

APPLICATION OF THE OBLIGATION OF CONTRACT CLAUSE TO STATE PROMISES

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"No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." ¹ Over this phrase many of the early constitutional battles relative to state power were waged. Of late years the rank growth springing from the exuberant soil of the Fourteenth Amendment has tended to obscure it. Nevertheless there remain in connection therewith problems of major importance to the constitutional lawyer. To one of these problems this article seeks to direct attention.

As an original proposition, it seems quite arguable that the contract clause was not intended to do away with a state's power to repudiate its own promises. In the Constitutional Convention its proponents urged the necessity of protection against the evils of legislative interference with private contracts.² The same is true of the scanty treatment accorded the clause in *The Federalist* with its short reference to "sudden changes and legislative interferences, in cases affecting individual rights".³ But in *Fletcher v. Peck* ⁴ John Marshall, speaking for the Supreme Court, threw the weight of his almost unanswerable logic against so narrow a construction. Pointing out that, since the language of the clause is sweepingly general in its application to all contracts, any exception in favor of the states "must arise from the character of the contracting party, not from the words which are employed",⁵ he stressed heavily the unlikelihood that a convention which broadly forbade the states to enact retrospective legislation in the form of bills of attainder and of *ex post facto* laws would, without specific indication, intend to limit the application of a general prohibition against the impairment of contract obligations.⁶ The position thus taken has been re-

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¹ U. S. CONST. Art. I, § 10.

² See WARREN, THE MAKING OF THE CONSTITUTION (1928) 553-557. See also 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919) 557, n. 3.

³ THE FEDERALIST No. 43 (Lodge's ed. 1888) 279.

⁴ 10 U. S. 87 (1810).

⁵ *Ibid.* 137.

⁶ "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

"In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?"

affirmed repeatedly by the court in numerous utterances.⁷ As stated by Mr. Justice Swayne:

“when a state becomes a party to a contract, . . . , the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.”⁸

Whether the men of 1787 were here particularly concerned with state repudiation or not, it is no doubt true that the same regard for vested rights which led them to condemn interference with private contracts would have brought them to make the same prohibition of state repudiation had the point been called specifically to their attention. Viewed in this light Judge Marshall's position seems fully justified; its repeated acceptance emphasizes the conclusion.

All problems are not solved, however, by the formula that a state may contract and that its covenants will be protected by the Constitution of the United States from impairment. Many bargains between private persons fail to find shelter under the contract clause. Limitations on the power to make compacts, whether arising from the legal status of the parties, from the subject matter of the agreement, or from its object, bar the way. May there not exist similar barriers to the ability of a state to bind itself without recourse? If it be the part of a sound public policy to protect the individual against certain of his promises, may there not be equal reasons for a similar policy with respect to bargains made by a government? The public servants are not always omniscient and incorruptible. Distinguished authority to the contrary notwithstanding,⁹ it is the purpose of this article to show that

“The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punished when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can conceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?” Fletcher v. Peck, *supra* note 4, at 138.

⁷ See *Goszler v. Georgetown*, 19 U. S. 593, 597 (1821); *Piqua Branch Bank v. Knoop*, 57 U. S. 369, 389 (1853); *The Binghamton Bridge*, 70 U. S. 51, 74 (1865); *Broughton v. Pensacola*, 93 U. S. 266, 269 (1876); *Newton v. Commissioners*, 100 U. S. 548, 556 (1879); *Poindexter v. Greenhow*, 114 U. S. 270, 297, 5 Sup. Ct. 903, 962 (1885).

⁸ *Davis v. Gray*, 83 U. S. 203, 232 (1873).

⁹ “It is argued, as a reason why courts should not be rigid in enforcing the contracts made by states, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

“If the knowledge that a contract made by a state with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and

watchfulness of the citizen is not the sole safeguard against official malfeasances and misfeasances.

State Sovereignty

The point that there must exist some limit to state contractual capacity was early made. Naturally enough, in an age when states' rights were the major concern of publicists, the earliest arguments for limiting the power of the states to contract were based on a contention that the state could not contract away its sovereignty, whatever might be meant by that term. Its first appearance seems to occur in the argument of Henry Clay in *Green v. Biddle*:

"It is incontestable that there are some attributes of sovereignty, of which a State cannot be deprived, even with the concurrence of Congress and the State itself. . . . This implied prohibition extends to every compact, in every form, by which a State attempts to deprive itself of its sovereign faculties."¹⁰

To this Mr. Justice Washington, speaking for the Court, responded acidly, after pointing out that the state and the Federal Constitution respectively impose certain limitations on "sovereignty", "If, then, the principle contended for be a sound one, we can only say, that it is one of a most alarming nature, but which, it is believed, cannot be seriously entertained by any American statesman or jurist."¹¹

The remark probably was not stimulating to Mr. Clay's sense of vanity, but it seems clear that Judge Washington laid his finger upon the vulnerable point of the argument. Sovereignty as a concept by which to set the bounds to state contractual capacity is utterly useless, since sovereignty, in the sense of unlimited and uncontrolled power, does not exist in any American state. Federal constitutional limitations cannot live side by side with state sovereignty. To adopt the suggested test therefore would be either to set no limits at all to contractual power or to destroy the contract clause as a binding restriction upon the states. The untenable nature of the argument, however, did not seem so apparent to men who were accustomed to think of their states as superior to the nation. Accordingly the Court found itself again called upon to deny its validity.¹² On one occasion even the judges themselves were so impressed with the argument as to be led solemnly to explain

care on the part of lawmakers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere." Davis, J., in *The Binghamton Bridge*, 70 U. S. 51, 74 (1865). See also *Wilmington R. R. v. Reid*, 80 U. S. 264, 266 (1872).

¹⁰ 21 U. S. 1, 42 (1823).

¹¹ *Ibid.* 88.

¹² *Charles River Bridge v. Warren Bridge*, 36 U. S. 420 (1837); *Humphrey v. Pegues*, 83 U. S. 244, 249 (1873); *Ohio L. Ins. & Tr. Co. v. Debolt*, 57 U. S. 416 (1853).

that the power to contract irrevocably is an essential characteristic of sovereignty!¹³

In somewhat different form, the sovereignty theory may have borne fruit in the rule that subordinate governmental units may not bind the state by contract.¹⁴ Meanwhile a suggestion by Mr. Justice Story, in the *Dartmouth College* case,¹⁵ that the effect of holding a private corporate charter to be a binding contract, unchangeable by the state without the corporation's assent, might be overcome by the reservation of a right of amendment, was adopted generally by state legislatures. In an increasing number of states this reservation was put into the constitutions as a definite limitation upon the contractual power of the legislatures in that particular field,¹⁶ and was given effect by the Supreme Court.¹⁷ A little later a state's compact was held unenforceable on general grounds without resort to state constitutional limitations.¹⁸ The theory that not all state agreements were necessarily binding had definitely arrived. Since then analysis has been directed more particularly to a classification of state agreements into those lying within the competence of the state and those lying outside thereof, and to a consideration of the factors determining into which group the particular contract shall fall. Arguments based upon abstract and erroneous theories of state sovereignty have passed into oblivion. To a detailed examination of the results of this work of assortment and classification we now turn.

Constitutional Limitations

One of the outstanding features of American public law has been the agency theory of government with its corollary proposition that the people as principals may give binding instructions to their governmental agents, these instructions finding expression in constitutional limitations enforced by the courts. Once this power to impose legally binding limits upon the competence of government is established there is of course no difficulty whatever in admitting its exercise to set limits to contractual capacity. The particular form of the limitation may vary with the whimsies of constitution makers or with the subject matter involved. It may take the form of reserving to the state power over a given subject matter as in the case of the common provisions for amending corporate charters or for regulating

¹³ *Piqua Branch Bk. v. Knoop*, 57 U. S. 369, 387 (1853).

¹⁴ See *dicta* of Marshall, C. J., in *Dartmouth College v. Woodward*, 17 U. S. 518, 629 (1819) and of Story, J., *ibid.* at 694 which bore fruit in *East Hartford v. Hartford Bridge Co.*, 51 U. S. 511 (1850).

¹⁵ *Dartmouth College v. Woodward*, *supra* note 14, at 712.

¹⁶ See 7 FLETCHER, *CYCLOPEDIA OF CORPORATIONS* (1931) 818.

¹⁷ *Aspinwall v. Daviess County*, 63 U. S. 364 (1860) appears to be the first case dealing with such a provision as a constitutional limitation upon the legislature's power to contract. Chief Justice Taney, in *Ohio L. Ins. & Tr. Co. v. Debolt*, 57 U. S. 416, 431 (1853) had suggested a somewhat different theory, namely, that a legislature possessed no power to bind the state by contract unless the state constitution delegated such power to it.

¹⁸ *Taylor v. Thomas*, 89 U. S. 479 (1875).

utility rates. As Mr. Justice Miller has said, a power "thus conferred cannot be limited or bargained away by any act of the legislature because the power itself is beyond legislative control."¹⁹ In other cases the limitation takes the form of a prohibition of the exercise of a permitted power in a specified way.²⁰ In still other cases the prohibition is upon the granting of particular favors, such as tax exemptions or exclusive franchises. Under such a provision, since government is powerless to grant the boon at all, it clearly may not do so by way of contract.²¹ Regardless of the form used in limiting the contractual power, the essential point is that the people have denied to their representatives contractual power over a particular subject.

The matters thus withdrawn from the sphere of the bargaining power are as diverse as the views of constitution makers. One of the most common uses to which the limitation on the contractual power has been put is to remove from corporate charters some of the protection afforded them under the *Dartmouth College* case²² by providing that all such charters shall be subject to alteration, amendment or repeal. There are numerous cases denying full contractual effect to charters granted subject to such a limitation,²³ though it must be admitted that in some respects the Court seems to have let its desire to prevent what is thought to be injustice to corporators override the plain intent and meaning of such provisions.²⁴ In such cases, however, the limitations judicially imposed upon this sort of regulation have consistently taken the form of "interpretation" of the meaning of reserved power clauses.²⁵ At least, in the absence of a square decision upon the

¹⁹ See *New Jersey v. Yard*, 95 U. S. 104, 111 (1877).

