling the charter of the college and bringing it under the control of the legislature; how the governor and council appointed new trustees and overseers; how the old trustees continued to run the college; how the trustees of the university removed the old trustees of

[1] 4 Life of John Marshall (1919) 220.

the college and the president and the professors who adhered to them; how the new régime ousted the old faculty from the college buildings and elected Wheelock president of the state institution; how the college faculty procured quarters in a neighboring building and continued their work; how William H. Woodard, who for years had been secretary and treasurer of the college, had in his possession the records, account books and seal of the college, and declined to recognize the college trustees and acted for the Board of the university; how the college trustees removed him from his position on the college Board and brought suit against him in the Court of Common Pleas for the recovery of the original charter, the books of record and account, and the common seal.

The only question which the United States Supreme Court considered was whether or not the legislature of New Hampshire by its legislation with reference to Dartmouth College had violated the provision in the United States Constitution against the state's impairment of the obligation of a contract. The court might have held that the grant of a charter to Dartmouth College was only an act of legislation which could be repealed as any other act of a legislature can be repealed. The King could not have annulled the charter, but Parliament could have done this. New Hampshire succeeded to the powers of Parliament and, therefore, the court might have held New Hampshire could do this.[2] But the court refused to take this position. The court might have taken the position that the college was a public corporation rather than a private corporation, in which case the protection of the constitutional provision would not have been available.[3] It did not, however, take this position. The court might have taken the position that a charter is not the kind of a contract protected by the Constitution because a grant, but the Supreme Court had already held that the protection of the contract clause applied to grants as well as to executory contracts,[4] and the Supreme Court held in this case that a charter of a private eleemosynary corporation is a contract between the state

[2] 51 American Law Rev. 711, 720; Denham, The Dartmouth College Case (1909) 7 Mich. L. Rev. 201, 207, 211.

[3] Laramie County v. Albany County (1875) 92 U. S. 307; The Dartmouth College Case (1931) 19 Georgetown L. Rev. 411.

[4] Fletcher v. Peck (1810) 6 Cranch 87; State of New Jersey v. Wilson (1812) 7 Cranch 164.

and the corporation, between the state and the members of the corporation, and between the corporation and its members. The Chief Justice in an obscure way found consideration and all the other essential elements of a contract. The court might have held that even though the charter of a corporation was a contract that it was subject to the sovereign powers of eminent domain, taxation and the police power. In that case the only question before the court would have been whether or not there was a sufficient social interest for the law passed by the legislature of New Hampshire to make it a proper exercise of the police power. The court might very well have found that it was not a proper exercise of the police power, and for that reason a violation of the United States Constitution, but if it had decided the case on that ground, it would have left all contracts subject to the exercise of these sovereign powers. The court did not take this position, but the position that the charter of a corporation is protected against the exercise of such powers; at least, this was the construction put upon the Dartmouth College Case by the cases which immediately followed it, and the cases following it also uniformly accepted the proposition that the doctrine of the Dartmouth College Case was applicable to all kinds of private business corporations.[5] Yet the courts have always held that private contracts between private individuals are subject to the exercise of these sovereign powers.[6]

The effect of this decision was the creation of a corporate capitalistic civilization in the United States. For fifty years it protected private corporations against political action and had much to do with the extraordinary development of private corporations in the United States. Everywhere corporations were springing up in response to the necessity for larger accumulations of money and more constant business units. Marshall's opinion afforded an extraordinary stimulus to this natural economic tendency. It gave both encouragement to business and aligned the economic forces of corporate organizations on the side of national development. It gave to the railway corporations, soon to begin, a basis

[5] Bridge Proprietors v. Hoboken Co. (1863) 1 Wall. 116; Piqua Bank v. Knoop (1853) 16 How. 369.

[6] Manigault v. Springs (1905) 199 U. S. 473; Munn v. Illinois (1876) 94 U. S. 113.

of credit which secured full play to the economic forces by which the achievement of cultivating the soil of the North American continent was performed. Justice Story says of the opinion that it "will check any undue encroachments upon civil rights, which the passions or the popular doctrines of the day may stimulate our State Legislatures to adopt." Chief Justice Marshall in another decision[7] gave the following as the occasion and general purpose of the contract clause:

> "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, . . . had been used to such an excess by the state legislatures, as to break upon the ordinary intercourse of society and destroy the confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith."

