making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. *Burgess v. Seligman*, 107 U.S. 20 [1883]."[1967] Although doubtless this was an available explanation in 1924, the decision in 1938, in *Erie Railroad Co. v. Tompkins*,[1968] so cut down the power of the federal courts to decide diversity of citizenship cases according to their own notions of "general principles of common law" as to raise the question whether the Court will not be required eventually to put *Gelpcke* and its companions and descendants squarely on the Contract Clause or else abandon them.

"Obligation" Defined.—A contract is analyzable into two elements: the agreement, which comes from the parties, and the obligation, which comes from the law and makes the agreement binding on the parties. The concept of obligation is an importation from the civil law and its appearance in the Contract Clause is supposed to have been due to James Wilson, a graduate of Scottish universities and a civilian. Actually, the term as used in the Contract Clause has been rendered more or less superfluous by the doctrine that "[t]he laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it."[1969] Hence, the Court sometimes recognizes the term in its decisions applying the clause, and sometimes ignores it. In *Sturges v. Crowninshield*,[1970] Chief Justice Marshall defined "obligation of contract" as the law that binds a party "to perform his undertaking," but a little later the same year, in *Dartmouth College v. Woodward*, he set forth the points presented for consideration to be: "1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?"[1971] The word "obligation" undoubtedly implies that the Constitution was intended to protect only executory contracts—*i.e.*,

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[1967] Tidal Oil Co. v. Flannagan, 263 U.S. 444, 452 (1924).

[1968] 304 U.S. 64 (1938).

[1969] Walker v. Whitehead, 83 U.S. (16 Wall.) 314, 317 (1873); Wood v. Lovett, 313 U.S. 362, 370 (1941).

[1970] 17 U.S. (4 Wheat.) 122, 197 (1819); *see also* Curran v. Arkansas, 56 U.S. (15 How.) 304 (1854).

[1971] 17 U.S. (4 Wheat.) 518, 627 (1819).