²⁰ *Aspinwall v. Daviess County*, *supra* note 17; *Boyd v. Alabama*, 94 U. S. 645 (1877); *Zane v. Hamilton County*, 189 U. S. 370, 23 Sup. Ct. 538 (1903); *Detroit United Ry. v. Detroit*, 255 U. S. 171, 11 Sup. Ct. 285 (1921).

²¹ "The Constitution . . . adopted in 1870 requires that all property should be taxed. After that Constitution went into effect, no valid contract could be made with a corporation for an exemption from taxation." *Memphis & Charleston R. R. v. Gaines*, 97 U. S. 697, 709 (1878).

²² *Dartmouth College v. Woodward*, 17 U. S. 518 (1819).

²³ *Miller v. State*, 93 U. S. 567 (1873); *Stone v. Wisconsin*, 94 U. S. 181 (1877); *Shields v. Ohio*, 95 U. S. 319 (1877); *Beer Co. v. Massachusetts*, 97 U. S. 25 (1878); *Railway Co. v. Philadelphia*, 101 U. S. 528 (1880); *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48 (1884); *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90 (1892); *Schurz v. Cook*, 148 U. S. 397, 13 Sup. Ct. 645 (1893); *New York & N. E. R. R. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437 (1894); *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21 (1900); *Northern Cent. Ry. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 62 (1902); *Stanislaus County v. San Joaquin & King's River Canal & Irr. Co.*, 192 U. S. 201, 24 Sup. Ct. 241 (1904); *Polk v. Mutual Res. Fund L. Ass'n*, 207 U. S. 310, 28 Sup. Ct. 65 (1907); *Hammond Pkg. Co. v. Arkansas*, 212 U. S. 322, 29 Sup. Ct. 370 (1904); *Noble St. Bk. v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186 (1911); *Sears v. Akron*, 246 U. S. 242, 38 Sup. Ct. 245 (1918); *Ft. Smith Lt. & Trac. Co. v. Board of Improvement*, 274 U. S. 387, 47 Sup. Ct. 595 (1927).

²⁴ See Stern, *The Limitations of the Power of a State under the Reserved Right to Amend or Repeal Charters of Incorporation* (1905) 53 U. OF PA. L. REV. 1; Dodd, *Dissenting Stockholders and Amendments to Corporate Charters* (1927) 75 U. OF PA. L. REV. 585, 723, for detailed discussion of the limitations upon the reserved power to alter, amend or repeal.

²⁵ Examples, a few among many, are afforded by *Asylum v. New Orleans*, 105 U. S. 362 (1882); *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 650 (1906); *Superior Water, Lt. & Pow. Co. v. Superior*, 263 U. S. 125, 44 Sup. Ct. 82 (1923).

point, there seems no reason for assuming that the Supreme Court would not give effect to a state constitutional provision which retained in the legislature by express language complete and unbridled control over the affairs, contracts and property of all corporations thereafter chartered.²⁶

Other objectives sought and gained through constitutional limitations on the contracting power have included prohibition of tax exemptions,²⁷ regulation of governmental subscriptions to railroad stock²⁸ or other forms of assistance to such enterprises,²⁹ regulation of grants of public utility franchises,³⁰ and control of the rate-fixing power.³¹ For states which have a definite public policy, permanent in character, with reference to matters regarded as of prime importance, the device of the constitutional restriction appears to be a most useful and desirable safeguard against excessive legislative generosity.

Illegality

Aside from statutory and constitutional limitations, contracts between man and man often fail because they fall athwart of a policy of the common law. It needed no statute to establish that a court could not be forced to entertain a highwayman's suit for an accounting from his partner, nor be called upon to enforce agreements not criminal but regarded as inimical to the public welfare, such as contracts in restraint of marriage. May there be similar principles of public policy, not arising from constitutional prohibitions, which will place the mark of illegality upon compacts made by a state?

This much it seems may safely be stated, that it must be a federal public policy the rules of which are thus applied. Inasmuch as next to the constitutional convention the legislature wields the policy-determining power of the state, it would be a headstrong and lawless court indeed that, lacking constitutional sanction, undertook to enthrone its idea of public policy above that of the legislature. If it be suggested that contracts frequently are made by executive or administrative officers, who possess no pre-eminence over judges as arbiters of public policy, the answer is that contracts entered into by them stand in a somewhat different light. If such compacts are made without constitutional or statutory sanction, express or implied, they are

²⁶ Cf. *Dodd, op. cit. supra* note 24, at 602 *et seq.*

²⁷ *Memphis & Charleston R. R. v. Gaines*, 97 U. S. 697 (1878); *New Orleans v. New Orleans W. W. Co.*, 142 U. S. 79, 12 Sup. Ct. 142 (1891); *Keokuk & Western R. R. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592 (1884); *Yazoo & Miss. Valley R. R. v. Adams*, 180 U. S. 1, 21 Sup. Ct. 40 (1901); *Gulf & Ship Island R. R. v. Hewes*, 183 U. S. 66, 22 Sup. Ct. 26 (1901).

²⁸ *Aspinwall v. Daviess County, supra* note 17.

²⁹ *Zane v. Hamilton County, supra* note 20.

³⁰ *Detroit United Ry. v. Detroit, supra* note 20.

³¹ *San Antonio Trac. Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261 (1900); *Puget Sound Trac. Lt. & Pow. Co. v. Reynolds*, 244 U. S. 574, 37 Sup. Ct. 705 (1917); *San Antonio v. San Antonio Pub. Serv. Co.*, 255 U. S. 547, 41 Sup. Ct. 428 (1921).

ineffective, not because of any theories of public policy but because they are *ultra vires*; if they have such sanction, then they are as though they emanated directly from the policy determining bodies. In the first case public policy is an unnecessary weapon with which to kill them; in the second case it is useless and unavailing. We may repeat: the public policy that lays low a state contract must be a federal policy.

One case seems to furnish an example of illegality based upon federal public policy. Mississippi, while the ports of the Confederacy were under blockade during the Civil War, issued "cotton notes" on the security of cotton pledged for their repayment when the blockade should be lifted. These "cotton notes" were made receivable in payment of taxes due the state and its subdivisions. At the close of the war, Mississippi's reconstruction legislature repealed this provision and it was held that the repeal did not violate the contract clause.³² The reasoning of the Court was to the effect that the notes, inasmuch as they were issued "against the public policy and in violation of the Constitution of the United States, are, therefore, illegal and void."³³ Here we have a very definite declaration of a federal public policy overriding and avoiding what otherwise would be a contractual agreement on the part of the State of Mississippi. The obvious purpose of this legislation was to aid in the support of the government of Mississippi and hence to advance the cause of the Confederacy. Such an act and the contract it contained was therefore invalid as in contravention of the public policy of the United States which makes preservation of the Union a primary matter of concern.³⁴

Another instance of federal policy supervening to nullify a state's attempt to contract seems to be furnished by *People v. Commissioners of Taxes and Assessments*.³⁵ In this case a claim of impairment of the obligation of contract by repeal of a tax exemption statute was met by the reply that the enactment was in contravention of the command of Congress that national bank stock be taxed at no higher rate than that of state banks, and for that reason was void. Here the overriding national policy arises from a statutory provision.

In each of these cases, be it noted, the policy is one of statecraft, not of expediency in the field of private law. Whether any federal rule in the latter area could have effect to nullify state compacts seems doubtful. The reluctance of the courts to exert such authority is illustrated by the repeated decisions upholding contractual grants of monopolistic franchises,³⁶ though

³² *Taylor v. Thomas*, 89 U. S. 479 (1875).

³³ *Ibid.* at 486.

³⁴ See also *Keith v. Clark*, 97 U. S. 454, 463 (1878).

³⁵ 94 U. S. 415 (1878).

³⁶ *Bridge Proprietors v. Hoboken Land & Imp. Co.*, 68 U. S. 116 (1864); *The Binghamton Bridge*, 70 U. S. 51 (1865); *New Orleans Gas Lt. Co. v. Louisiana Lt. & Heat Prodg. & Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252 (1885); *New Orleans Water Wks. Co. v. Rivers*,

there has been a suggestion that to be valid they must not continue for too long a time.³⁷

Lack of Capacity in Other Party

Strictly speaking, cases of this sort do not come within the announced scope of this article. Inability to contract here resides not in the state but in the other party to the claimed contract. Nevertheless many cases of this sort arise under the contract clause and inasmuch as they do present situations in which the state is without power to bind itself it seems proper to note them here.

The most common example arises from the relation between the state and its governmental subdivisions. The uniform holding is that no contractual obligation arises out of agreements between the state and these subordinate units.³⁸ While this result may be justified upon the ground that the dispositions in question are not contractual in character,³⁹ it may and has been rested also upon the proposition that the governmental subdivisions are incompetent to form contracts with the state.⁴⁰ On the whole this seems a more satisfactory way in which to look at those cases involving matters, such as tax exemptions,⁴¹ grants of franchise,⁴² water rights⁴³ or land titles,⁴⁴ which would be regarded as of a contractual nature if granted to private persons, natural or artificial.

Of a kindred nature but of much less practical importance is the suggestion of Mr. Justice McKinley in *Pollard v. Hagan*⁴⁵ that "an express stipulation . . . granting the municipal right of sovereignty and eminent domain to the United States" over land within the confines of a state would be "void and inoperative; because the United States has no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain,

115 U. S. 674, 6 Sup. Ct. 273 (1885); *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 6 Sup. Ct. 265 (1885). Cf. *The Slaughter House Cases*, 83 U. S. 36 (1873) refusing to invalidate such a contract on Fourteenth Amendment grounds.

³⁷ See *Pearsall v. Great Northern Ry.*, 161 U. S. 646, 675, 16 Sup. Ct. 705, 714 (1896).