To guard against the continuance of this evil was one of the objects of deepest interest to the Constitutional Convention and one of the most important benefits expected from the Dartmouth College decision. Chief Justice Hughes, in a recent case,[8] said:

> "The wide-spread distress following the revolutionary period and the plight of debtors had called forth in the states an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. . . . It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of 'private faith.' "

Within the last ninety years the tendency has been strongly away from some of the doctrines of the Dartmouth College decision, but the doctrine that the charter of a corporation is a contract still stands, and the Dartmouth College Case not only inspired confidence in the business world, but taught the American people, as Beveridge says, "that faith once plighted, whether in private contracts or public grants, must not and cannot be broken by state legislation."

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[7] Ogden v. Saunders (1827) 12 Wheat. 213, 354.
[8] Home Building and Loan Assoc. v. Blaisdell (1934) 54 S. Ct. 231.

Since the date of the decision of the Dartmouth College Case, many changes have occurred both in constitutional law and in corporate development. Some of the changes in corporate organization and our capitalistic system have been the result of new forms of social control of them permitted by later decisions of the United States Supreme Court. But some of the most important changes in our capitalistic system and corporate organization have been the result of the capitalistic system and the corporations themselves.

After Chief Justice Marshall's retirement from the bench, it was soon discovered that the doctrine of the Dartmouth College Case, which protected corporations against social control after the issuance of a charter to them, was extending undue protection to corporations and endowing them with the power to do many unsocial things. Since corporations had nothing to fear after they once got a charter, all they had to be concerned about was to get a charter of the sort they desired. As a consequence, for years the corruption and bribery of state legislatures by railway and other corporations became almost a scandal. When it gradually became more difficult for corporations to procure the charters they wanted in this way, all they had to do was to run to Delaware or New Jersey. States like these were only interested in revenue from franchise taxes. They were not interested in what the corporations they might charter might do to other states. Hence, if corporations were willing to pay their license fees, these states were willing to grant them any charters they might desire and even to enact new laws to satisfy the needs and demands of new corporations and then to send such corporations out to prey upon the rest of the country. If these corporations were engaged in interstate commerce, the other states had absolutely no redress, and it was not until two or three years ago that any state discovered that it had any redress against corporations engaged in intrastate commerce,[9] and as yet the states generally have not availed themselves of the new protection available to them. For this reason, in the course of time the doctrine of the Dartmouth College Case began to be modified.

The first modification of the Dartmouth College Case was made by the adoption by the Supreme Court of a rule of strict construc-

[9] Railway Express Agency v. Virginia (1931) 282 U. S. 440.

tion. This rule was first announced in the case of *Charles River Bridge v. Warren Bridge.*[10] The opinion in this case was written by Chief Justice Taney, and it was the first opinion read by him after his appointment as Chief Justice. In this case the state of Massachusetts had incorporated the Charles River Bridge Company to build a bridge between Boston and Charleston and to take tolls for forty years, which time was within a few years extended to seventy years; but the charter said nothing about the monopoly of the Charles River Bridge Company nor the exclusion of other bridge companies. Later the state of Massachusetts incorporated the Warren Bridge Company to build another bridge within a few rods from the first bridge and to be a free bridge after six years. The Charles River Bridge Company sought an injunction, but the Supreme Court, under the rule of strict construction, held that it was not entitled to it but that the second bridge company was privileged to go ahead and build its bridge. This rule of strict construction was followed in many subsequent cases of the Supreme Court.[11] The effect of this decision was to enable the states to protect their general social interests against the operations of self-seeking corporations so long as they had poor charters, but the final effect of this decision was to make the corporations more careful as to the language in their charters. Attorneys for corporations exercised more and more care and became more and more expert in drafting corporate charters. Thereafter, the rule of strict construction had very little operative effect.

As a consequence, a second method for limiting the effect of the Dartmouth College decision was tried. The states in constitutions and general statutes began to insert provisions forbidding the grant of irrevocable charters and reserving the power to alter or repeal them. The Supreme Court held that such limitations were valid on the theory that they became a part of the obligation of the contract in any charter, so that later repeal or alteration of terms of contracts did not impair their obligation.[12]

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[10] (1837) 11 Pet. 420.

[11] Fertilizing Co. v. Hyde Park (1878) 97 U. S. 659; Stein v. Bienville Water Supply Co. (1891) 141 U. S. 67; Knoxville Water Co. v. Knoxville (1906) 200 U. S. 22.

