

agreement like a contract is, at best, questionable. Notwithstanding that the parties may provide remedies, the Act's failure to adequately resolve the problems created by the slowdown is without justification. There have been indications that no-slowdown clauses may be decreasing in frequency.<sup>55</sup>

At present, the LMRA affords no effective relief from the slowdown. The Board and the courts can go no further to bring this unjustified tactic within the scope of the Act. Therefore, prohibition of the slowdown should be included within the provisions of Section 8(b) of the LMRA. Such regulation would accomplish, at least, two advantageous objectives: It would establish an express national policy on slowdowns; and it would permit the NLRB to issue appropriate remedial orders to unions engaged in this practice. If the slowdown were to be included within Section 8(b) as an unfair labor practice, the unions and the employees would lose no legal or moral rights,<sup>56</sup> for only the adequacy of remedies given an employer against this admittedly unfairly coercive device would be affected. By affirmative action Congress can dispel the existing confusion and provide a more certain and exact method of alleviating the injustices of the slowdown.

## CORPORATE DONATIONS: COMMON LAW, STATUTORY, AND CONSTITUTIONAL IMPLICATIONS

An estimated three hundred million dollars are deducted from corporate tax returns each year as donations to charity,<sup>1</sup> although seventy years

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55. Unions may shy away from the use of no-strike provisions because of damage liability for contract breaches. There is another indication that the no-slowdown clause may decrease in use because of the NLRB's holding that the clause is an *absolute* prohibition. For example, if the employer engages in an unfair labor practice, a union may attempt to retaliate by slowing down or striking in violation of its contract rather than go to the Board for relief. Suppose, then, the employer discharges the employees for striking in breach of the contract. The Board has upheld such discharges. The Board contends the union should have sought aid from it and not attempted self-help action. For a full discussion of the preceding material, see Blinn, *supra* note 40, at 281.

56. It is true unions would lose the opportunity to hold the slowdown before the employer as a possible contract clause and demand concessions for inclusion of a no-slowdown provision in the collective agreement. But as has been indicated, the slowdown is both legally and morally frowned upon; consequently, losing this opportunity can hardly be considered as losing any right.

1. ANDREWS, CORPORATION GIVING 15 (1952). This figure is based on corporate income tax returns. It is believed that many dollars are listed as necessary and ordinary business expenses although they resemble a "gift" more than a true expense. *Id.* at 41.

ago a classic decision prohibited corporations from making donations.<sup>2</sup> Primarily responsible for this change is the increasing social pressure being applied to force corporations to assume a major role in community welfare.<sup>3</sup> This pressure has found expression in the federal tax policy toward corporate gifts. Congress encourages corporate donations by allowing corporations to deduct a maximum of 5 percent of their net income for such contributions.<sup>4</sup> Indeed, corporate control of a large

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For a discussion of this confusion of gift and expense from a common law point of vantage, see note 13 *infra*.

Surprisingly, corporations donate only 5 percent of the total receipt of charitable funds. ANDREWS, *loc. cit. supra*, at 19. See also note 4 *infra*.

Another fact of interest is that there is an inverse ratio of net income to percentage of contribution. The small corporations donate a greater portion of their profit than the large ones. ANDREWS, *loc. cit. supra*, at 44.

A breakdown of the purposes for which corporations donate shows that thirty-one percent of the total contribution is given to community chests, eighteen percent to hospitals, 10 percent to colleges and universities, 4 percent to other educational institutions, 1 percent to national health agencies, and twenty-six percent to other charities. *Id.* at 69. For additional material on corporate donations generally, see THE MANUAL OF CORPORATE GIVING (Ruml ed. 1952).

2. "It is not charity sitting at the board of directors, because, as it seems to me charity has no business to sit at the board of directors *qua* charity." *Hutton v. West Cork Ry.*, 23 Ch. D. 654, 673 (1883) (concurring opinion). A distinction is to be noted here between the charitable donation sought to be made in the above case (an outright gift to a director of the corporation which was being wound up) and a donation to a charitable organization. "Charitable donation" will be used in the latter sense throughout this discussion.

It is ironical that the case which has been pointed to as an example of the common law prohibition against corporate giving contains dicta which approves corporate giving if it is in any way to the benefit of the corporation. *Id.* at 665-666, 672. Perhaps this case is sound law today and in accord with *Evans v. Brunner, Mond & Co.*, [1921] 1 Ch. 359, rather than contrary to it as is often supposed.

The recognized American precedent for the common law prohibition of corporate giving is *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

3. "Absolute power is useful in building the organization. More slow, but equally sure is the development of social pressure demanding that the power shall be used for the benefit of all concerned. This pressure, constant in ecclesiastical and political history, is already making its appearance in many guises in the economic field." BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 353 (1948).

"It is conceivable,—indeed it seems almost essential if the corporate system is to survive,—that the control of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity." *Id.* at 356.