³⁸ *East Hartford v. Hartford Bridge Co.*, *supra* note 14; *Aspinwall v. Daviess County*, *supra* note 17; *Mt. Pleasant v. Beckwith*, 100 U. S. 514 (1880); *Cape Girardeau County Court v. Hill*, 118 U. S. 68 (1886); *Williamson v. New Jersey*, 130 U. S. 189, 9 Sup. Ct. 483 (1889); *Essex Pub. Road Bd. v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790 (1891); *New Orleans v. New Orleans W. W. Co.*, 142 U. S. 79, 12 Sup. Ct. 142 (1891); *Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. 383 (1899); *Attorney General v. Lowrey*, 199 U. S. 233, 26 Sup. Ct. 27 (1905); *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 36 Sup. Ct. 58 (1915); *Pawhuska v. Pawhuska O. & G. Co.*, 250 U. S. 394, 39 Sup. Ct. 526 (1919); *Trenton v. New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923). The foundation of the doctrine seems to rest on *dicta* by Marshall, C. J., and Story, J., in *Dartmouth College v. Woodward*, 17 U. S. 518, 629, 694 (1819).

³⁹ See *East Hartford v. Hartford Bridge Co.*, *supra* note 14, at 533; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524 (1880).

⁴⁰ See *Aspinwall v. Daviess County*, *supra* note 17, at 377.

⁴¹ *Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. 383 (1899).

⁴² *East Hartford v. Hartford Bridge Co.*, *supra* note 14.

⁴³ *Trenton v. New Jersey*, *supra* note 38.

⁴⁴ *Essex Pub. Road Bd. v. Skinkle*, *supra* note 38.

⁴⁵ 44 U. S. 212 (1845).

within the limits of a state or elsewhere, except in the cases in which it is expressly granted".⁴⁶ The learned justice would of course count as within his exception the power to "exercise exclusive Legislation . . . over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings,"⁴⁷ granted to Congress by the Constitution. Aside from this the matter would seem to be of little practical importance for it is most difficult to conceive of a state undertaking by compact to cede any of its general governmental powers to the nation other than through the ordinary process of constitutional amendment. Federal aid legislation of course does not in any way raise this problem, since the states do not agree to suspend their governmental discretion in return for national subventions.⁴⁸

Contracts in a Proprietary Capacity

The distinction between powers proprietary and powers governmental bulks large in our public law, particularly in respect to municipal corporations. In concrete application the two concepts at times prove difficult to discriminate, yet it will be admitted that they furnish a most valuable pair of tools for dealing with certain types of juristic problems. Particularly is this true in the field with which this inquiry is concerned, for while the functions commonly termed governmental lie within the field of statecraft, where retention of discretion and freedom of action are most important *desiderata*, the proprietary functions resemble more the ordinary activities of individuals in respect to which contractual capacity and stability might well be desired. Accordingly we find a very strong tendency to uphold state compacts in this field. The initial case which blocked a state's attempt to renege upon a contract involved a sale of land⁴⁹ and to this day, almost without exception, state contractual capacity, when unfettered by constitutional restrictions or supervening public policy, has been upheld in the domain of proprietary action.

Applications of the rule furnish a somewhat extended catalog. Grants of property⁵⁰ or contracts to sell or dispose of property⁵¹ frequently have been before the courts and as frequently have been upheld. Neither may a state withdraw from a contract to purchase.⁵²

⁴⁶ *Ibid.* 223.

⁴⁷ U. S. CONST. Art. I, § 8.

⁴⁸ Cf. Burdick, *Federal Aid Legislation* (1923) 8 CORN. L. Q. 324, 335-337.

⁴⁹ Fletcher v. Peck, *supra* note 4.

⁵⁰ *Ibid.*; Terrett v. Taylor, 13 U. S. 43 (1815); Pawlet v. Clarke, 13 U. S. 292 (1815); Columbia Ry. G. & E. Co. v. South Carolina, 261 U. S. 236, 43 Sup. Ct. 306 (1923).

⁵¹ Pennoyer v. McConaughy, 140 U. S. 1, 11 Sup. Ct. 699 (1891); Houston & Tex. Cent. Ry. v. Texas, 170 U. S. 243, 18 Sup. Ct. 610 (1898); John P. King Mfg. Co. v. Augusta, 277 U. S. 100, 48 Sup. Ct. 489 (1928).

⁵² Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 34 Sup. Ct. 627 (1914); Superior Water, Lt. & Pow. Co. v. Superior, 263 U. S. 125, 44 Sup. Ct. 82 (1923).

A few cases deal with agreements concerning the conduct of state owned enterprises. Thus in *Curran v. Arkansas*⁵³ a contract to maintain unimpaired the capital of a state bank was upheld as against a subsequent attempt to divert the fund to other purposes. In two instances bargains not to erect or to operate municipal utilities have been preserved from violation,⁵⁴ though there is at least some ground for argument that so valuable a weapon against private utility rapacity and oppression should be preserved inviolate from a too shortsighted alienation by myopic city fathers.

Very naturally state and municipal borrowing furnishes a substantial grist for the obligation of contract mill. In the absence of constitutional restriction it is clear that there is no ground for doubting the capacity of a state or of its subdivisions to incur any debt that the legislature sees fit to authorize. The anticipation of future revenue in this manner too long has been an accepted prerogative of kings and of republics alike to encounter any effective opposition from courts unaided by constitutional provisions. And when the government borrows, it is treated by the courts like any private debtor. As Mr. Justice Field remarked in *Broughton v. Pensacola*,⁵⁵ "Although a municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the State for the convenient administration of government, yet, when authorized to take stock in a railroad company, and issue its obligations in payments of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guarantees which protect the engagements of private individuals."⁵⁶ The distinguished justice might have added that the same is true of the state itself.⁵⁷ Accordingly we find decisions protecting bondholders against acts which would impair the means available for the payment of their claims,⁵⁸ against the imposition of tax liens upon their interest payments,⁵⁹ or the displacement of security pledged for the satisfaction of the debt.⁶⁰

Another proprietary function is the power of financial management involved in compromising claims against the state. Compromise agreements

⁵³ 56 U. S. 304 (1853).

⁵⁴ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 10 Sup. Ct. 77 (1898); *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 650 (1906).

⁵⁵ 93 U. S. 266 (1876).

⁵⁶ *Ibid.* 269.

⁵⁷ "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons." *Murray v. Charleston*, 96 U. S. 432, 445 (1878).

⁵⁸ *Von Hoffman v. Quincy*, 71 U. S. 535 (1866); *Broughton v. Pensacola*, 93 U. S. 266 (1876); *Wolff v. New Orleans*, 103 U. S. 358 (1880); *Port of Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398 (1886); *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190 (1887); *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957 (1897); *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. 245 (1906).

⁵⁹ *Murray v. Charleston*, *supra* note 57.

⁶⁰ *Wabash & Erie Canal Co. v. Beers*, 67 U. S. 448 (1863); *Board of Liquidation v. McComb*, 92 U. S. 531 (1876).

have several times been enforced⁶¹ and there seems no good reason to question the capacity of a state to compromise where it could have contracted in the first instance. It would seem, however, that the converse is equally true, namely, that a contract which the state could not properly make will not afford a proper basis for a compromise agreement.⁶² But a settlement of even such a claim, if consummated by payment, will be protected by the contract clause.⁶³

One limitation of general policy seems properly to exist in respect to contracts in the field of proprietary functions. In *Board of Liquidation v. McComb*⁶⁴ the Supreme Court upheld and enforced a contract setting apart certain taxes for the payment of bonds of a specified issue as against subsequent legislation attempting to impose the payment of still other bonds against this fund. The opinion contains this statement, however:

“We are not prepared to say that the legislature of a State can bind itself, without the aid of a constitutional provision, not to create a further debt, or not to issue any more bonds. Such an engagement could hardly be enforced against an individual; and, when made on the part of a State, it involves, if binding, a surrender of a prerogative which might seriously affect the public safety. The right to procure the necessary means of carrying on the government by taxation and loans is essential to the political independence of every commonwealth.”⁶⁵

Abdication, even in respect to the proprietary functions, may not be permitted. There is a vital public interest in having government free to act. To some extent this may be overridden by the desirability of stability in ordinary business dealings with public bodies as with individuals. Hence to a limited degree such compacts are enforced. But an utter surrender of all power would impair governmental efficiency unduly and cannot be permitted. It seems extremely probable that this will apply to all contracts under the so-called proprietary functions.

One other limitation should be noted. Contracts for the sale of trust property⁶⁶ or for its disposition contrary to the terms of the trust⁶⁷ do not bind the state. Whether in respect to such property the *bona fide* purchaser

⁶¹ *Louisiana v. Pilsbury*, 105 U. S. 278 (1882); *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128 (1883); *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230 (1897). Cf. *Terre Haute & Indianapolis R. R. v. Indiana*, 194 U. S. 579, 24 Sup. Ct. 767 (1904).

⁶² This is indicated by *Northern Cent. Ry. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 62 (1902).

⁶³ *Houston & Tex. Cent. R. R. v. Texas*, 177 U. S. 66, 20 Sup. Ct. 545 (1900).

⁶⁴ 92 U. S. 531 (1876).

⁶⁵ *Ibid.* 535.

⁶⁶ *Illinois Cent. R. R. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110 (1892) (submerged lands under a navigable lake, conveyed in violation of trust for public use). Cf. *Appleby v. New York*, 271 U. S. 364, 46 Sup. Ct. 569 (1926) (upholding and protecting a conveyance of similar land where no such public trust existed).

⁶⁷ *Paup v. Drew*, 51 U. S. 218 (1850); *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972 (1890).

doctrine would be applied appears not to have received the Supreme Court's attention. In each of the cases cited, the trust found embodiment either in the constitutions or the public acts of the respective states, or in some common law rule of policy, of all of which the purchaser was bound to take notice.⁶⁸ It is somewhat difficult to conceive of a governmental trust which would not fall under one or the other of these classifications. The question may therefore be not only moot but of no importance.

Contracts Affecting Public Revenue

The revenue assembling and preserving function presents features akin to both the proprietary and the governmental functions of public administration. It is concerned with the collection and the preservation of the state's income; to that extent it deserves classification with the activities belonging to the former category. On the other hand, the revenue forms the life blood of the state from which must be drawn the necessary vigor for the carrying out of all the governmental functions; to that extent judicial as well as political and administrative attitudes toward it must take into account the factors which condition public policy in respect to functions of the latter class.

In view of this one would be quite prepared to find a somewhat stricter attitude displayed toward contracts affecting the public revenue than toward those with which we have heretofore dealt. The serious consequences to governmental efficiency and to the ideal of equal distribution of the tax burden which lurk in the recognition of this field as affording legitimate scope for the exercise of the bargaining power might well lead to a denial thereof or to the imposition of extreme restrictions. However the Supreme Court has not taken this view, but on the contrary has been quite liberal.