[12] Greenwood v. Freight Co. (1881) 105 U. S. 13; Covington v. Kentucky (1899) 173 U. S. 231.

However, a great many corporations had procured their charters before the enactment of these provisions, and some states did not incorporate such limitations in their constitutions or general statutes.

As a result, in the course of time some cases came before the United States Supreme Court which showed up the fallacy of the Dartmouth College decision in such a clear light that the Supreme Court did what Marshall and his associates should have done at the time of rendering the decision. It tended to place the contracts of corporations with the state upon the same basis as private contracts in general. Dissenting judges had always contended that a state could not abrogate its sovereign powers of eminent domain, taxation and police.[13] Finally, with a change in the personnel of the bench, these dissenting judges attracted enough other judges to their position so that they obtained a majority upon the Supreme Court bench. They first prevailed in eminent domain cases, and the Court held that all charters of a corporation were subject to the exercise of this sovereign power.[14] Later they held that the charters of a corporation were subject to the exercise of the police power: first, as to public morals;[15] then as to public health;[16] then as to public safety;[17] and, finally, as to economic social interest.[18] The state of Mississippi had chartered a lottery for a period of twenty-five years. Three years thereafter in a new state constitution and a statute enacted pursuant thereto, all lotteries were forbidden in the state. *Quo warranto* proceedings were brought against corporations operating lotteries, and the question was whether or not their charters were protected against this exercise of the police power. The Su-

[13] Trustees of Dartmouth College v. Woodward (1819) 4 Wheat. 518; Piqua Bank v. Knoop (1853) 16 How. 369; The Washington University v. Rouse (1869) 8 Wall. 439.

[14] The West River Bridge Co. v. Dix (1848) 6 How. 507; Long Island Water Co. v. Brooklyn (1897) 166 U. S. 685. The Tennessee Valley Authority is authorized to use private processes patented by the United States Patent Office in its production of commercial fertilizers, but this is not a violation of the obligation of any contract because it is provided that reasonable compensation shall be paid, and this is therefore a proper exercise of the power of eminent domain. Note (1934) 43 Yale L. J. 815, 822.

[15] Stone v. Mississippi (1879) 101 U. S. 814.

[16] Butchers etc. Co. v. Crescent City Co. (1884) 111 U. S. 746.

[17] New Orleans v. Louisiana Light Co. (1885) 115 U. S. 650; Texas etc. Co. v. Miller (1911) 221 U. S. 408.

[18] Illinois Central Ry. Co. v. Illinois (1892) 146 U. S. 387.

preme Court, in the case of *Stone v. Mississippi,* held that the social interest in morals could be protected in spite of the fact that the charter was a contract. The state of Louisiana gave a slaughter-house company a monopoly on the butchering business in the city of New Orleans for twenty-five years. Ten years after this grant the state adopted a new constitution which repealed the monopoly features of all prior charters except those of railroad companies, and the city of New Orleans opened butchering to competition. A new slaughter-house company started business, and the first slaughter-house company asked for an injunction, but the Supreme Court, in the *Butchers' Union Slaughter-House etc. Co. v. The Crescent City etc. Slaughter-House Co.,* held that (for the protection of health) the first charter was subject to the exercise of the police power found in the new state constitution. A Louisiana statute gave an exemption from liability for death. A corporation was incorporated under this statute. A later statute imposed liability for death caused negligently, and this corporation was guilty of causing the death of an employee through its negligence. When sued the question which was raised was whether or not the later statute could impose any liability on it in view of its charter, but the Supreme Court, in the case of *Texas etc. Co. v. Miller,* held that the charter was subject to the exercise of the police power for the protection of safety. The state of Illinois, in 1869, granted to the Illinois Central Railway Company in fee all of the state's rights to the submerged lands under Lake Michigan in the Chicago Harbor for a distance of one mile from the shore, including a thousand acres of land. The grant was in perpetuity. In 1873, the Illinois legislature repealed this grant. Bills in equity were filed to determine the rights of the parties to the land involved, and the Supreme Court, in the case of *Illinois Central Ry. Co. v. Illinois,* held that the repeal was constitutional as a proper exercise of the police power to protect the social interest in economic progress, because all grants are made subject to the police power of the state. These decisions subjected the charters of corporations to so many different exercises of the state's police power that the natural inference would be that they were subject to any and every form of police power, but the Supreme Court has as yet refused to apply this modification of the Dartmouth College