See BALLANTINE, *CORPORATIONS* § 7 (Rev. ed. 1946); ANDREWS, *CORPORATION GIVING* 113-114; Geiger, *Public Policy and the Five Percent* in THE MANUAL OF CORPORATE GIVING 3 (Ruml ed. 1952); H. R. REP. No. 2514, 82d Cong., 2d Sess. 4-5 (1953); Navarro, *Corporate Authority to Contribute to Charity*, 26 PHIL. L.J. 187 (1951); Burck, *The Jersey Company*, *Fortune*, Oct., 1951, p. 98.

4. 26 U.S.C. § 23(q) (Supp. 1951). The importance of this statute is emphasized when one realizes that the corporation expends only forty-eight to eighteen cents—depending on the income group to which it belongs—from each dollar of net income it donates up to the 5 percent maximum deduction. The remainder is, in effect, con-

portion of the nation's wealth,<sup>5</sup> coupled with fewer personal fortunes,<sup>6</sup> emphasizes the need for facilitating donations to charity.

Accordingly, twenty-nine states have enacted legislation designed to overcome the common law prohibition against corporate gifts.<sup>7</sup> The absence of a precise holding<sup>8</sup> in the remaining states leaves the extent of the common law prohibition in doubt.<sup>9</sup> Originally, the lack of a "direct benefit" to the corporation from the expenditure rendered the donation without the scope of implied and incidental powers and, therefore, *ultra vires*.<sup>10</sup>

tributed by the government in the form of tax deduction. Consequently, a corporate gift need produce only eighteen to forty-eight cents profit to match the full dollar-for-dollar value which advertising, for instance, must produce to benefit the corporation.

That this policy has been effective as a stimulant to corporate giving is evidenced by the fact that corporate donations today are ten times the amount they were in 1936 when Section 23(q) of U.S.C. became effective. ANDREWS, CORPORATION GIVING 15. Nevertheless, corporations in general do not yet make contributions which even approximate the permissible 5 percent maximum. In only one year since 1936 has the ratio of net profit to contributions been as high, nationally, as 1.24 percent. *Id.* at 42.

5. "There can be little doubt that the wealth of the large corporations has been increasing at a very much more rapid rate than the total national wealth." BERLE AND MEANS, *op. cit. supra* note 3, at 40.

6. ANDREWS, CORPORATION GIVING 20. Graduated income taxes, large estate taxes, and public antipathy toward excessively wealthy people each contribute to the rarity of this form of wealth.

7. *Id.* at 235.

8. A recent New Jersey case attempts to delineate the modern common law view. However, a statute authorizing corporate gifts, passed in conjunction with a reserve statute, was also claimed as a basis for the corporate gift. The court's decision, approving gifts made in the public interest, is apparently based on a combination of the common law and the statute, and, accordingly, the standing of the common law prohibition remains somewhat in doubt. See *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N. J. 1953) *semble*. For further discussion of this case see note 33 *infra* and accompanying text

9. De Capriles and Garrett, *Legality of Corporate Support to Education: A Survey of Current Developments*, 38 A.B.A.J. 209, 210 (1952); Rudick, *Legal Aspects of Corporate Giving* in THE MANUAL OF CORPORATE GIVING 35, 43 (Ruml ed. 1952). As Mr. Rudick points out, the scarcity of cases coupled with the fact that corporate donations are everywhere accepted as commonplace, indicate an environment conducive to approval of reasonable corporate gifts. *Ibid.* An opinion research survey found that seventy-six percent of community leaders who own stock approve of corporate giving. *Meeting the Problem of Charitable Contributions*, The Public Opinion Research Corporation, Princeton, 1948, as quoted in ANDREWS, CORPORATION GIVING 18.

10. *Compare Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668, 684 (1919), *with*: "It seems to us that this must be the test: If the direct and proximate tendency of the improvements sought to be obtained by the donation is the building up of the town, and the enhanced value of the remaining property of the corporation, the donation is not *ultra vires*." *Whetstone v. Ottawa University*, 13 Kans. 240, 255 (1874) (land donated by realty company for purposes of setting up a college). The rule set up in *Armstrong Cork Co. v. H. A. Meldrum Co.*, 285 Fed. 58, 59 (W.D.N.Y. 1922) is less stringent: "In the circumstances the rule of law that may fairly be applied is that the action of the officers of the company [subscribing to college fund drive] was not *ultra vires*, but was in fact within their corporate powers, since it tended to promote the welfare of the business in which the corporation was engaged."