In the earliest case involving a tax exemption agreement, *New Jersey v. Wilson*,⁶⁹ the court seemed not at all aware that there was any question as to the power of a state to bargain away immunity from contribution to its support. After reviewing the negotiations between New Jersey and the Delaware Indians culminating in the grant to the latter of a tax-free reservation, John Marshall laconically said, "Every requisite to the formation of a contract is to be found in the proceedings between the then colony of New Jersey and the Indians."⁷⁰ Eighteen years later, when next the matter engaged his attention, he recognized difficulties and, without deciding that such a grant could not be made, applied a rule of strict construction against those claiming its existence.⁷¹ There the matter rested and did not come up again until after his death.

⁶⁸ *Neblett v. Barron*, 160 S. W. 1167 (Tex. Civ. App. 1911).

⁶⁹ 11 U. S. 164 (1812).

⁷⁰ *Ibid.* 166.

⁷¹ "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. . . . It would seem, that

In 1845 an agreement to exempt certain bonds from taxation in return for the construction of a road and for payments to the school fund was held to be a contract whose obligation might not be impaired⁷² with little or no discussion of its propriety, but in 1855 the first of the long line of Ohio tax exemption cases presented a more difficult nut to crack. The decision was in favor of the validity of the tax exemption contract⁷³ but three judges, Catron, Daniel and Campbell, dissented. The main argument against the power seems to have been based on the claim that it was a surrender of sovereignty⁷⁴ and it was to that argument that Mr. Justice McLean, speaking for the court, chiefly addressed himself, by arguing that to make such a bargain is in reality an exercise of sovereignty.⁷⁵

Other contemporaneous cases were decided in the same way.⁷⁶ But opposition was not stilled and arose again, through the voice of Mr. Justice Miller, in the more tenable objection that the prevailing view really sanctioned a draining of the life blood of the state.⁷⁷ The majority remained inflexible, however, and rejoined to Miller's argument that the watchfulness of the people must be depended on to prevent the state from becoming *felo de se*.⁷⁸ The result has been that the advocates of the power to contract for tax exemptions have decisively gained the day. A long line of decisions attests the sweeping character of their victory.⁷⁹

the relinquishment of such a power is never to be presumed. We will not say, that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it, may not exist; but as the whole community is interested in retaining it undiminished; that community has a right to insist, that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." *Providence Bank v. Billings*, 29 U. S. 514, 561 (1830).

⁷² *Gordon v. Appeal Tax Ct.*, 44 U. S. 133 (1845).

⁷³ *Piqua Branch Bank v. Knoop*, *supra* note 7.

⁷⁴ See for a discussion of this general theory, *supra* p. 641, in this article.

⁷⁵ "This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away State sovereignty." *Piqua Branch Bank v. Knoop*, *supra* note 7, at 389.

⁷⁶ *Dodge v. Woolsey*, 85 U. S. 331 (1855); *Jefferson Branch Bank v. Skelly*, 66 U. S. 436 (1862); *McGee v. Mathis*, 71 U. S. 143 (1866).

⁷⁷ "To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful." Miller, *J.*, dissenting in *Washington University v. Rouse*, 75 U. S. 439, 443 (1869).

⁷⁸ "It may be conceded that it were better for the interest of the State, that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered. In the nature of things the necessities of the government cannot always be foreseen, and in the changes of time, the ability to raise revenue from every species of property may be of vital importance to the State, but the courts of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the legislature on this subject, there is no remedy, except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power." *Wilmington R. R. v. Reid*, 80 U. S. 264, 267 (1872).

⁷⁹ *Home of the Friendless v. Rouse*, 75 U. S. 430 (1869); *Tomlinson v. Branch*, 82 U. S. 460 (1873); *Wilmington R. R. v. Reid*, 80 U. S. 264 (1872); *Humphrey v. Pegues*, 83 U. S. 244 (1873); *Pacific R. R. v. Maguire*, 87 U. S. 36 (1874); *New Jersey v. Yard*, 95 U. S. 104

From the standpoint of statecraft, oft said to be the dominant consideration in administering the broad provisions of the Constitution, the balance appears to hang on the side of the minority. Inequality in taxation, child of tax exemptions, inevitably brings dissatisfaction and resentment. That a power to contract to accomplish these results should be recognized in this field seems unfortunate. In addition, exemptions, if carried too far, may seriously handicap needed fiscal reform, may impair the revenues beyond the point of safety. The Court has recognized that complete surrender of the taxing function would not be upheld. "No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication."⁸⁰ However, these words seem likely to bear but little fruit in the form of decision. No government will grant a general moratorium on taxes, and it seems that it is only to such a general moratorium that this language is meant to apply. Perpetual, at least unlimited, individual tax exemptions have received approval and protection from the Court since the earliest case with no indication that at any time would they be deemed to have expired.⁸¹ The hope has been expressed that eventually the Court may recognize the force of the objections to making the taxing power the subject of bargain and sale and overrule the long line of cases approving the practice.⁸² But the decisions to date give little encouragement to this view.

Closely akin to tax exemptions are those arrangements by which states agree to receive bank notes or their own bonds and coupons in payment of taxes due. The Court uniformly has held these to constitute contracts between the states and those who take the paper in question and by protecting them against impairment has recognized the competence of the states to make them,⁸³ a ruling entirely consistent with its stand on tax exemption agreements.

Public or Governmental Functions in General

For obvious reasons one would be prepared to accede to a general proposition that "the power of governing is a trust committed by the people to

(1877); *Farrington v. Tennessee*, 95 U. S. 679 (1878); *University v. People*, 99 U. S. 309 (1879); *Asylum v. New Orleans*, 105 U. S. 362 (1882); *Powers v. Detroit*, G. H. & M. Ry., 201 U. S. 543, 26 Sup. Ct. 556 (1906); *Macallen Co. v. Massachusetts*, 279 U. S. 620, 49 Sup. Ct. 432 (1929).

⁸⁰ *Stone v. Mississippi*, 101 U. S. 814, 820 (1879).

⁸¹ *New Jersey v. Wilson*, 11 U. S. 164 (1812) and *Macallen Co. v. Massachusetts*, *supra* note 79, the first and the last of the tax exemption cases, both exemplify the enforcement of agreements unlimited in point of time.

⁸² See BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* (1922) 470.

⁸³ Cases relating to bank notes: *Woodruff v. Trapnall*, 51 U. S. 190 (1850); *Furman v. Nichol*, 75 U. S. 44 (1869); *State v. Stoll*, 84 U. S. 425 (1873); *Keith v. Clark*, 97 U. S. 454 (1878). Cases relating to state bonds and coupons thereof: *Hartman v. Greenhow*, 102 U. S. 672 (1881); *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91 (1883); *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962 (1885); *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. 510 (1886); *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972 (1890).

the government, no part of which can be granted away,"⁸⁴ and that "The contracts which the Constitution protects are those that relate to property rights, not governmental."⁸⁵ But in spite of judicial language to that effect, the decisions clearly show that no such broad and easy test has been applied in the past to the solution of cases wherein litigants claimed to bind governance by contract nor do they indicate that it will be given a general and undeviating application in the future. It seems better therefore to subject the cases relating to this problem to a somewhat detailed analysis.

The question was early mooted concerning compacts between the nation and the states. In availing itself of the constitutional permission that "New States may be admitted by the Congress into this Union"⁸⁶ the national legislature repeatedly has exacted as a condition to the act of admittance that the new state consent to be bound by terms and conditions dictated by Congress.⁸⁷ The validity of a compact between state and nation, whether at the time of admission or later, seems unquestioned if the subject matter falls within the domain of the proprietary powers,⁸⁸ in accordance with principles heretofore discussed⁸⁹ and the same has been held in respect to an agreement concerning taxation,⁹⁰ which we have seen to be governed by principles analogous to those applied to the proprietary functions.⁹¹ As early as 1845, however, it was decided that an agreement on the part of the inhabitants of a newly admitted state "that they forever disclaim all right and title to the waste or unappropriated lands lying within the same territory; and that the same shall be and remain at the sole and entire disposition of the United States" was effective only so far as to reserve title to such lands in the national government and did not operate to give Congress any power to determine rules of property within the new state.⁹² The Court even went so far as to say that the agreement as to title "cannot operate as a contract between the parties, but is binding as a law",⁹³ a position that probably would not be maintained today.⁹⁴

⁸⁴ See *Stone v. Mississippi*, 101 U. S. 814, 820 (1879).

⁸⁵ *Ibid.*

⁸⁶ U. S. CONST., Art. IV, § 3.

⁸⁷ See WILLOUGHBY, *THE AMERICAN CONSTITUTIONAL SYSTEM* (1904) 265-266.

⁸⁸ *McGee v. Mathis*, 4 Wall. 143 (U. S. 1866) (grant of swamp lands to state by Congress).

⁸⁹ See *supra* p. 647, in this article.

⁹⁰ *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. 73 (1900).

⁹¹ See *supra* p. 650, in this article.

⁹² *Pollard v. Hagan*, 44 U. S. 212 (1845).

⁹³ *Ibid.* 224, per McKinley, J. He goes on to say, "Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation."

⁹⁴ See cases cited *supra* notes 88, 90.

