THE PRIVATE BOND CASE AS A POSTPONEMENT OF THE REAL ISSUE

J. ROLAND PENNOCK†

The discussion which immediately follows a significant Supreme Court ruling often emphasizes its political and economic effects; and if any respectable chain of reasoning can be found to serve the purpose, a decision expedient from an economic angle becomes "correct" from a legal point of view. Moreover, it is widely recognized that in the field of Constitutional Law the Court may escape the past without restricting the future by somewhat forced construction and a "proper" selection from among competing analogies. The existence of this process and the desire of the critic to approve a practically desirable result combine to minimize the importance of a single decision as a source of Constitutional Law. Yet in the long run the true significance of the case may prove to be that it furnishes points of reference on which the Court, if it chooses, may later rely. Viewed in this latter sense, as a precedent for the future rather than a result socially desirable for the present, the case of *Norman v. Baltimore & Ohio R. R.*[1] is found to contain many important implications which have passed unnoticed. In particular, if, as seems altogether likely, the process of extending federal powers continues, the "necessary and proper" clause and the Fifth Amendment as a substantive check thereon will inevitably become the focal points of a portentous struggle. An attempt will be made in the following pages to subject the *Norman* case to careful analysis with a special view to these implications.

The plaintiff's bond in this case provided that payment of principal and interest would be made in gold coin of the standard of weight and fineness existing when the bond was issued. A joint resolution of Congress declared invalid all contract provisions, past or future, which purported "to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby. . . ."[2]

The first section of Mr. Chief Justice Hughes' opinion deals with the interpretation of the clause in the bond. With the issues involved in this matter we are not here concerned. Suffice it to say that, while discarding the theory that the contracts were for gold as a commodity, or bullion, the Chief Justice also denied by implication the contrary contention that they were for gold coin and nothing else. They were, he concluded, "gold value" contracts,

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† A. B., 1927, Swarthmore College; A. M., 1928, Ph. D., 1932, Harvard University; Assistant Professor of Political Science, Swarthmore College.

1. 294 U. S. 240 (1935).

2. 48 STAT. 112 (1933), 31 U. S. C. A. § 463 (Supp. 1934).

and "were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed." [3]

The opinion then proceeds to a consideration of the power of Congress to establish a monetary standard. The broad outlines of this resultant power as sketched in the *Legal Tender Cases* [4] are recalled. It is pointed out that the doctrine that private contracts cannot stand in the way of the exercise of a federal power was said in those cases to permit an apparent frustration of contracts to pay in dollars by an act changing the definition of the legal tender dollar.[5]

With these preliminaries out of the way, the Court went to the heart of the subject and considered "the power of Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority." [6] Here the Court invoked the "established principle" that "contracts . . . cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity." [7] This is sound doctrine. As might now be remarked, however, the real question is whether a contract of debt, the value of which is to be determined by reference to a gold dollar of a certain content, is a subject matter which lies within the control of Congress. The subject matter of the contract would appear, at least, to be a debt—a value to be paid. The reference to currency is only as to a measuring rod. But before going into that question further it would be well to examine the authorities which the Court uses to support and elaborate the above doctrine. The first, and that in which the rule, as above, was formulated, was the case of *Hudson County Water Co. v. McCarter*.[8] In that case the right of a state to prevent the diversion of the water from an important stream into another state, despite the fact that the riparian owner had contracted to do so, was upheld. The contract had not been made until after the statute which was complained of. This fact, however, would not affect the argument from the due process clause, the reply to which is virtually identical with the doctrine we are considering. The main point, then, is that the subject matter of the contract (the water flow of an important stream) was held to be within the police

3. 294 U. S. at 302.
4. Knox v. Lee, 12 Wall. 457 (U. S. 1871).
5. In Knox v. Lee, the Court stated: "Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless. . . . It may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse Acts, or direct an embargo. All such measures may, and must, operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance." *Id.* at 311-312.
6. 294 U. S. at 306.
7. *Id.* at 307-308.
8. 209 U. S. 349 (1908).

power of the state to the extent of enabling the state to prevent its diversion to a point outside the state. "The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." [9] The rights of riparian owners have been historically subjected to various limitations. Furthermore, natural resources generally have long been recognized as especially subject to regulation.[10] Finally, it should also be pointed out that this case dealt with a state, rather than with the national government, which depends upon delegated powers. Clearly this case does nothing to answer the question whether or not the federal government has jurisdiction over the subject matter of the contracts in the *Gold Cases*.