Typically, corporate gifts represent a reasonably foreseeable benefit to the corporation,<sup>11</sup> its employees,<sup>12</sup> or its customers.<sup>13</sup> Until a recent New Jersey Supreme Court decision,<sup>14</sup> contributions made simply for society's general welfare were regularly considered not to be directly beneficial to the corporation.<sup>15</sup> This case, which is substantially similar

11. *E.g.*, *State ex rel. Sorenson v. Chicago, B. & Q. R.R.*, 112 Neb. 248, 199 N.W. 534 (1924) (donation for goodwill); *cf.* *Greene County National Farm Loan Ass'n v. Federal Land Bank of Louisville*, 57 F. Supp. 783, 789 (1944), *aff'd*, 152 F.2d 215 (6th Cir. 1945), *cert. denied*, 328 U.S. 834 (1945); *In re San Francisco Bay Exposition*, 50 F. Supp. 344, 346 (N.D. Calif. 1943); *but cf.* *Davis v. Old Colony R.R.*, 131 Mass. 258, 259 (1881); see note 13 *infra*.

12. *E.g.*, *Steinway v. Steinway*, 17 Misc. Rep. 43, 40 N.Y. Supp. 718 (Sup. Ct. 1896); *People ex rel. Metropolitan Life Ins. Co. v. Hotchkiss*, 136 App. Div. 160, 120 N.Y. Supp. 649 (3d Dep't 1909); see note 13 *infra*.

13. *E.g.*, *Willcutts v. Minnesota Tribune Co.*, 103 F.2d 947 (8th Cir. 1939), *rev'd on other grounds*, 308 U.S. 577 (1939); *Fairmount Creamery Corp. v. Helvering*, 89 F.2d 810 (D.C. Cir. 1937). These cases permit deductions from tax returns of expenditures made to charitable organizations in the form of contributions. Each donee was a customer of the donor corporation. The court allowed the deductions as necessary and ordinary business expenses under the authority of 26 U.S.C. § 23(a).

The argument might be made that a determination for purposes of taxation is not an adequate determination for purposes of corporate power. This argument is weakened by the fact that the court has approved the coincidence of the two purposes in a converse situation: A determination for purposes of corporate power is a criterion for tax purposes. *Cf.* *American Rolling Mill Co. v. Comm'r of Int. Rev.*, 41 F.2d 314, 315 (6th Cir. 1930); *Corning Glass Works v. Comm'r of Int. Rev.*, 37 F.2d 798, 800 (D.C. Cir. 1929). It is significant to note also that both of the cited cases were decided prior to 1936 when 26 U.S.C. § 23(q) became effective, authorizing corporate donations as such. Since 1936 deductions under section 23(a) have been limited to those contributions given to organizations other than those authorized to receive donations under 23(q). Internal Revenue Bureau Regulation 111, § 29.23(a)-13, as quoted in 5 CCH 1952 FED. TAX REP. ¶ 6313 (Rev. Rul. 160, 1952). See Note, *Corporate Charitable Payments*, 4 TAX L. REV. 124 (1948).

There are tax cases buttressing corporate "donations" made for purposes of good will and general corporate benefit. *Times-Picayune Pub. Co. v. Comm'r of Int. Rev.*, 27 B.T.A. 277 (1932); *First Nat'l Bank in St. Louis v. Comm'r of Int. Rev.*, 23 B.T.A. 1125 (1931); *First Nat'l Bank of Omaha v. Comm'r of Int. Rev.*, 17 B.T.A. 1358 (1929); *but cf.* *Merchant's Nat'l Bank of Mobile v. Comm'r of Int. Rev.*, 90 F.2d 223 (5th Cir. 1937).

But most of the tax cases concern money donated by corporations for employee benefit and sought to be deducted under Section 23(a). In the following cases the deductions were allowed: *Lincoln Electric Co. v. Comm'r of Int. Rev.*, 162 F.2d 379 (6th Cir. 1947); *American Rolling Mills Co. v. Comm'r of Int. Rev.*, *supra*; *Corning Glass Works v. Comm'r of Int. Rev.*, *supra*; 5 CCH 1952 FED. TAX REP. ¶ 6313, *supra*; *contra*, *McDonnell Aircraft Corp. v. Comm'r of Int. Rev.*, 16 T.C. 189 (1951); *Roberts Filter Mfg. Co. v. Comm'r of Int. Rev.*, 10 T.C. 26 (1948); *Alfred J. Sweet, Inc. v. United States*, 66 Ct. Cl. 654 (1929).

For additional cases in this area see, ANDREWS, CORPORATION GIVING 317-327.

14. *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953).