In *Withers v. Buckley*⁹⁵ the Court said of a provision in the Mississippi enabling act stipulating for freedom of navigation on the Mississippi River and its tributaries that "it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign Government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated."⁹⁶ It remained for the Twentieth Century, however, to bring this doctrine to full fruition when, in *Coyle v. Smith*,⁹⁷ the Supreme Court refused to allow binding effect to the attempt of Congress to stipulate with Oklahoma as to the location of the Sooner State's seat of government. There, in a lucid and well-reasoned opinion by Mr. Justice Lurton, the inability of the federal government to exact agreements concerning governmental matters from new states as the price of admission was explained as resulting from the implied condition that, since the original union was composed of states co-equal in power, the new states to be admitted to "this Union" must necessarily be equal in power to their elder sisters. Hence Congress may not impose upon them limitations which will bind or restrict the exercise of governmental power by them to an extent not applicable to all other states of the union.⁹⁸

This reason of course applies only to exactions attempted at the granting of statehood. It leaves open to question whether Congress could strike a bargain with a state after admission as to the exercise of governmental power. Apparently no case has directly dealt with the problem. A *dictum* in *Pollard v. Hagan*⁹⁹ suggests that an attempted transfer of state governmental power to the nation would be void because of incapacity on the part of the grantee to exercise such power. A similar line of reasoning would appear to stand in the way of an agreement by the state to exercise its governmental powers in a specific way. Our dual organization of government, with its distribution of powers between state and nation, contemplates that the states shall within their own field exercise full discretion in matters of government except as limited by the Constitution. Any agreement undertaking to bind that discretion would contravene this fundamental policy. Hence while states may follow certain policies because of a desire to cooperate with national authority or in order to earn federal subventions or for any other reason, it is believed that they cannot bind themselves to do so and that the Supreme Court will not give effect to such an agreement.

A distinction is to be drawn in this respect between contracts of a state with the nation on the one hand and contracts of a state with another state on the other hand. In the latter situation it is apparently no objection to

⁹⁵ 61 U. S. 84 (1858).

⁹⁶ *Ibid.* 92. See also *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 296, 8 Sup. Ct. 113, 116 (1887).

⁹⁷ 221 U. S. 559, 31 Sup. Ct. 688 (1911).

⁹⁸ *Ibid.* at 567, 31 Sup. Ct. at 690.

⁹⁹ *Supra* note 92, at 223.

the binding force of the agreement that it relates to matters governmental. For example, in *Green v. Biddle*¹⁰⁰ an agreement between Virginia and Kentucky was held to prevent the latter state from enacting a law relating to the rights of occupying claimants in ejectment suits; surely an exercise of governmental discretion if ever there was one. The basis for this distinction seems to lie in the different relation of the contracting parties to each other. As we have suggested, state and nation are welded together in a constitutional scheme of organization which allots different powers to each. Pacts between them concerning matters governmental would tend to alter this scheme by an extra-constitutional method. On the other hand, as to each other and as to matters within their own competence, the states occupy somewhat the position of independent powers.¹⁰¹ International agreements binding the exercise of governmental functions are common and legitimate. There seems no reason why interstate agreements should not be valid, subject only to the constitutional requirement that pacts of a political nature be approved by Congress.¹⁰²

Contracts with individuals in respect to governmental structure and organization have had a somewhat varied treatment. An agreement for the location of a county seat has been held not binding¹⁰³ on the ground of the public interest in free and untrammelled legislative discretion over such matters.¹⁰⁴ *A fortiori a dictum* to the same effect concerning the site of a state capital seems sound.¹⁰⁵ Admitting that the powers and authorities of public officers could not be the subject of contract, Mr. Justice Story, in the *Dartmouth College* case, nevertheless voiced the opinion that an official salary could not be reduced within the officer's term.¹⁰⁶ When the point was definitely presented to the Court, however, in *Butler v. Pennsylvania*,¹⁰⁷ the decision was against the officer's claim to contractual protection both

¹⁰⁰ 21 U. S. 1 (1823).

¹⁰¹ See *Buckner v. Finley*, 27 U. S. 586, 590 (1829).

¹⁰² The Constitution in general terms requires all interstate compacts to have congressional consent. U. S. CONST., Art. I, § 10. By interpretation, however, this is held applicable only to agreements tending to increase state political power or influence. *Virginia v. Tennessee*, 148 U. S. 503, 13 Sup. Ct. 728 (1893). See Donovan, *State Compacts as a Method of Settling Problems Common to Several States* (1931) 80 U. OF PA. L. REV. 5.

¹⁰³ *Newton v. Commissioners*, 100 U. S. 548 (1879).

¹⁰⁴ "This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil." *Newton v. Commissioners*, *supra* note 103, at 559.

¹⁰⁵ *Newton v. Commissioners*, *supra* note 103, at 560.

¹⁰⁶ "But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens. Will it be contended that the legislature of a state can diminish the salary of a judge, holding his office during good behaviour? Such an authority has never yet been asserted to our knowledge." *Dartmouth College v. Woodward*, 17 U. S. 518, 693 (1819). Cf. *Crenshaw v. United States*, 134 U. S. 99, 10 Sup. Ct. 431 (1890) where the court seems to have assumed that the obligation of contract clause applies to congressional action.

¹⁰⁷ 51 U. S. 402 (1850).

for the tenure and for the emoluments of his office. Said Mr. Justice Daniel:

"The contracts designed to be protected by the tenth section of the first article of that instrument [the Constitution] are contracts by which *perfect rights, certain definite, fixed private rights* of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is a matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being, shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecurists."¹⁰⁸

The considerations of policy set forth in this opinion seem unanswerable and it is believed, if a distinction may be drawn between officers on the one hand and agents or independent contractors on the other, that it represents settled law. Upon the basis of such a distinction, two decisions holding invalid impairment agreements with employees of the latter class may be supported.¹⁰⁹ Contractors with the state are not regarded as its officers or instrumentalities in such a sense as to exempt them from federal income taxation upon their salaries,¹¹⁰ and it does not seem that their services rank high enough in the scale of state policy to embarrass seriously the conduct of public affairs if their agreements with the state are held to be enforceable. Even in the case of persons in the officer class the court gives contractual protection to the obligation to pay the stipulated sum for services once they

¹⁰⁸ *Ibid.* 416.

¹⁰⁹ *Hall v. Wisconsin*, 103 U. S. 5 (1886) (one hired under legislative authorization to conduct a state geological survey for a specified time); *Mississippi v. Miller*, 276 U. S. 174, 30 Sup. Ct. 40 (1928) (tax collector's contract to press suits for back taxes on percentage basis). Cf. *Head v. The University*, 86 U. S. 526 (1874) (agreement interpreted as subject to modification).

¹¹⁰ *Metcalf v. Mitchell*, 269 U. S. 514, 46 Sup. Ct. 172 (1926).

are performed. The state may not by subsequent legislation impair the obligation to pay or the substantial remedies for enforcing that protection.¹¹¹

State Contracts and the Police Power

The cases concerning agreements with private persons to surrender or limit the free exercise of the police or regulatory power of government are so numerous and so devious in their implications that it seems better to segregate them for treatment under a separate division of this article, although logically they should be grouped under the general heading of contracts affecting governmental functions.

A large part of the confusion and ambiguity which plagues all students of the police power decisions in constitutional law is due to a tendency to treat that power as a mysteriously separate and distinct manifestation of governmental authority. It has been well said that "Judges and lawyers need to recollect constantly that the police power is not an entity."¹¹² Nevertheless it is just that which is forgotten in the common statement, too stereotyped to require citation or quotation, that a particular governmental act is unconstitutional unless it may be justified under the police power, as though this same police power were some divinely mysterious governmental attribute, of superior rank to the Constitution itself. The truth of course is, as Judge Hastings so well demonstrates,¹¹³ that the term police power when coupled with the word state was originally employed to designate the residuum of governmental powers left to the states after subtracting that delegated to the national jurisdiction and has continued to have that significance on every occasion when subjected to thorough analysis. So construed and so applied it becomes nothing more nor less than, in the luminous phrase of Chief Justice Taney, "the powers of government inherent in every sovereignty to the extent of its dominions . . . the power to govern men and things . . ." ¹¹⁴ Hence when one speaks of a contract to alienate or to restrict the police power what is really meant is a contract to restrict or to alienate the governing or regulating power for which "the police power is but another name." ¹¹⁵

The view that there are some limits to the validity of stipulations to surrender or to limit governing power appears fairly early in the Supreme

¹¹¹ *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 6 Sup. Ct. 329 (1885); *Louisiana v. New Orleans*, 215 U. S. 170, 30 Sup. Ct. 40 (1909). *Mississippi v. Miller*, *supra* note 109, apparently is regarded by the court as belonging in that class, but even under the liberal innovation contained in CONTRACTS RESTATEMENT (Am. L. Inst. 1928) § 45, it seems impossible to regard the tax ferret's compensation as being *fully* earned when the law governing his compensation was modified. It therefore appears better to regard the case as giving the tax ferret the status of an independent contractor, which may well be done.

¹¹² See HASTINGS, THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE (1900) 191.

¹¹³ See *ibid.*, *passim*.

¹¹⁴ The License Cases, 46 U. S. 504, 583 (1847).

¹¹⁵ See *Mutual Loan Co. v. Martell*, 222 U. S. 225, 233, 32 Sup. Ct. 74, 75 (1911).

Court Reports, though it received but little sympathy from the court in ante-bellum days. In part the argument was based on the alleged inalienability of sovereignty, heretofore discussed.¹¹⁶ On other occasions the argument assumed more modern form. As early as 1821 John Marshall suggested that a municipal corporation "cannot abridge its own legislative power."¹¹⁷ The case went off on another point and in any event the capacity of a municipality to contract away its delegated powers, in the absence of express legislative authority therefore, might well be regarded with a narrower vision than that with which the similar acts of a general legislative body, unhampered by constitutional limitations, would be viewed. But the idea thus given judicial cognizance was to reappear.¹¹⁸

It was expressed at greater length and in language much like that which eventually secured judicial approval in the argument by Mr. Hazzard in the tax exemption case of *Providence Bank v. Billings*.¹¹⁹ He contended:

"It is not wholesome doctrine for private corporations to imbibe, that they are independent of the power that creates them; and that they shall be protected in setting it at defiance. Not only are their franchises and other property subject to the taxing power of states; but, so far as the public interests are affected by the action of a corporation, so far those operations must be under the control of government, whose province and paramount duty, it is to provide for the public welfare. Thus, should the public good require the suppression of a paper currency, certainly the government would have a right to suppress it although, in so doing, they would destroy the banks whose paper composes that currency. It will not do to say that a chartered military company may not be put down, or, that a chartered company engaged in supplying a city with water, or any such corporations, may not be suppressed, if the government should see good cause for suppressing them; and, in point of character, there is no difference between those corporations and banking corporations whose paper bills constitute the public money currency of the country."¹²⁰

A little later he states still more explicitly the doctrine of the inalienability of the governing power:

¹¹⁶ See *supra* p. 641, in this article.

