"No legislature can bargain away the public health or the public morals."

Stone v. Mississippi

101 U.S. (11 Otto) 814, 25 L.Ed. 1079 (1880).

In 1867 Mississippi granted a 25–year charter to a lottery company for an initial fee of $5,000 and an annual tax of $1,000. The following year, however, the state adopted a new constitutional text, one clause of which forbade the legislature to authorize lotteries or the sale of lottery tickets. In 1870 the legislature enacted a statute which, in effect, repealed the charter of 1867. In 1874 the state attorney general began legal proceedings against the company, and state courts ruled that it could no longer do business within Mississippi. The company then obtained a writ of error from the U.S. Supreme Court.

Mr. Chief Justice **WAITE** delivered the opinion of the court. ...

It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. ... The doctrines of Dartmouth College v. Woodward [1819] have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are.

In the present case the question is whether the State of Mississippi, in its sovereign capacity, did by the charter now under consideration bind itself irrevocably by a contract. ... There can be no dispute but that ... the legislature of the State chartered a lottery company ... for twenty-five years. ... If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object. ... Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way.

All agree that the legislature cannot bargain away the police power of a State. ... Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Beer Co. v. Mass. [1878]; Patterson v. Ky. [1878]. Neither can it be denied that lotteries are proper subjects for the exercise of this power. When the government is untrammelled by any claim of vested rights or chartered privileges, no one has

ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social morality. ...

The question is therefore directly presented, whether ... the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. ... 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. *Beer Company*. ...

In *Dartmouth College* ... Chief Justice Marshall ... was careful to say ... "that the framers of the Constitution did not intend to restrain 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." The present case, we think, comes within this limitation. ...

... [T]he 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." ...

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. ... They are species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. ... Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. ...

Judgment affirmed.

Editors' Notes

(1) **Query:** *Stone* raised several issues about WHAT the Constitution includes. First, where did the Court find an "implied understanding" that a contract with a state regarding lotteries—or any other subject—can be modified by the state? In the words of the constitutional document? In reasoned inference from those words? In original intent or understanding? In previous decisions? In a political theory of democracy or constitutionalism?

(2) **Query:** Second, Waite wrote that the doctrines of *Dartmouth College* had "become

so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself." To what extent was Waite claiming that judges could amend the larger constitution by interpreting the constitutional text?

(3) **Query:** Waite also raised interesting questions about democratic theory and limits on valid constitutional change. Not only did he deny that a government could alienate its police power but, he added: "The people themselves cannot do it. ..." How can one square such a denial of popular authority with democratic theory?

(4) In Marshall's time, the contract clause had been the principal judicial instrument for protecting property rights. *Stone*, however, qualified the doctrine of Fletcher v. Peck (1810; reprinted above, p. 1091) and *Dartmouth College* (1819) that state grants were contracts for constitutional purposes. Home Building & Loan Ass'n v. Blaisdell (1934; reprinted above, p. 210), further weakened the contract clause as a limitation on state power to modify contracts between private citizens. More than forty years after *Blaisdell*, the Court suddenly struck down two state statutes and reminded the world that the "Contract Clause remains part of the Constitution. It is not a dead letter." U.S. Trust v. New Jersey (1977); Allied Structural Steel v. Spannaus (1978). See the literature cited in Editors' Note 6 to *Charles River Bridge* (1837).