The opinion next turns to cases where a federal power has been held to override private contracts. In *Addyston Pipe & Steel Co. v. United States*,[11] it was held that contracts, valid when made, could not be enforced when they operated directly to restrain interstate commerce, contrary to the Sherman Act. Here there was no dispute as to the power of Congress to prevent the very kind of restraints involved in the contracts. Clearly, then, the contracts must be considered to have been made subject to the exercise of this power. It should be noted that the purpose—the ultimate aim—of the parties to the contract was to regulate commerce. Thus it was within the scope of Congressional power.

This observation leads logically to the next case relied upon by the Court, that of *Louisville & Nashville R. R. v. Mottley*.[12] In that case the railroad company had given Mottley and his wife a free pass on the railroad for one year and an agreement to renew the pass at the end of each year as long as either of them should live, as part consideration for Mottley's release of a claim against the company for damages. Later, Congress passed a statute prohibiting the issuance of free passes; and, in this case, the Court held that the railroad company's contract could no longer be enforced. It is very important to note, however, that in doing so the Court stated: "Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover to restore the rights they had when the railroad collision occurred is a question not before us, and we express no opinion on it." [13] This contract does deal directly with a matter over which Congress has control—charges for interstate transportation. The purpose of the parties, however, was not directly to regulate the method of assessing such charges. This was merely the means of attaining a far different purpose, and one over which Congress had exercised no authority: namely, to give compensation for the settlement of a claim for

9. *Id.* at 356.
10. See Geer v. Connecticut, 161 U. S. 519 (1896).
11. 175 U. S. 211 (1899).
12. 219 U. S. 467 (1911).
13. *Id.* at 486.

damages. The above quotation from the Court's opinion would seem to be in recognition of this fact, and to point the way whereby the parties might still achieve this original purpose.

The lead given by the Court in this concluding observation in the *Mottley* case was followed up a few years later in the case of *New York Central & Hudson R. R. v. Gray,*[14] also cited by the Court in the *Norman* case. This was another "free pass" case arising under the Act of Congress prohibiting the issuance of such passes. Gray had received such a pass as part consideration for a map he had made for the railroad company. Unlike Mottley, however, he did not sue for specific performance of the contract but rather for the unpaid balance of the agreed price of the map. The trial court granted the claim, which was upheld both by the Supreme Court of New York and by the United States Supreme Court, on the ground that it was in accordance with "general principles of justice" and not incompatible with the Act of Congress. Congress, in other words, had made no attempt to prohibit contracts between railroad companies and private individuals for payment for services rendered. It had merely outlawed a certain method of payment.

Another case, not mentioned by the Court, should be noted in this connection. Great reliance is placed by the Court on cases upholding the right of states to void rate fixing contracts between public utilities and their customers.[15] Much more to the point, and to the contrary conclusion, however, is *Ortega Co. v. Triay.*[16] In that case a real estate development company had sold a branch street railway line worth about $33,000 for $10,000 cash plus a covenant with the purchaser to maintain the rates on the line at five cents. When this rate was later raised to seven cents by order of the Public Utilities Commission, the real estate company, alleging that this would destroy the value of its development at the end of the line, sued to prevent the violation of the contract. The Court upheld the Commission on orthodox grounds, but significantly added, ". . . while this denies the relief the Ortega Company prays against appellee, we do not wish to be understood as adjudging that the Company may not be entitled to some remedy for the non-observance of the contract by the Traction Company",[17] referring to *Louisville & Nashville R. R. v. Crowe.*[18]

14. 239 U. S. 583 (1916).