¹¹⁷ See *Goszler v. Georgetown*, *supra* note 7.

¹¹⁸ It has been suggested that the doctrine of the inalienability of police power may be traced two years earlier to the *dictum* of Chief Justice Marshall in *Dartmouth College v. Woodward*, *supra* note 14, at 629. "That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted." See Denny, *The Growth and Development of the Police Power of the State* (1921) 20 *MICH. L. REV.* 173, 183. But to me at least this statement, read in its context, refers to the organization of subordinate governmental units and other public agencies and instrumentalities rather than to agreements by the state concerning the exercise of regulatory power.

¹¹⁹ 29 U. S. 514 (1830).

¹²⁰ *Ibid.* 547.

“There is another question, a most important one, which must always present itself in a case like the present. That question is, whether any legislature can, if it would, grant or surrender any portion of that power of which sovereignty itself consists? . . . [He then speaks of cases upholding executed property grants against legislative impairment.] But such grants and contracts, it appears, are very different from an alienation, in perpetuity, of a portion of the taxing power of the state; which, in another case, this court declared to be ‘an incident of sovereignty’, and ‘essential to the existence of government’.

“There are certain powers which are inherent in the people, and cannot be alienated, even by the people themselves, much less by their representatives, to whom those powers are entrusted for a time; not to be annihilated, but to be exercised by them, until other representatives shall be appointed in their places.”¹²¹

The case was decided upon a construction of the charter as not undertaking to confer the exemption claimed by the bank, so that again the point was evaded.

The doctrine assumed more definite form still in the argument of Mr. Greenleaf in *Charles River Bridge v. Warren Bridge*.¹²²

“Among the powers of government, which are essential to the constitution and well-being of civil society, are, not only the power of taxation, and providing for the common defense, but that of providing safe and convenient ways for the public necessity and convenience; and the right of taking property for public use. . . . They are intrusted to the legislature, to be exercised, not bartered away; and it is indispensable that each legislature should assemble, with the same measure of sovereign power, that was held by its predecessors.”¹²³

The argument was rejected vigorously by Justice Story, dissenting;¹²⁴ and by Justice McLean, concurring,¹²⁵ while the case itself once more went off on a point of interpretation, leaving the doctrine still without definite judicial approval. A *dictum* indicative of a view that “. . . powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good . . .” are so important that “. . . governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them”,¹²⁶ and an express refusal to decide upon a contention by counsel in another case “That one legislature cannot restrain, control or bargain away the power of future

¹²¹ *Ibid.* 548.

¹²² 36 U. S. 420 (1837).

¹²³ *Ibid.* 466.

¹²⁴ *Ibid.* 643.

¹²⁵ *Ibid.* 568.

¹²⁶ See *Butler v. Pennsylvania*, 51 U. S. 402, 417 (1850).

legislatures to authorize public improvements for the benefit of the people,"¹²⁷ terminate the record of the attention given by the court to this problem in pre-Civil War days.

In the second decade following the War the question came up with renewed importance. The profligacy with which the reconstruction legislatures in the South had bartered away the public welfare and an awakening sensitiveness at the North to social advancement as against the claims of vested rights united in presenting to the court a series of cases in which the expediency of sustaining contracts limiting the exercise of regulatory power appeared in a most unfavorable aspect.

The first case was *Boyd v. Alabama*.¹²⁸ There the Alabama legislature had chartered a lottery by an act which the state Supreme Court held to be void under the Alabama Constitution. Hence under principles already discussed¹²⁹ there was no binding contract to be impaired by the subsequent act of repeal. In delivering the opinion of the court to that effect Mr. Justice Field, not usually regarded as a judicial liberal, added that "We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end suppress any and all practices tending to corrupt the public morals",¹³⁰ citing two state cases in which the inalienability of the police power had then recently been asserted.¹³¹

The next year, after upholding a Massachusetts prohibition act against the claim that it impaired the obligation of the charter contract of a brewery on the ground of a reserved power to repeal, Mr. Justice Bradley proceeded to say that even had there been no such reservation the legislature would not have been bound by its predecessor's acts to permit the manufacture of beer until the expiration of the charter.¹³²

In 1879 came the decision foreshadowed by these *dicta*. A Mississippi legislature had chartered a lottery for a term of years. The next year a new state constitution outlawed the business. The Supreme Court upheld the outlawry,¹³³ Chief Justice Waite speaking in vigorous terms:

¹²⁷ See *Richmond etc. R. R. v. Louisa R. R.*, 54 U. S. 71 (1851).

¹²⁸ 94 U. S. 645 (1877).

¹²⁹ *Supra* p. 642, in this article.

¹³⁰ *Supra* note 128, at 650.

¹³¹ *Moore v. State*, 48 Miss. 147 (1873); *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657 (1866).

¹³² "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." *Beer Co. v. Massachusetts*, 97 U. S. 25, 33 (1878).

¹³³ *Stone v. Mississippi*, 101 U. S. 814 (1879).

"No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."¹³⁴

"But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" ¹³⁵

"The contracts which the Constitution protects are those that relate to property rights, not governmental."¹³⁶

Upon similar reasoning the repeal by Louisiana of a monopoly to maintain slaughterhouses at New Orleans was upheld.¹³⁷

But the sweeping principle that no part of the public trust of governing is subject to alienation by contract was not to go unchallenged. A warning note was sounded in the slaughterhouse decision when Justice Miller asserted that "we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power."¹³⁸ The suggestion was translated into decision in 1885 and 1887 when monopolies of gas¹³⁹ and of water supply¹⁴⁰ were upheld against

¹³⁴ *Ibid.* 819.

¹³⁵ *Ibid.* 820.

¹³⁶ *Ibid.* 820. Of course a state constitution may place such things in the field of contract. *Houston v. New Orleans*, 119 U. S. 265, 7 Sup. Ct. 198 (1886).

¹³⁷ "The preservation of these [the public health and the public morals] is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

"It cannot be permitted that, when the constitution of a State, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty, can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure." *Butchers' Union Slaughterhouse etc. Co. v. Crescent City Live Stock Landing etc. Co.*, 111 U. S. 746, 751, 4 Sup. Ct. 652, 654 (1884).

¹³⁸ *Butchers' Union Slaughterhouse etc. Co. v. Crescent City Live Stock Landing etc. Co.*, *supra* note 137, at 760, 4 Sup. Ct. at 654.

¹³⁹ *New Orleans Gas Lt. Co. v. Louisiana Lt. & Heat Prodg. & Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252 (1885).

¹⁴⁰ *St. Tammany Waterworks Co. v. New Orleans Water Works Co.*, 120 U. S. 64, 7 Sup. Ct. 405 (1887).

subsequent repeal. The Court undertook to draw a distinction between the police power in its broadest sense and the narrower police power concerned only with protecting the public health and the public morals. Only in this narrower sense, it was declared, was police power inalienable and even then to no greater degree than was absolutely necessary to accomplish these purposes. Thus complete repeal of a charter grant would be upheld only if the business however conducted involved danger to health or morals; in other cases the power of regulation alone must be relied upon to protect these interests.¹⁴¹

The suggested limitation was not without authoritative support. The *Dartmouth College* case itself involved the exercise of regulatory power in the supervision of education¹⁴² and the various attempts to abolish monopoly grants in respect to bridges and ferries which uniformly had been defeated¹⁴³ could be regarded as undertaken in aid of the general welfare. Nevertheless these cases had been decided before judicial recognition of the public policy against limiting governmental discretion by contract had occurred and it might well have been determined that they became obsolete when the new principle was recognized.

More recently judicial language has reverted strongly to the broad position of inalienability of all police power. It seems to have started in 1896 when, in holding that the charter power of a railroad to purchase a parallel line did not prevent a subsequent prohibition of the consolidation of parallel and competing lines, the court said, "While the police power has been most frequently exercised with respect to matters which concern the public health, safety or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests."¹⁴⁴ Later pronouncements have been even more specific:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."¹⁴⁵

¹⁴¹ *New Orleans Gas Lt. Co. v. Louisiana Lt. & Heat Prod. & Mfg. Co.*, *supra* note 139, at 669, 6 Sup. Ct. at 262.

¹⁴² *Dartmouth College v. Woodward*, 17 U. S. 518 (1819).

¹⁴³ See cases cited *supra* note 36.

¹⁴⁴ *Louisville & Nashville R. R. v. Kentucky*, 161 U. S. 677, 695, 16 Sup. Ct. 714, 721 (1896).

¹⁴⁵ *Atlantic Coast Line R. R. v. Goldsboro*, 232 U. S. 548, 558, 34 Sup. Ct. 364, 368 (1914). An identical line of reasoning may be found in *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 76, 35 Sup. Ct. 678, 682 (1915). To the same effect see *Denver & Rio Grande R. R. v. Denver*, 250 U. S. 241, 243, 39 Sup. Ct. 450, 451 (1919).

When one turns from words to decisions it becomes at once apparent that neither of these two theories is consistently followed by the Supreme Court. Instead there is a curious preservation of both as the ground of decision in cases roughly contemporaneous down to the present hour. A large number of the decisions wherein the existence of binding contracts has been denied are clearly explainable upon the ground that the powers claimed to be contracted away involved the public health, safety or morals.¹⁴⁶ At least one of these cases advances the broad doctrine of the inalienability of all police power.¹⁴⁷ At the extreme opposite end of the scale is one case which seems to deny inalienability of even the power to provide for the public safety¹⁴⁸ though it is best explained, perhaps, on the view that the considerations of public safety advanced to uphold the revocation in that case were wholly fictitious. The court has so explained it.¹⁴⁹ On the other hand there are some cases which can be explained only upon the theory that the police power to protect the general welfare, as well as health, safety and morals, is not the subject of contract.¹⁵⁰

Still another line of cases is inexplicable except on the basis that police power of the sort there sought to be exercised may validly be contracted away. Some of these cases antedate the Civil War,¹⁵¹ but others are more modern. Into this class fall the decisions that the state or its subordinate units may contract away the police power to fix rates,¹⁵² if they do not sur-

¹⁴⁶ *New York & New England R. R. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437 (1894) (railroad grade crossings); *Douglas v. Kentucky*, 168 U. S. 488, 18 Sup. Ct. 199 (1897) (lottery grant); *Chicago, B. & Q. R. R. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513 (1898) (agreement as to erection and repair of viaduct over tracks); *Northern Pac. Ry. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341 (1908) (same); *Texas & New Orleans R. R. v. Miller*, 221 U. S. 408, 31 Sup. Ct. 534 (1911) (liability for negligently causing death of employee); *Atlantic Coast Line R. R. v. Goldsboro*, *supra* note 145 (location of railroad tracks and switching in busy street); *Pierce Oil Corp. v. Hope*, 248 U. S. 498, 39 Sup. Ct. 172 (1919) (location of gasoline storage tanks); *Denver & Rio Grande R. R. v. Denver*, 250 U. S. 241, 37 Sup. Ct. 450 (1919) (location of railroad track in street).