Case to the regulation of the rates of public utilities, but has steadfastly held that charter provisions as to rates are contracts which cannot be varied or changed by the state's police power over rate-making.[19] Up to the present time, the Supreme Court has also continued to hold that charter provisions in contracts are not subject to later modification by the state's exercise of its power of taxation.[20] The taxation cases and the rate cases are, of course, contra to the eminent domain cases and all the other police power cases. The Dartmouth College Case should have held at least that if a charter of a corporation is a contract it is subject to the exercise of all of the sovereign powers of police, taxation and eminent domain. The Supreme Court has corrected the original mistake except for taxation and the fixing of the rates of public utilities. These exceptions are indefensible and doubtless in the course of time will be eliminated by the Supreme Court, and taxation and rate cases will be made to harmonize with other police power and eminent domain cases.

In the recent case of *Home Building and Loan Association v. Blaisdell*,[21] Chief Justice Hughes used this language:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . . Whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. . . . There has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. . . . The question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

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[19] Detroit v. Detroit Citizens' Ry. Co. (1902) 184 U. S. 368; Cleveland v. Cleveland City Ry. Co. (1904) 194 U. S. 517; Vicksburg v. Vicksburg Water Works Co. (1907) 206 U. S. 496; Columbus etc. Co. v. Columbus (1919) 249 U. S. 399; St. Cloud Public Service Co. v. St. Cloud (1924) 265 U. S. 352.

[20] Piqua Bank v. Knoop (1853) 16 How. 369; The Washington University v. Rouse (1869) 8 Wall. 439; Roberts etc. Co. v. Emmerson (1926) 271 U. S. 50; Lake Superior etc. Mines v. Lord (1926) 271 U. S. 577.

[21] (1934) 54 S. Ct. 231.

As a result of these modifications of the Dartmouth College Case, corporations and our capitalistic system have been subjected to a great deal of social control to which they were not subject for many years after the Dartmouth College decision, and the indications at the present time are that they will be subjected to much greater social control in the future.

Capitalism, during its history, however, has worked more changes in itself than has the Supreme Court through its modifications of the Dartmouth College decision. Adam Smith[22] gave six characteristics as the characteristics of capitalism: private property, private enterprise, individual initiative, the profit motive, wealth, and competition. Practically all of these characteristics as Adam Smith understood them have disappeared. In Adam Smith's day, private property or ownership consisted of the unity of interest in the enterprise, of power over it, and of acting with respect to it. By the nineteenth century in industry the first two only belonged to the owners, who hired managers to perform the third. Now all three have been separated and the people who call themselves owners own only an interest in the enterprise. Their situation is practically that of creditors who have loaned money, only for dividends instead of interest. In the same way, corporate enterprise has supplanted private enterprise. Under the modern quasi-public corporation, where the wealth of the many has been placed under the control of a few, the property owner has surrendered the direction of his wealth for the wages of capitalism. He has no responsibility. Individual initiative also has gone. At first, in the United States, individualism expressed the agricultural economy. Then the traders, craftsmen and capitalists, crying, *"Laissez faire,"* set themselves free from old restrictions. *Laissez faire,* starting as a liberation of individualism, has, however, developed one of the worst forms of tyranny, although it is still justified and defended in the name of freedom. The responsible individual entrepreneur has been replaced by the non-responsible corporation which has succeeded to the position formerly occupied by the feudal lord. Corporations have thrived upon the investment of the thrifty and the accumulations of the many and the exemption from personal,

[22] The Wealth of Nations.