15. For example, Mr. Chief Justice Hughes cites New York v. United States, 257 U. S. 591 (1922), and United States v. Hubbard, 266 U. S. 474 (1925).

16. 260 U. S. 103 (1922).

17. *Id.* at 110.

18. 156 Ky. 27, 160 S. W. 759 (1913). This was another of the "free pass" cases arising out of the Congressional prohibition of such passes. In this case the pass had been given as payment for a right of way. The court upheld the claim for a cash compensation. The opinion noted that the Mottley case was not in point, because it dealt with specific performance, and declared that it had been unable to find any authorities on the subject, with the single exception of Cowley v. Northern Pac. Ry., 68 Wash. 558, 123 Pac. 998 (1912). Although that case (also involving a free pass) was decided the other way, the Kentucky court specifically declined to be governed by it. The Cowley case, in fact, was decided almost entirely on the basis of authorities which were not strictly in point and gave no satisfactory reasoned defense of its conclusion. In the Crowe case, the court referred to the many cases

Another of the cases cited by the Court in this connection, *Calhoun v. Massie,*[19] involved a contract for attorney's fee for the prosecution of a claim against the government in the amount of fifty per cent of the proceeds. A statute, enacted after the contract was made, limited such fees to twenty per cent. The validity of such statutes in general had been previously upheld and was not contested, but suit was brought directly against the client for payment (out of any money in his possession) as a substitute for the extra thirty per cent not awarded by the government. The claim was held to have been barred by the statute in question, and the statute was upheld as thus applied. The opinion is rather unsatisfactory, four justices dissented, and there are several considerations tending to deprive it of authority in support of the Court in the *Norman* case. Thus the general question of the validity of the statute as applied to contracts made before its passage was briefly dismissed by reference to *Ball v. Halsell.*[20] As pointed out in the dissent to the *Massie* case, however, *Ball v. Halsell* dealt with quite a different situation. The contract there was unilateral, and had not been executed even in part at the time of the passage of the act voiding it, and consequently was held to have been subject to change or cancellation by the maker at any time. It would seem, therefore, that the *Massie* case must be taken to have been decided on the basis of certain special considerations to which the Court devoted most of its attention. These considerations (that at the time the contract was made there was no legislation granting Massie any right of recovery even if his claim proved to be equitable, and that such a statute therefore was a condition precedent to Massie's liability to Calhoun; and that Calhoun's acceptance of the twenty per cent from the government estopped him from making further claim from Massie) were irrelevant to the general principle involved. It is also significant to note that, just the year before, the Court, in a unanimous judgment (Holmes, J., concurring in the result) had declared, by way of *dicta,* in a case involving the same statute:

> "If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States but from other assets of the estate, a situation is presented which it was said in *Nutt v. Knut,* 200 U. S. 12, 21, would not encounter legal objection. In other words, the limitation in the act appropriating the money to 20% as the amount to be paid to an agent or attorney would have no application or be involved." [21]

dealing with contracts where the fulfillment of *A's* part of the bargain was rendered impossible after *B,* in good faith, had performed part or all of his share. In several of these cases *B* was not allowed compensation. See *infra,* note 23. With regard to them, the court declared that they "do not hold that one party can take the property of another under a promise to pay for it, and still hold it, and not pay for it, if by reason of an enactment of law after the contract is made such party is prohibited from making payment in the article he contracted to pay with." 156 Ky. at 29, 260 S. W. at 760.

19. 253 U. S. 170 (1920).
20. 161 U. S. 72 (1896).
21. Capital Trust Co. v. Calhoun, 250 U. S. 208, 216 (1919).