¹⁴⁷ *Atlantic Coast Line R. R. v. Goldsboro*, *supra* note 145.

¹⁴⁸ *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544, 33 Sup. Ct. 303 (1913) (upholding against attempted repeal contract right to lay second railroad track in street already occupied by single track).

¹⁴⁹ See *Atlantic Coast Line R. R. v. Goldsboro*, *supra* note 145, at 560, 34 Sup. Ct. at 369; *New Orleans Public Service, Inc. v. New Orleans*, 281 U. S. 682, 685, 50 Sup. 449, 450 (1930).

¹⁵⁰ *Minneapolis & St. Louis Ry. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870 (1893) (fencing right-of-way by railroad); *Louisville & Nashville R. R. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714 (1896) (consolidation of parallel and competing railroad lines); *St. Louis & S. F. Ry. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243 (1897) (liability of railroad for property damage); *Chicago & Alton R. R. v. Tranbarger*, *supra* note 145 (maintenance of water way to prevent property damage).

¹⁵¹ *Dartmouth College v. Woodward*, 17 U. S. 518 (1819) (educational policy); *Planters' Bk. v. Sharp*, 47 U. S. 301 (1848) (power of bank to transfer negotiable paper); *Vincennes University v. Indiana*, 55 U. S. 268, 14 L. Ed. 416 (1852) (educational policy).

¹⁵² *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558, 20 Sup. Ct. 136 (1900); *Detroit v. Detroit Citizens' St. Ry.*, 184 U. S. 368, 22 Sup. Ct. 410 (1902); *Cleveland v. Cleveland City Ry.*, 194 U. S. 517, 24 Sup. Ct. 756 (1904); *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 27 Sup. Ct. 762 (1907); *Minneapolis v. Minneapolis St. Ry.*, 215 U. S. 417, 30 Sup. Ct. 118 (1910); *Detroit United Ry. v. Michigan*, 242 U. S. 238, 37 Sup. Ct. 87 (1916); *Detroit United Ry. v. Detroit*, 248 U. S. 429, 39 Sup. Ct. 151 (1919); *Georgia Ry. & Pow. Co. v. Decatur*, 262 U. S. 432, 43 Sup. Ct. 613 (1922). For late *dicta* accord see *St.*

render it for too long.¹⁵³ Likewise here belong the numerous cases which uphold as binding contractual grants of franchise privileges in the public streets to various and sundry public utilities.¹⁵⁴ Here there is apparently no limit as to the time for which such a contract may run, inasmuch as the decisions uphold perpetual franchises with no suggestion that they ever will become terminable.¹⁵⁵ Finally it is not without significance that in a long line of cases the Court avoids the necessity of facing squarely the issue of cedability of the police power by construing the alleged contract to involve no surrender.¹⁵⁶ One cannot, it is obvious, accept the view which has been advanced¹⁵⁷ that the Supreme Court has gone over completely to the position that the police power in all of its aspects is wholly inalienable. To do so would deny full faith and credit to too many modern decisions.

Is it possible to deduce from the cases any consistent theory of the relation between contract and the police power? The answer seems doubtful at best. Clearly enough attempts to distinguish between health, morals and safety on the one hand and general welfare on the other must go by the board. The cases insure that, and if they did not the public need would do so. A suggestion by counsel in *Bank of Oxford v. Love*¹⁵⁸ that "the power to legislate can be irrevocably surrendered by contract in those matters which go merely to the industrial interests of the community" seems un-

Cloud Pub. Ser. Co. v. St. Cloud, 265 U. S. 352, 44 Sup. Ct. 1054 (1924); Railroad Comm. v. Los Angeles Ry., 280 U. S. 145, 151, 50 Sup. Ct. 71, 72 (1929).

¹⁵³ See Home Tel. Co. v. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 52 (1908).

¹⁵⁴ New Orleans Gas Lt. Co. v. Louisiana Lt. & Heat Prodg. Co., 115 U. S. 650, 6 Sup. Ct. 252 (1885); St. Tammany Waterworks Co. v. New Orleans Water Works Co., 120 U. S. 64, 7 Sup. Ct. 405 (1887); City Ry. v. Citizens St. R. R., 166 U. S. 557, 17 Sup. Ct. 653 (1897); Southern Pac. Co. v. Portland, 227 U. S. 559, 33 Sup. Ct. 308 (1913); Owensboro v. Cumberland T. & T. Co., 230 U. S. 58, 33 Sup. Ct. 988 (1913); Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U. S. 85, 33 Sup. Ct. 997 (1913); Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517 (1914); Northern Ohio Trac. & Lt. Co. v. Ohio, 245 U. S. 574, 38 Sup. Ct. 196 (1918); Ohio Pub. Ser. Co. v. Ohio, 274 U. S. 12, 47 Sup. Ct. 480 (1927).

¹⁵⁵ Owensboro v. Cumberland T. & T. Co.; Northern Ohio Trac. Co. v. Ohio; Ohio Pub. Ser. Co. v. Ohio, all *supra* note 154.

¹⁵⁶ Fertilizing Co. v. Hyde Park, 97 U. S. 659 (1878) (location of fertilizer works); Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681 (1885) (visitorial inspection of life insurance company); Eagle Ins. Co. v. Ohio, 153 U. S. 446, 14 Sup. Ct. 868 (1894) (reports to state by insurance company); New Orleans Gas Lt. Co. v. Drainage Com., 197 U. S. 453, 25 Sup. Ct. 471 (1905) (gas main franchise does not exclude building of drainage canal in public streets); Chicago, B. & Q. Ry. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341 (1906) (railroad embankment obstructing construction of drainage ditch); West Chicago St. R. R. v. Chicago, 201 U. S. 506, 26 Sup. Ct. 518 (1906) (construction of tunnel under river impeding later deepening of channel); Cosmopolitan Club v. Virginia, 208 U. S. 378, 28 Sup. Ct. 394 (1908) (corporate charter vs. prohibition law); Hammond Pkg. Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370 (1909) (corporate charter vs. anti-trust law); Southern Pac. Co. v. Campbell, 230 U. S. 537, 33 Sup. Ct. 1027 (1913) (rate regulation); Darling v. Newport News, 249 U. S. 540, 39 Sup. Ct. 371 (1919) (lease of oyster bed vs. municipal sewage disposal); Bank of Oxford v. Love, 250 U. S. 603, 40 Sup. Ct. 22 (1919) (bank charter vs. state examination); Hardin-Wyandot Ltg. Co. v. Upper Sandusky, 251 U. S. 173, 40 Sup. Ct. 104 (1919) (regulation of electric transmission lines); Kirk v. Maumee Valley Elec. Co., 279 U. S. 797, 49 Sup. Ct. 507 (1929) (lease of water from canal vs. abandonment of canal).

¹⁵⁷ See Denny, *op. cit. supra* note 118, at 183-188.

¹⁵⁸ 250 U. S. 603, 40 Sup. Ct. 22 (1919). Quotation from the abstract of the argument found in 63 L. Ed. 1165.

tenable in view of the fact that most of the cases in which the court has refused to sanction irrevocable surrender do involve industrial matters. No particular light seems to be derived from the chronological order of the cases; examples of each point of view may be found almost side by side in respect of time. There seems little significance in the fact that the modern cases permitting an alienation of the power to legislate for the general welfare have involved public utilities. As it happens, the cases refusing to permit such alienation have all involved a particular type of utility—the railroad, while the cases which avoid a decision by the device of “interpretation” of the alleged contracts cover a wide variety of subjects. One cannot generalize. It is possible only to give the results of the cases.

It is desirable that the Court should come eventually to some definite position upon this problem. It is recognized that constitutional law presents a series of problems in statecraft, in the solution of which *stare decisis* and the quest for certainty play a much less important role than in other divisions of the judicial system. None the less, as much certainty as possible is desirable, here as elsewhere, in the interest of accurate forecasting of the judicial course. No one will question the undesirability of contemporaneously inconsistent lines of decision. May we not hope that the Supreme Court will seize the first opportunity to clarify the existing confusion?

It is suggested that the clarification should take the form of a complete and thorough-going adoption of the principle that the power to make regulations for the general welfare, in all its manifestations, is not a legitimate subject of contract. To do so would require the overruling among modern decisions of only the rate and the franchise cases. There is no apparent reason why public utilities should occupy a specially favored position in being able to bind the state by contract and there are very strong considerations in favor of maintaining the police power unhampered by any such restrictions. The trend of our economic and financial development of late has been toward the concentration of power in the hands of an aristocracy of wealth and of management, a comparatively small group at the top of a social organism which has been termed aptly “the new feudalism”.¹⁵⁹ In other times and in other civilizations wherein there have arisen similar concentrations of power, the very understandable short-sighted selfishness of the controlling class has resulted in neglect of the interests of the masses, eventually producing social disorders or violent revolution. Our current economic ills seem in part traceable to a similar defective vision on the part of our own overlords. If we can by our democratic institutions sufficiently dissociate control of the government from the power of the economically dominant group and can maintain its freedom to act in defense of the gen-

¹⁵⁹ See Pound, *The New Feudalism* (1930) 16 A. B. A. J. 553.

eral interests against the interests of that group, possibly we may avoid in our own history the more tragic results of that want of discernment. Such a modern development of the time-honored American theory of preventing tyranny by a system of checks and balances seems to be one of the fundamental requisites of an enlightened statecraft today. Removal of the police power from the field of contract would form an integral part of such a policy. Any fear of giving too free a rein to regulatory power in this manner would seem to be groundless so long as due process remains as a weapon in the hands of the judiciary against arbitrary governmental action.