social and political responsibility. More recently, because the credit structure is the core of modern finance, the banker and his scheme of values have been set up at the head of the corporations, and money has become king. This consummation has been accomplished behind a screen; yet it is none the less an accomplishment. The power of financiers and industrialists has become so great that they have come to be spoken of as "the interests" and as an invisible government. Thus, within the superficial framework of a political structure, postulated on free and individual farmers, there has been built up an economic hierarchy which has reduced individuals, concentrated very largely in our cities, to dependent salary and wage workers. The profit motive, which the classical economists so much emphasized, no longer operates as they prophesied that it would. The modern owners under our corporate system get the profits, but this does not motivate them to a more efficient use of their property, for they have no control. Any spiritual values which used to attach to their ownership are gone. The wealth of stockholders is determined by others. It fluctuates, is liquid, but cannot be employed by them. They own only a symbol of ownership. When they were in control there was at least an assumption that they would operate their business for their own interests. There is no longer any guaranty that their business will be operated even in this way. Those in control do not directly get the profits and may not be interested in profits for the stockholders. Since those in control of our quasi-public corporations do not get the bulk of the profits, they cannot be motivated by the profit motive. When it is remembered that the power over our huge corporations is not in the shareholders, nor the bondholders, nor the employees, nor the public consumers, but in the hands of a relatively few called management, the implications of the situation begin to appear. Those in control are very likely to desire profits, but under our present set-up, if they would gain profits they must do so through selling to the corporations which they manage, things which they themselves own, or by wrecking the corporations, or by shifting profits to subsidiary companies which they own, or by speculation on the stock market. Competition also in modern times has ceased to operate in the way planned for it by the

classicists. Business has now developed so that it is characterized either by monopoly or by cut-throat competition.[23]

Thus, all of the characteristics of capitalism emphasized by Adam Smith have disappeared. The cause of these changes has been the corporation. It cannot be emphasized too much that these changes and the present plight of capitalism are not due to social control but to the fact that corporations in the respects that caused these changes have been permitted to operate without social control. In the United States, the history of capitalism may be divided into four periods: (1) the pre-industrial or agricultural period prior to 1840; (2) the corporate, industrial period, from 1840 to 1880; (3) the period of corporate monopoly, from 1880 to the World War; and (4) the period of corporate finance, from the World War to date. The corporation at first provided a means through which private business transactions of individuals could be carried on. Then it provided a method of property tenure. But with the advent of quasi-public corporations, it has organized our economic life. The concentration of economic power in the United States has become such that in 1930 two hundred non-banking corporations controlled 49 per cent of the corporate wealth other than banking. Adam Smith combatted corporations as unfit to accomplish the results which he advocated; yet today, though corporations dominate our economic life and have dethroned all of Adam Smith's generalizations, the disciples of Adam Smith still both continue to acclaim his doctrines and the institution of the corporation. The terms and concepts remain, but the economic conditions have changed. New terms and new concepts are imperatively needed.

But more than this is needed. The changes in the structure of capitalism worked by corporate organization and development have created an economic order which has become, for the time being at least, unworkable and will continue to be unworkable unless the operation of capitalism is essentially changed. With the new development in our corporate organization and with the profit motive largely exempted from social control, there has resulted a concentration of wealth which has given 2 per cent of

[23] Berle & Means, The Modern Corporation and Private Property (1932).

our population about 65 per cent of our wealth.[24] In order to make the capitalistic system operate, there is an economic law that somewhere there must be a purchasing power equivalent to the producing power. With the introduction of new machinery and the technological device of mass production, the problem of production has been entirely solved. It has been solved so well that it has outrun purchasing power to such an extent that we are now suffering the consequences of it in this depression. In order to cure our depression, the principal thing needed is the creation of new purchasing power. At the present time, purchasing power abroad is not available, and probably never will be again except in so far as it can be obtained by a planned national economy. The 2 per cent of our population which own 65 per cent of our wealth has this purchasing power but it does not want to use it for the purpose of buying goods, if indeed it could, but it wants to use it either for the production of more goods or for purposes of investment. That means that the rest of our population, which owns only 35 per cent of our wealth, must do all the buying, and this seems to be proving a job too great for their accomplishment. The solution of this problem is now one of the major tasks of the Roosevelt administration. The constitutionality of the Roosevelt program involves not only the doctrines of the Dartmouth College Case, but many other constitutional doctrines and limitations.

In concluding this paper, the writer will undertake only to show the application of the modified principles of the Dartmouth College Case to present day legislation, state and national. In other words, he will undertake to show to what extent state and national legislation recently enacted in his opinion is a violation of the provision in the Constitution against the impairment of the obligation of contracts. This provision in the Constitution is an express limitation only upon state legislatures, but due process of law, which is a limitation on all branches of the federal government, includes the impairment of the obligation of a contract,

[24] Report in 1915 of Commission on Industrial Relations; Edie, Principles and Problems of Economics (1926) chap. 25; Gemmill, Contemporary Economic Problems, chap. 21; Garver & Hanson, Principles of Economics (1928) chap. 31; Taussig, Principles of Economics (1927) vol. 2, chap. 55.

so that the legislation of Congress probably has just as much limitation as does the legislation of the states.[25] In addition, Section 4 of Fourteenth Amendment provides that: "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." This provision probably applies to future debts and not merely to those existing at the time of the adoption of the amendment and, therefore, is also another limitation on the federal government so far as the public debts are concerned, comparable with the contract clause.