Finally, it is important to note that even though the statute be taken to have been upheld apart from the special considerations, it was so upheld on the ground that Congress had the authority to regulate the whole matter of the amount of contingent attorney's fees for prosecuting claims against the government. Thus again we are faced with a situation where not only the substance of the contract as formulated, but the very purpose and intent of it were subject to Congressional regulation. Under such circumstances, of course, as in the already discussed *Addyston* case, no substitute would be possible. In fact, the Court distinguished this from the *Gray* case on that basis, saying, "Here, . . . a performance of a substitute for the obligation undertaken and later prohibited by the statute is impossible, because the act forbids the collection or receipt of any compensation in excess of twenty per cent." [22]

The application of all this to the *Norman* case would seem to be that the Court cited no authority supporting the power of Congress to invalidate contracts other than those dealing with a matter which Congress has the power to regulate; and, furthermore, that the power to invalidate even such contracts does not go to preventing the fulfillment of the purpose and intent of those contracts where that purpose and intent are lawful or are not within the scope of federal authority. It is not contended in the *Norman* opinion that Congress has authority to regulate ordinary contracts of debt, as such.[23]

22. Calhoun v. Massie, 253 U. S. 170, 176 (1920).

23. With regard to the questions raised by the cases treated above, Professor John Dickinson has written as follows: "Whatever may be thought of the quasi-contractual cases generally, it would certainly seem provocative of litigation and unsettling to the stability of transactions to hold that a subsequent exercise of the police power, while effective to terminate prior contracts, operates to give rise to equitable actions to readjust the position of the parties. The decision in the Baltimore and Ohio Bond Case would have little beneficial economic effect if, while holding that the bondholder could not recover the present value of the gold dollars promised him by the contract, he could still recover in an equitable action the difference in present value between what he gave and what, under the new legislation, it is lawful for him to receive. It does not seem likely that the courts will permit themselves to be drawn into any such calculus of relative values." Dickinson, *The Gold Decisions* (1935) 83 U. of Pa. L. Rev. 715, 720n. But there would seem to be no occasion for the determination of the present value of what was given for the gold bond. In New York Central & Hudson R. R. v. Gray, 239 U. S. 583 (1916), the price for the map had originally been fixed at $750, and that figure was used to ascertain the additional compensation due, by the simple process of subtracting payments in cash and fare and adding interest. The price of the loan made to the railroad company, in this case, had been fixed by the terms of the bond at $1000, the value of a dollar being defined as 25.8 gr. of gold, nine-tenths fine. The standard dollar of today is fixed at 15 5/21 gr. of gold, nine-tenths fine. The $1000, by the terms of the bond, is worth 25,800 gr. of gold. Dividing this figure by 15 5/21, we get $1693⅛ as the present value of the bond, assuming that the bond had matured.

Furthermore, there would seem to be no need for a separate suit in equity, in any case. Professor Dickinson is evidently working on the assumption that the gold clause case might possibly be brought within the doctrine of the Gray case to the effect that where the right to void the contract existed there might still be a right on the part of the injured party to compensation in cases where the original purpose of the contract was not within the scope of the legislation in question. But this is not the point. In the gold case, it is here being contended that there was no authority whatever to void the contracts in the first place. In other words, the validity of the contracts in the gold clause case bears the same relationship to the admittedly legitimate exercise of the legislative authority (the change in the gold content of the dollar) as did the validity, not of the free pass agreement, but of the sale of the map and the debt thereby incurred to the exercise of Congressional authority to ban free passes: namely, none which could justify extension of the power over the one to the other.