15. *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919); *Orpheum Theatre & Realty Co. v. Brokerage Co.*, 197 Mo. App. 661, 199 S.W. 257 (1917); *Brinson R.R. v. Exchange Bank of Springfield*, 16 Ga. App. 425, 85 S.E. 634 (1915). There is, however, an early case approving corporate gifts even for general purposes. *State ex rel. Sorenson v. Chicago B. & Q. R.R.*, 112 Neb. 248, 199 N.W. 534 (1924). There is also a recent case condoning general donations upon a goodwill basis. *Greene County Nat'l*

to an English case,<sup>16</sup> concluded that such an expenditure satisfied the direct benefit test.<sup>17</sup> The older view of causal "direct benefit" reflected the prevalent philosophy that each expenditure must conceivably produce a traceable return; the new concept manifests a realization that the corporate end—profit—can best be achieved by indirect means under certain circumstances. Modern society seems to have imposed upon corporations the obligation of donating to charitable causes in order to function most profitably.

Those state statutes authorizing corporate gifts<sup>18</sup> despite the common law admonition of the necessity for direct benefit raise serious constitutional problems. Where the "direct benefit" test has been espoused in the state's ease law, a statutory declaration that a corporate gift is permissible may constitute a violation of the Federal Constitution's contract clause as defined by the famous *Dartmouth College Case*.<sup>19</sup> Many states quickly mitigated the effects of that ruling by reserving the right to alter, amend or repeal corporate charters.<sup>20</sup>

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Farm Loan Ass'n v. Federal Land Bank of Louisville, 57 F. Supp. 834 (1944), *aff'd* 152 F.2d 215 (6th Cir. 1945), *cert. denied* 328 U.S. 834 (1945).

16. *Evans v. Brunner, Mond & Co.*, [1921] 1 Ch. 359. The facts in this case are very similar to those in *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953). The defendant chemical company voted to distribute from the company's surplus the sum of 100,000£ to various scientific institutions for the furtherance of scientific research. A minority stockholder objected, asserting that the gift was ultra vires. The court held that it was not ultra vires but was within the incidental powers of the corporation.

17. Compare *Evans v. Brunner, Mond & Co.*, *supra* note 16 at 367, with *A. P. Smith Mfg. Co. v. Barlow*, *supra* note 16, at 586. The "direct benefit" terminology is much more common in tax cases than in cases concerning the corporate power to donate. *E.g.*, *Merchants Nat'l Bank of Mobile v. Comm'r of Int. Rev.*, 90 F.2d 223, 224 (5th Cir. 1937); *Corning Glass Works v. Comm'r of Int. Rev.*, 37 F.2d 798, 800 (D.C. Cir. 1929); *Alfred J. Sweet, Inc. v. United States*, 66 Ct. Cl. 654, 660 (1929); *Capital Traction Co. v. Comm'r of Int. Rev.*, 27 B.T.A. 926, 927 (1933).

18. ANDREWS, CORPORATION GIVING 235. The actual statutes are varied in content, as one might expect. Most of the statutes cover all business corporations, although it is common to except certain financial and utility corporations. However, Virginia's statute applies only to utilities. Many of the statutes permit the corporations to donate any amount which they choose although the majority place some limitations upon the corporation's discretion. Indiana's statute permits only such donations as qualify under 26 U.S.C. § 23(q) (1949). Other states limit the percentage of net income which can be donated. Some demand that the donation be taken from a special fund. Still others require that the donation promote corporate interests. For a complete compilation of these statutes, see ANDREWS, CORPORATION GIVING 293-316.

19. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (U.S. 1819). This case held that a corporate charter is a contract which, when impaired by state legislation, is afforded the protection of the Federal Constitution. For a comprehensive treatment of the limitations on this decision, see Trimble, *Chief Justice Waite and the Limitations on the Dartmouth College Decision*, 9 UNIV. OF CINN. L. REV. 41 (1953).

20. This reservation at first took two forms: statutes reserving the right or power, and clauses within the corporate charter itself reserving to the state the right to alter the charter when it was granted. Later the reserve clause in the corporate charter dropped out of existence as more and more states chartered corporations by general act instead of special act; the reserve statute took the form of a section within the general

The early courts, when construing legislation passed in conjunction with the authority of reserve statutes, limited application of the latter to such legislation as did not frustrate or change the corporate end.<sup>21</sup> Later the limitation preserving the corporate purpose became less popular as notions of vested rights gained favor.<sup>22</sup> The Supreme Court declared that the reserve statute did not authorize the legislature to alter the charter so as to deprive the corporation of vested rights.<sup>23</sup> After passage of the Fourteenth Amendment, property rights also became important in conjunction with reserve statutes. The Court concluded that vested property rights could not be taken without just compensation by means of legislation enacted subject to the authority of reserve statutes;<sup>24</sup> although such laws might be applied prospectively to deprive one of interests which had not vested.<sup>25</sup> However, the term "vested rights" became so vague with use and abuse that it adds little to any meaningful analysis of reserve statute problems.<sup>26</sup>

Reserve acts, and statutes passed in conjunction with them, have not, of course, escaped the rational due process limitations imposed on legislation by the Fourteenth Amendment.<sup>27</sup> Consequently, a statute authorizing contributions must have rational basis and be reasonably calculated to effect the end desired by the legislature.<sup>28</sup> Of course, it has been the recent practice of the Supreme Court almost unflinchingly to

act. IND. ANN. STAT. § 25-404(b) (Burns Supp. 1953); N.J. REV. STAT. § 14:2-9 (1937); see also OHIO CONST. Art. XIII, § 2.