Recently a vast number of new laws, retroactive in effect, principally for the benefit of debtors, have been passed both by the states and the federal government. The state laws have been in the nature of moratory legislation, staying the execution of judgments, or judicial proceedings, or foreclosure of mortgages, or extending the period of redemption, or prohibiting loans or payment of cash surrender value by insurance companies, or liberalizing exemption laws, or abolishing deficiency judgments and foreclosure by advertisement. The federal laws have related to such topics as the gold content of the dollar, gold hoarding, and gold clauses in contracts.

Is any or all of this legislation unconstitutional because of its impairment of the obligation of contracts? We will first consider some of the state legislation. Stay laws which do not place a fixed and arbitrary time limit but place the matter in the hands of the courts for them to exercise their discretion are constitutional. This was so decided in the celebrated case which the United States Supreme Court decided on January 8, 1934.[26] This is exactly what was provided by a Minnesota law, and the United States Supreme Court upheld the law. In announcing the decision for the Court, Chief Justice Hughes said:

> "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them.[27]

[25] Sinking-Fund Cases (1878) 99 U. S. 700, 718; United States v. Northern Pacific Ry. Co. (1921) 256 U. S. 51.

[26] Home Bldg. & Loan Assoc. v. Blaisdell (1934) 54 S. Ct. 231.

[27] Sturges v. Crowninshield (1819) 4 Wheat. 122.

"This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may not be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserve power of the state to protect the vital interests of the community. . . . Whatever doubt there may have been that the protective power of the state, its police power, may be exercised—without violating the true intent of the provision of the federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing.[28] . . . Contracts are made subject to this exercise of the power of the state when otherwise justified."

Where, instead of giving a discretion to the courts, the legislature stays the execution of a judgment or judicial proceedings or foreclosure of a mortgage for a stated time, the law would probably be held bad by the United States Supreme Court; but where there is an extension or enlargement for a stated time of the period of redemption from the foreclosure of a mortgage or for the sale for non-payment of taxes, the law might be upheld, provided the period was a reasonable period.[29] The foreclosure by advertisement could probably be abolished by a retroactive statute, but the abolition of a deficiency judgment would probably be unconstitutional although it probably would be constitutional to require a separate action at law.[30] A law permitting the mortgagor to continue in possession without the payment of rent for the value of the use of the property would also probably be unconstitutional. A dictum in the *Blaisdell* case seems to be to

[28] Block v. Hirsh (1921) 256 U. S. 135; Marcus Brown Holding Co. v. Feldman (1921) 256 U. S. 170.

[29] Bronson v. Kinzie (1843) 1 How. 311; Hooker v. Burr (1904) 194 U. S. 415. This case allows redemption from a tax sale before a sale to a third party purchaser.

[30] Bunn, The Impairment of Contracts: Mortgage and Insurance Moratoria (1933) 1 Univ. of Chi. L. Q. 249; Small, Legality of State Legislation for Debtor's Relief (1933) 11 N. Y. Univ. L. Q. 183.

this effect. After the Civil War many attempts to liberalize the exemption laws, as by the exemption of the homestead, were attempted, but the Supreme Court held them to be illegal.[31] This form of relief for debtors has not been attempted at the present time, but if it should be attempted the courts would probably continue to hold it illegal unless the exemptions were very small. The abolition of imprisonment for debt has been held by the courts to be constitutional.[32] The prohibtion of loans by insurance companies and the prohibition of the payment of cash surrender value by insurance companies are both probably valid because within the principle of the *Blaisdell* case.