There remains for consideration one other aspect of police power and obligation of contract. In a late case¹⁶⁰ a city, in return for the granting by a railroad of the right of way for certain streets across its tracks and the construction of crossings, agreed that if other streets were opened it would pay stipulated amounts for the right of way and that if a particular crossing were opened it would pay all the cost of construction in return for a grant of the right of way without cost. Later, under state law passed subsequent to this agreement, this particular crossing was opened and the cost of construction was apportioned between the city and the railroad. The Supreme Court held that this impaired the obligation of the prior agreement. To the obvious argument that the contract was void as affecting the police power to guard the public safety, the Court responded with a new theory, namely, that such contracts are bad only if their tendency is to hamper or to hinder the proper exercise of the police power.¹⁶¹ It found no such tendency in the contract before it.

Just how far this new theory of determining the validity of contracts will be carried remains to be seen. It has not appeared since and the case in question seems to mark its *debut*. The result there reached seems in conflict with prior decisions,¹⁶² despite the Court's attempt at reconciliation.¹⁶³ Unless carefully applied, it opens the way for the imposition of

¹⁶⁰ *Missouri, K. & T. Ry. v. Oklahoma*, 271 U. S. 303, 46 Sup. Ct. 517 (1926).

¹⁶¹ "If the enforcement of its provisions operates to hamper the State's power reasonably to regulate the construction and the use of the Comanche Avenue crossing, then undoubtedly the ordinance is void. . . ."

"The precise question is whether the agreement of the city to bear the cost of construction is inconsistent with the proper exertion of police power." *Supra* note 160, at 307, 46 Sup. Ct. at 518.

"There is nothing in the ordinance that involves any attempt to interfere with or hinder the proper exertion of the police power." *Ibid.* 309, 46 Sup. Ct. at 519.

¹⁶² *Chicago, B. & Q. R. R. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513 (1898); *Northern Pac. Ry. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341 (1908).

¹⁶³ The Court distinguishes *Northern Pac. Ry. v. Minnesota*, *supra* note 162, on the ground that there was really no contract because, as the city already owned the right of way and the railroad was bound to bear the cost of constructing a viaduct, the latter gave no consideration for the city's promise. See *Missouri, K. & T. Ry. v. Oklahoma*, 271 U. S. 303, 309, 46 Sup. Ct. 512, 519 (1926). The argument is not convincing. While the railroad is under duty to pay the cost of constructing improvements to protect the public safety, whether the improvements really are necessary for that purpose or whether the cost is not so great as to make the exaction an arbitrary taking of property under the due process clause is always open for litigation. For recent examples see *Lehigh Valley R. R. v. Board of*

many burdens on the police power by contracts affecting the manner of its exercise. One can easily conceive of a town refraining from opening a needed crossing, the expense of which must come from a depleted treasury, or installing a grade crossing rather than an underpass for similar reasons. Almost any agreement as to the manner in which the police power shall be exerted is capable of becoming a clog upon it. Unless the Court is astute to restrict its application to situations wherein it will not in fact prove a burden, the new doctrine is capable of much mischief. Would it not be better to let it die of neglect while it is still young and tender?

Eminent Domain

The power of eminent domain is so closely akin to the general regulatory power in the importance of its free exercise to the efficient promotion of the general welfare that it would be surprising if it could effectually be contracted away. The earlier cases avoided a square decision of this point on the ground that a franchise to operate for a term of years, if regarded as creating a binding contract, could itself be taken by the power of eminent domain by making just compensation.¹⁶⁴ In 1917, however, a case arose wherein the state had agreed expressly not to open any street through certain hospital grounds. In upholding the right thereafter to lay out streets through the grounds by the power of eminent domain the Supreme Court squarely held that the power, so necessary to efficient government, is inalienable by contract.¹⁶⁵ The doctrine has since been reiterated¹⁶⁶ and seems clearly sound.

One case raises a doubt. It held that an agreement by a city to purchase a water plant at a price to be determined in a certain manner at the end of a specified period excludes the right to acquire it by eminent domain procedure.¹⁶⁷ This seems very much like contracting away the power of eminent domain. It is possible, however, to reconcile the case with the accepted view upon the ground that the exercise of eminent domain requires just compensation under the Fourteenth Amendment,¹⁶⁸ that where a contract to purchase has been entered into, just compensation for taking the contract must be the contract price, and that the only way of establishing

P. U. Comm'rs, 278 U. S. 24, 49 Sup. Ct. 69 (1928); *New Orleans Pub. Ser. Inc. v. New Orleans*, 281 U. S. 682, 50 Sup. Ct. 449 (1930). This being so, it would seem that the railroad gave up a reasonably doubtful cause of action, which should be good enough consideration for anybody's promise. See *CONTRACTS RESTATEMENT* (Am. L. Inst. 1928) § 76.

¹⁶⁴ *West River Bridge Co. v. Dix*, 47 U. S. 507 (1848); *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718 (1897).

¹⁶⁵ *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 38 Sup. Ct. 35 (1917).

¹⁶⁶ "The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will." *Georgia v. Chattanooga*, 264 U. S. 472, 480, 44 Sup. Ct. 369, 370 (1924).

¹⁶⁷ *Superior Water, Lt. & Power Co. v. Superior*, 263 U. S. 125, 44 Sup. Ct. 82 (1923).

¹⁶⁸ *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581 (1897).

the contract price in cases of this kind is by resorting to the procedure prescribed by the contract. Such a limitation upon the doctrine of the inalienability of the power of eminent domain seems likely to do no substantial harm to the public interests and its effects in stabilizing and so in encouraging contracts of sale to government may be of value. It is at this point that the power of eminent domain impinges upon the ordinary proprietary power to contract for the acquisition of property, heretofore discussed, and it may well be proper to give precedence to the binding nature of ordinary proprietary contracts.¹⁶⁹

Contractual Capacity and the Doctrine of Unconstitutional Conditions

The writer has discussed elsewhere the comparatively modern doctrine of unconstitutional conditions, suggesting certain apparent inconsistencies in its development and application and proposing a solution to the problem of harmonizing the decisions and keeping the new doctrine within proper bounds.¹⁷⁰ The present topic presents one or two points of contact with that doctrine which seem worthy of brief consideration.

Preparatory to the discussion let us briefly review the unconstitutional condition doctrine. Beginning as a policy against state requirements that foreign corporations should give up their privilege of resorting to the federal courts as the price of admission to do business within their borders, the doctrine has grown until, as currently phrased and as applied in at least one case,¹⁷¹ it constitutes a barrier to the exaction in return for favors granted by a state of the renunciation on the part of any corporation or individual of any privilege secured by the Constitution of the United States. Thus broadly applied the doctrine conflicts with a long line of the Supreme Court's own decisions and presents a serious barrier to effective state bargaining. It is suggested that a reconciliation both of the decisions and of the conflicting interests involved might be and should be reached upon the basis that the unconstitutional condition doctrine forbids bartering away those constitutional privileges only which are bound up with the working of our federal system of government, leaving free subjects of barter those which are bestowed upon the individual as a matter of personal privilege.¹⁷²

The first question suggested by the present topic in relation to the doctrine of unconstitutional conditions is, may that doctrine be explained upon the ground that the states have no capacity to bargain away the privileges which they purport to confer so that the promises of corporations and of individuals fail for want of consideration? The answer to this question seems clearly negative. The Supreme Court has always recognized that

¹⁶⁹ See cases cited *supra* note 52.

¹⁷⁰ See Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879.

¹⁷¹ *Frost & Frost Trucking Co. v. Railroad Comm.*, 271 U. S. 583, 46 Sup. Ct. 605 (1926).

¹⁷² See Merrill, *op. cit. supra* note 170, at 892-895.

admission of a foreign corporation to do business within a state is a proper subject of contract.¹⁷³ Consequently the admission cases, which constituted the foundations and until *Frost & Frost Trucking Co. v. Railroad Comm.*¹⁷⁴ the only applications of the doctrine, cannot be explained upon the ground of an absence of *quid pro quo* for the corporation's promise. Moreover, the *Frost* case itself involves the grant of a privilege to operate upon the public highways akin to a franchise grant, recognized by the Supreme Court as within the contractual power.¹⁷⁵ Very clearly the unconstitutional condition cases cannot be explained on the ground of failure of consideration.

The second question is somewhat akin. What becomes of state bargaining power, in a very wide and important field, if the powers of police and of eminent domain are held to be incapable of alienation? Does not such a view result in a failure of consideration for any promise that is based upon a surrender or limitation of these powers? There is at least one case which lends some color to such a view,¹⁷⁶ holding as it does that an obligation to furnish a city with water falls with the repeal of the exemption from taxation for which it was given. On the other hand, it is to be remembered that in all cases of this sort there will be an abstention from a particular course of action or a grant of some privilege by the state, if even for a comparatively short period. Sufficient care in drafting the agreement on the part of the public could make this temporary or indefinite grant the consideration for the grantee's promise.¹⁷⁷ It is by no means necessary to consideration that the promisee be tied up to a performance that will last as long as that of the promisor, though the Supreme Court appears to have so assumed in two rate contract cases.¹⁷⁸ Consequently there should be no substantial threat to state bargaining power in the view that police power and eminent domain are incapable of alienation or of suspension.

¹⁷³ *New York, L. E. & W. R. R. v. Pennsylvania*, 153 U. S. 628, 14 Sup. Ct. 952 (1894); *American Smelt'g & Ref. Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. 198 (1907).

¹⁷⁴ *Supra* note 171.

¹⁷⁵ See cases cited *supra* note 154.

¹⁷⁶ *Louisville Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. 346 (1892).

¹⁷⁷ See I WILLISTON, *CONTRACTS* (1920) § 140.

¹⁷⁸ *San Antonio v. San Antonio Pub. Ser. Co.*, 255 U. S. 547, 41 Sup. Ct. 428 (1921); *Railroad Comm. v. Los Angeles Ry.*, 280 U. S. 145, 50 Sup. Ct. 71 (1929).