21. *Durfee v. Old Colony R.R.*, 5 Allen 230 (Mass. 1862). The court reasoned that, although the state might control corporations in the public interest, it might not use this power to change the very nature of the stockholder's investment.

22. *E.g.*, *Coombes v. Getz*, 285 U.S. 434, 442 (1931); *Berea College v. Kentucky*, 211 U.S. 45, 57 (1908); *Looker v. Maynard*, 179 U.S. 46, 52 (1900); *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 519 (U.S. 1872).

23. See *e.g.*, *Berea College v. Kentucky*, *supra* note 22; *Looker v. Maynard*, *supra* note 22; *Holyoke Water-Power Co. v. Lyman*, *supra* note 22. One popular definition of a vested right was any right necessary to the attainment of the corporate end, which, obviously, preserves the corporate end. *Holyoke Water-Power Co. v. Lyman*, *supra* at 519.

24. *Chicago, M. & St. P. R.R. v. Wisconsin*, 238 U.S. 491 (1915); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 32-3 (1878).

25. See *e.g.*, *Coombes v. Getz*, 285 U.S. 434, 442 (1931); *St. Louis, I. M. & Southern R.R. v. Paul*, 173 U.S. 404, 409 (1898).

26. *Cf. Gargo v. Maid of the Mist Steamboat Co.*, 303 N.Y. 516, 522, 104 N.E.2d 882, 886 (1952); see *Lattin, A Primer on Fundamental Corporate Changes*, 1 WEST. RES. L. REV. 3 (1949).

27. See *Trimble*, *supra* note 19, at 65. The effect of a reserve statute seems to be a nullification of the contract clause, making the only limitations those ordinarily imposed on any legislation.

28. "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that

approve state legislation in the economic field.<sup>29</sup> If the gift statute were questioned upon substantive due process grounds, the considerations which persuaded the state legislature to act would probably establish the rationality of the legislation;<sup>30</sup> that the statute is reasonably calculated to effect the desired end could hardly be denied unless it fails in its terms to authorize corporate giving.

A few jurisdictions place an additional limitation on the applicability of the reserve statute, holding that it is available not to alter the contract among the stockholders themselves but only the contract between the corporation and the state.<sup>31</sup> The reasoning underlying this limitation is that the reserve statutes were passed to avert the result of the *Dartmouth College Case*, which was not concerned with the contract between the state and the stockholder or among the stockholders themselves.<sup>32</sup> Recently, the New Jersey Supreme Court probably<sup>33</sup> abandoned that

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the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

It is interesting to note that state courts often deal with legislation under state provisions for due process. Consequently, any discussion of the problem from the viewpoint of federal courts must be tempered with the realization that the state courts may also invalidate legislation for lack of the due process as required by state declaration or statute. See Note, *State Views on Economic Due Process: 1937-1953*, 53 COL. L. REV. 827 (1953).

29. See Note, *State Views on Economic Due Process: 1937-1953*, 53 COL. L. REV. 827, 829 (1953). See Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 885-887 (1944) for a discussion of the views of various Justices of the Supreme Court concerning the interpretation of "reasonable" legislation.

30. This point has been an issue in numerous substantive due process cases since *Munn v. Illinois*, 94 U.S. 113 (1877). The trend has been toward giving legislative declaration wide approval where federal agency orders are questioned on substantive due process grounds. See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

31. *Dow v. Northern R.R.*, 67 N.H. 1, 36 Atl. 510 (1886); *Garey v. St. Joe Mining Co.*, 32 Utah 497, 91 Pac. 369 (1907). Ohio maintains that statutes violating the obligations of contracts may not be applied retroactively to the contract between corporations and their stockholders so as to deprive shareholders of rights already accrued, even though a general reserve statute exists. *Wheatley v. A. I. Root Co.*, 147 Ohio St. 127, 69 N.E.2d 187 (1946). This holding seems to place Ohio among the states protecting the minority stockholders' contract rights even where a reserve statute exists.

32. Most states reason that the stockholders assume their contracts with the knowledge that they can be altered by the legislature and thus have no complaint when the state reasonably exercises this power. The minority, however, maintains that the stockholders' contracts, never becoming subject to the reserve power, are not taken with the knowledge that they can be altered, and, consequently, stockholders have a legitimate complaint when their contracts are altered by the state.