The fixing of the gold content of the dollar by the executive branch of the federal government through authorization by Congress is undoubtedly constitutional. Congress has been given the express power to "coin money" and "regulate the value thereof." The delegation of the power to the executive branch of the government is not a violation of the doctrine of separation of powers because the executive branch of the government is not thereby legislating, but is administering a standard set-up by Congress.[33]

The gold hoarding order also is undoubtedly constitutional. The federal government does not have this power given to it as an express power, but it should be held to be a power implied from the power to regulate the value of money. That it is not a violation of the doctrine of separation of powers should be answered for the same reason that was given in the case of the change in the gold content of the dollar. However, in the case of the gold hoarding order, a question of due process is involved. There is some question whether the government in requiring the delivery of gold coin, bullion or certificates to the treasury for an equivalent amount of any other form of coin or currency is exercising the power of eminent domain or exercising a police power. In either event, it would seem that the person from whom the gold is being taken is entitled to notice and an opportunity to be heard. If the power is an exercise of the power of eminent domain, he would also be entitled to a jury trial and to just compensation,

[31] Gunn v. Barry (1872) 15 Wall. 610.
[32] Penniman's Case (1880) 103 U. S. 714.
[33] Hampton v. United States (1928) 276 U. S. 394.

and it might be doubtful whether the payment of an equivalent amount of any other form of coin or currency would be just compensation. If, however, the power is an exercise of the police power, no compensation would have to be made. It is the opinion of the writer that in this matter the federal government is exercising a police power and not the power of eminent domain. The government is not taking private property for a public use, but is regulating the use of money by its people. Furthermore, it is doubtful whether or not money is subject to the power of eminent domain. This is a proper exercise of the police power because of the social interest in a stable currency.[34]

The legislation abrogating the gold clauses in private and public contracts involves no different question of dual form of government or separation of powers than do the pieces of legislation which have just been considered, but the abrogation of the gold clauses does raise a most difficult question under the due process clause. There is no question that Congress has the power to prescribe what shall be legal tender.[35] In the case of *Bronson v. Rodes*,[36] the Supreme Court held that the Legal Tender Acts did not apply to the gold clauses in private contracts, but in that case it did not hold that Congress lacked the power to make them apply. Since Congress in its recent legislation has expressly declared that such clauses are against public policy, forbidden their insertion in later obligations, and provided for the discharge of obligations, whether heretofore or hereafter incurred, by the payment dollar for dollar in any coin or currency which at the time of payment is legal tender for public and private debts, and since Congress has also authorized the Secretary of the Treasury to require the giving up of the possession of gold coins, the question is now directly raised. However, it is the opinion of the writer that the government may cancel gold clauses provisions in its own contracts under its power to define what shall be legal tender and also because of the fact that the government cannot be sued without its consent; and that the government may over-

[34] 43 Note (1933) Yale L. J. 497; Note (1933) 82 Univ. of Pa. L. Rev. 395.
[35] Legal Tender Cases (1870) 12 Wall. 457; Juilliard v. Greenman (1884) 110 U. S. 421. These cases overruled the earlier decision of Hepburn v. Griswold (1869) 8 Wall. 603.
[36] (1868) 7 Wall. 229.

ride the gold clauses in private contracts because of its power over legal tender and its authority to call in gold coins. So long as there is an embargo on the possession and use of gold coin, the government has rendered it impossible to perform the condition in the contracts, and therefore it should be held to frustrate the contracts. Where there is a sale of a commodity, a clause in a private contract should have operative effect; but where such a contract simply creates a debt, the situation is different. Government has the power to say what shall be the legal tender for the payment of debts. If there are two legal standards, one gold and the other lawful money, a clause for the payment in gold, of course, would prevail; but where there is only one legal standard, and that is payment in any legal tender, the gold clauses should be held to amount to nothing. Changing the legal tender from two standards to one is due process of law.[37]

So far as the gold clauses are concerned, it should also be held that Section 4 of the Fourteenth Amendment places no greater limitation on the federal government than does the due process clause of the Fifth Amendment.[38]

All of which means that as the Supreme Court in John Marshall's day protected corporations against social control only to allow them almost to ruin our capitalistic system; so the Supreme Court of today will subject corporations to social control in the hope of saving capitalism.

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[37] Barry, Gold (1933) 20 Va. L. R. 263, 274, 288, 294, 296; Nebolsine, The Gold Clauses in Private Contracts (1933) 42 Yale L. J. 1051; Post and Willard, The Power of Congress to Nullify Gold Clauses (1933) 46 Harv. L. R. 1225; Hanna, Currency Control and Private Property (1933) 33 Col. L. R. 617, 645.

[38] But see Eder, 14th Amendment—A Forgotten Section (1933) 19 Cornell L. Q. 1, where a position contrary to that taken by the writer is maintained.