33. A qualification is necessary here because the court's holding in relation to the application of the reserve statute is not clear. Compare: "And since in our view the corporate power to make reasonable charitable contributions exists under modern conditions, *even apart from express statutory provision* [emphasis added], its enactments simply constitute helpful and confirmatory declarations of such power, accompanied by limiting safeguards." *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (N.J. 1953); *with*, "We find that it [corporate gift] was a lawful exercise of the corporation's implied and incidental powers under common-law principles and that it came within the

state's prior position as leader among those jurisdictions which adhered to this restriction.<sup>34</sup> *A. P. Smith Mfg. Co. v. Barlow* was brought by a minority stockholder who asked the court to declare ultra vires a corporate gift of fifteen hundred dollars to Princeton University.<sup>35</sup> The plaintiff argued that the donation was not authorized by the certificate of incorporation and that the statute authorizing gifts could not be constitutionally applied to the contract between the stockholders despite the existence of a reserve statute. The court resolved that the contractual relationship among the shareholders is no bar to an alteration of the charter required in the "public interest."<sup>36</sup> If the court's implications are given full import, the old line of cases protecting the stockholders' contracts have been severely limited or, perhaps, overruled. Regardless of implication, the court's holding affords an exception to the rule protecting stockholders' contracts so broad in scope as to be capable of extremely wide application.

The court's reliance on "public interest" in that case may evidence a realization of the desirability of extensive legislative control over corporations. "Public interest" language could have been employed merely as a transitional device by which to adopt the majority rule permitting alteration of any charter where a reserve statute exists. Additionally, the appealing and popular cause of permitting corporations to donate to a respected educational institution perhaps encouraged the court's shift.

Alternatively, the public interest aspect might be explained as an attempt to justify the gift legislation as rational and reasonably calculated to produce the end desired. The admitted public interest served by donations to educational institutions such as Princeton University, tends to demonstrate the reasonableness of the act. Furthermore, none of the gift statutes requires that corporations donate to charity but only author-

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express authority of the pertinent state legislation." *Ibid.* If the statute merely declares the common law, an extension of the application of the reserve statute was unnecessary. A statute declaratory of the common law obviously does not need the authorization of a reserve statute to validate it. Indeed, the extension may not be present in this case since the language does not clearly indicate that such is its finding. But elsewhere in the opinion the court deals with this extension at such length that some significance must be given to the dictum, even though it be unnecessary to the holding. *Id.* at 587-589.

34. See *Zabriskie v. Hackensack & N.Y. R.R.*, 18 N.J. Eq. 178 (1867). This was considered the leading case which held that the stockholders' contracts *inter se* could not be altered even where a reserve statute preceded the enactment which actually altered the contract. The facts leading to this rule were: A railroad sought to mortgage its property in order to finance an extension of its line. The extension had been authorized by the New Jersey Legislature. A minority stockholder requested an injunction which was granted upon the grounds that the statute authorizing the extension impaired the obligation of the stockholders' contracts *inter se*.

35. 98 A.2d 581 (N.J. 1953).

36. *A. P. Smith Mfg. Co. v. Barlow*, *supra* note 35, at 588.



izes it to do so; this absence of compulsion appears to substantiate its reasonableness. It must be noted, however, that the court did not explicitly express any concern for the substantive due process issue.

Corporate gift statutes might be upheld as a valid exercise of the state's police power in the absence of a reserve statute. In such case the contract clause is not reserved away but rather is subjected to the superior public interest of the state.<sup>37</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*,<sup>38</sup> determined that such legislation, in addition to being rational,<sup>39</sup> must also be borne of an emergency situation.<sup>40</sup> "Emergency" has not developed into a readily definable concept; a direct holding since the *Blaisdell* case is lacking.<sup>41</sup> *A. P. Smith Mfg. Co. v. Barlow*, while not discussing the issue of emergency in relation to police power and the contract clause, suggests that an emergency situation is being nurtured from abroad which requires the continued powerful counteracting influence of our educational institutions.<sup>42</sup> A policy of furnishing financial sustenance to our

37. *E.g.*, *East New York Savings Bank v. Hahn*, 326 U.S. 230, 233 (1945); *Viex v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 39 (1939); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, 375 (1918); *Stone v. Mississippi*, 101 U.S. 814, 816-817 (1879); *Finerty v. School City of Gary*, 213 Ind. 470, 474, 12 N.E.2d 941, 943 (1937).

38. 290 U.S. 398 (1934).

39. *Id.* at 438. The statement in this case was adopted by the court in *Nebbia v. New York*, 291 U.S. 502, 525 (1934), in the passage generally accepted as defining the substantive due process limitation today. See note 28 *supra*.

40. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426-440 (1934); *Block v. Hirsch*, 256 U.S. 135, 155 (1920). Once the necessary emergency is found, "[i]t is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." *Home Bldg. & Loan Ass'n v. Blaisdell*, *supra* at 442. *But cf.* "The emergency of the depression may have caused the 1932 legislation but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue." *Viex v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 39 (1939). Although the court will not release its control over whether or not the emergency prompting the legislation still exists, it suggests a wide latitude when asked to declare it ended.

Assuming, however, that the emergency which gave rise to the legislation must at the time in question still exist without question, the gift statutes would seem to come within such a requirement. This conclusion arises from the fact that most of the gift statutes have been enacted during the last 10 years. Hence, once it is established that an emergency existed at the time of passage, it is not difficult to demonstrate that the same emergency continues today. For dates of passage of the gift statutes see ANDREWS, CORPORATION GIVING 293.

41. *But see* *Viex v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 39 (1939).

42. *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 586 (N.J. 1953). The court's language here is probably intended to preface the holding that the corporate gift was to its direct benefit, rather than to justify the gift statute on the basis of an emergency situation. Nevertheless, the language seems to describe a situation which can be called "emergency" since it indicates that "threats from abroad" could destroy our "economic and social environment." There may be no need to discuss emergency in relation to the contract clause in this case, for the reserve statute may substantially remove the contract clause from consideration and leave only the problem of substantive due process

colleges and universities is considered one of the chief preventatives of national decay.<sup>43</sup> Accordingly, gift statutes might be upheld even without a reserve statute.

While gift statutes appear to satisfy due process requirements, a problem developing from the date of enactment of the reserve statute impeded corporate giving in at least one state. When the Indiana General Assembly passed the first General Corporations Act in 1929,<sup>44</sup> the act did not contain a reserve clause. Nor was there a general reserve statute in effect prior to its passage, although some corporate charters contained reserve clauses.<sup>45</sup> This lack of reserve power either went unnoticed or was considered unnecessary until 1949 when Indiana finally passed a reserve clause as an amendment to the General Corporations Act.<sup>46</sup> On the same day, the statute authorizing corporate donations was enacted, also as an amendment to the General Corporations Act.<sup>47</sup> Since it is extremely doubtful that a reserve statute can be applied retroactively,<sup>48</sup>

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for which an emergency situation need not be shown—if the reserve statute is operative. See note 33 *supra*.

43. See De Capriles and Garrett, *supra* note 9, at 209-210. Note particularly the sources listed at 209, n.3; Geiger, *supra* note 3, at 8. H.R. REP. NO. 2514, 82d Cong., 2d Sess. 4-5, 10 (1953).

44. Acts 1929, c. 215, §§ 1-76 (since amended). Prior to this act corporate legislation usually dealt with types of corporations: e.g., Acts 1853, c. 111 (telegraph companies); Acts 1859, c. 16 (canal companies); Acts 1865, c. 32 (hydraulic companies). There was, however, a previous attempt to give a specific act general application by enumerating various types of voluntary associations. See Acts 1901, c. 127.

45. See *Denny v. Brady*, 201 Ind. 59, 163 N.E. 489 (1928); *Indianapolis v. Navin*, 151 Ind. 139, 47 N.E. 525 (1898). Oddly enough, both of these cases involved a municipal transit company which is subject to legislative direction even though no power to alter, amend, or repeal is reserved. *Indianapolis v. Navin*, *id.* at 143, 163 N.E. at 490. A reserve clause is also found in Acts 1901, c. 127, § 37 (since repealed) which reserved the right to amend or repeal any part of that chapter. The act concerned voluntary corporations of various enumerated types. See note 44 *supra*.

46. "The right of the general assembly to alter, amend, or repeal this act is hereby expressly reserved, and all corporations formed or coming under this act are subject to such reserved right. If the application of this section to any corporation, person or circumstance is held invalid, the application of such provision to any other person, corporation, or circumstance shall not be affected thereby." IND. ANN. STAT. § 25-404(b) (Burns Supp. 1953).

47. IND. ANN. STAT. § 25-211b (Burns Supp. 1953). An interesting feature of this corporate gift statute is that it authorizes only such donations as the board of directors may reasonably believe will be deductible under the Federal Internal Revenue Code. The power is also subject to any contrary declaration in the articles of incorporation. These limitations might permit a future corporation to avert statutory authority of corporate giving, which otherwise could be exercised by the directors without stockholder approval, if so provided in its articles at the time of its incorporation.

48. Any attempt to make a reserve statute operate retroactively would be in direct violation of the rule established in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (U.S. 1819). The *Dartmouth College Case* held that a corporate charter was a contract protected by U.S. CONST. Art. I, § 10. Obviously, any legislation designed to overcome this rule is a violation of it, if it be applied retroactively. Even if a retroactive application of the reserve statute did not violate the *Dartmouth College Rule*, to be retroactive in effect the intent of the legislature must be express. *Indianapolis &*

corporations chartered prior to 1949 may not be subject to the reserve power. Hence, only those corporations chartered under or accepting the General Corporations Act since 1949 are clearly subject to this reserve statute.<sup>49</sup>

Manifestly, the severe limitations imposed upon corporate giving seventy years ago are being discarded by means most suitable to the jurisdictions in which they are exercised. In states, such as Indiana, where there is no clear common law prohibition against corporate giving, the most satisfactory method of legalizing donations is by a validating interpretation of the common law in the light of modern corporate environment. The stockholder desires today, as he did seventy years ago, the largest return possible on his investment; the corporation is still devoted to that end, but modern social pressure demands that different means be used to achieve it. When the law required a direct benefit for corporate expenditures, it did so with the corporate end and stockholders' interests in view. Circumstances have so altered the picture that a blind adherence to that restriction frustrates rather than furthers the professed goal. The ability to change under such circumstances has been extolled as a chief virtue of common law; certainly here is a worthy opportunity for its exercise. Authorization of corporate giving should not be distributed blindly by the courts, however. If the directors should make a gift obviously unreasonable in that it could not possibly benefit the corporation in any way, certainly that gift should be declared *ultra vires*.

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*Cincinnati R.R. v. Kercheval*, 16 Ind. 84, 88-90 (1861); *Aurora & Laugherty Turnpike Co. v. Holthouse*, 7 Ind. 59, 61 (1885); *Martindale v. Moore*, 3 Blackf. 275, 286 (Ind. 1833); *Lewis v. Brackenridge*, 1 Blackf. 220, 221-222 (Ind. 1822). The rationale of this rule is that law should be a standard of conduct which cannot be observed before it is known. It would be difficult to find any express retroactive intent in the reserve statute. IND. ANN. STAT. § 25-404(b) (Burns Supp. 1953). The wording, however, does not preclude a retroactive application or interpretation. Even though it says "hereby reserved," indicating future application, it continues, "all corporations formed or coming under this act are subject to such reserve right." Is "formed" used in the past tense? Or should the words "to be" mentally precede it, indicating future or prospective application? Does "coming" here mean "coming under this act after being formed," or "subject to the provisions of this act"? The first interpretation would indicate a prospective intent, the second, a retrospective intent. The second sentence of the act lends itself to a retroactive application. It carries a flavor of separability which defies explanation unless it be that the legislature, doubting the constitutionality of a retroactive application of the act, desired to insure that it would not be stricken down for purposes of prospective application also.

49. The act provides that those corporations chartered prior to its enactment might bring themselves under its provisions by making a formal acceptance of it. IND. ANN. STAT. § 25-246, 247 (Burns Repl. 1948). Upon acceptance the corporation is subject to all provisions, both privileges and obligations existing at the time of acceptance. If accepted after 1949, one of the obligations would be the reserve clause. See IND. ANN. STAT. § 25-248 (Burns Supp. 1953).

In those jurisdictions which have expressly declared corporate gifts *ultra vires*, re-interpretation of the common law is not feasible; courts are reluctant to overrule a common law precedent which has been long recognized. Statutory authorization is especially valuable in such a situation. If the state's reserve statute antedates the statute authorizing corporate gifts, there is generally no problem beyond the ordinary due process requirements. Even in those states which limit the application of the reserve statute as New Jersey did, *A. P. Smith Mfg. Co. v. Barlow* indicates that the limitation may be avoided when the public interest is involved. Unfortunately, the court's eager use of the common law and its elusive and vague extension of the reserve statute robs the case of much of its utility in this area.<sup>50</sup> To permit one minority stockholder to thwart the corporation's desire to accept the varied responsibilities demanded of modern corporations, and thus lessen the corporation's chances of producing an eventual maximum profit, seems to defeat the very purpose of its existence.

As a last resort, the gift statute might be authorized under the state's police power regardless of the existence of a reserve statute. Invocation of this concept to authorize corporate gift statutes, since it would impair the obligation of the stockholders' contracts, probably demands the existence of an emergency situation. Since "emergency" does not lend itself to precise definition under existing decisions, any use of the police power for this purpose is precarious.

None of the preceding methods should be used by the courts or the legislatures merely to impose the will of the general public upon stockholders. Nevertheless, corporations are institutions integral to our modern economic structure; their preservation should be an omnipresent consideration when imposing any economic regulation upon them. Conditions today demand activities uncommon to corporate law of the nineteenth century. As the demand then was to prevent corporate gifts in order to further the corporate end, so the demand now is to permit corporate gifts in order to further the corporate end.

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50. The courts language exhibits a clear desire to authorize the gift at common law. Its treatment of statutory authorization is correspondingly unclear. The common law is a familiar vehicle to the court; statutes, on the other hand, are expressions of legislative intent, subject, at times, to strange interpretations yet not so readily adaptable to the court's desires. The temptation to deal with the familiar, forsaking the unfamiliar, appears to have overcome the court. Consequently, the statutory issue is left in doubt. See note 33 *supra*.