The Court concluded its consideration of this point by remarking, "The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority." [24] Thus the *Second Employers' Liability Cases* [25] and *Philadelphia, Baltimore & Washington R. R. v. Schubert* [26] upheld that provision of the Employers' Liability Act which voided all contracts the purpose of which was to enable the common carrier to exempt itself from the liability which the Act created. In this application, the proposition that what can be done indirectly can also be done directly is undoubtedly sound. The question then goes back to what can be done either incidentally or directly. Thus it should be noted that in the case of the Employers' Liability Act the contracts which were voided not only had as their subject the very matter (liability of interstate common carriers for injuries to their employees) which Congress had constitutionally regulated; but also that the contracts were designed to secure a result diametrically opposed to what Congress lawfully intended. Clearly, where the rule of liability rightfully imposed by Congress was opposed by a different rule contained in a private contract, the latter would have to fall. In the *Norman* case, on the other hand, Congress was professing to regulate the value of money; while the gold clause in the bond was attempting to fix the value of the debt. True, Congress may enact laws "necessary and proper" to prevent the evasion of its authority. But the gold clauses in no way evade the regulation of the value of money. Congress can exercise that power to its fullest without hindrance by such contracts. It is merely one of the incidental effects of that power (the alteration in the value of a certain kind of property—debts) which is affected. If this were something which in itself was subject to Congressional regulation, then, of course, private contracts regulating it could be invalidated. But Congress has no power, as such, to alter the value of debts. An incidental result of Congress's exercise of its power to regulate the value of money may be to make salaries, fixed in terms of dollars, less valuable (in terms of commodities) than they previously were. Yet certainly Congress could not, even if it would, compel a proportionate increase in all salaries.

But if the gold clauses are not evasions of a kind which Congress can prohibit, are they interferences with the exercise of Congressional power? This brings us to the fourth and last of Mr. Chief Justice Hughes' main points: "The effect of the gold clauses in suit in relation to the monetary policy adopted by the Congress." [27] In the light of our preceding analysis, it appears that this is the only prop left for the government's case. It might be expected that this point would be fully and carefully investigated in the

24. 294 U. S. at 309.
25. 223 U. S. 1 (1912).
26. 224 U. S. 603 (1912).
27. 294 U. S. at 311 *et seq.*

opinion.[28] Such can hardly be said to be the case. The matter of interference depends, as the Court said, upon the determination of questions of fact. Following the rule of *M'Culloch v. Maryland*,[29] the Court declared that it would inquire into such questions only as far as is necessary to determine whether the action of Congress bore a reasonable relation to a legitimate end.[30] A large part of this section of the opinion is devoted to quoting from the report of the House Committee on Banking and Currency,[31] and from the Joint Resolution itself, and to arguing the point that to allow payment in gold would be an interference with a lawful exercise of Congressional power. When it comes to the clinching and all-important point, the question of allowing payment in legal tender at 169 per cent of the face value of the debt, less than a page sufficed the Court. It began by pointing out the obvious fact that to invalidate the Joint Resolution would greatly increase the liabilities without increasing the assets of a great many states, cities, and private corporations, and that the total of this dislocation would be very extensive. To quote the opinion: "It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency." [32]

True. But this way of stating the fact seems to be designed to confuse rather than to clarify. It is merely another way of stating that if people are to be forced to do what they contracted, in the event of a certain exigency, to do, the resulting economic dislocations will be very great. It might be possible to go on to argue from this point that somehow these economic dislocations, and thus the contracts which in their present application would be the immediate occasion for them, constituted interferences with the power of Congress to regulate the value of the currency, to make the currency legal tender, and to establish a uniform monetary system. That, however, is not at all what the majority opinion does. The opinion proceeds to its conclusion as follows:

> "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an evasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that

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28. See Post and Willard, *The Power of Congress to Nullify Gold Clauses* (1933) 46 HARV. L. REV. 1225, 1226.
29. 4 Wheat. 216, 421, 423 (U. S. 1819).
30. 294 U. S. at 311.
31. H. R. REP. No. 169, 73d Cong., 1st Sess., Ser. No. 9774 (1933).
32. 294 U. S. at 311.

currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed." [33]

This paragraph is difficult to submit to logical criticism because there appears to be so little logic about it! Professor Corwin puts it mildly indeed when he declares that it is "certainly difficult to see just how" the gold clause interpreted simply as the measure of the value of a debt does or can interfere with the uniformity of the currency.[34] It would seem that the Chief Justice has refused, or otherwise failed, to follow to its logical conclusion his own decision that the contract expressed by the gold clause is a gold value contract. That logical conclusion would seem to be that there is clearly no interference with the power of Congress to maintain a uniform currency system.[35] The opinion would thus be left with no basis whatsoever for the exercise of Congressional authority attempted by the Joint Resolution. The latter would be voided by default of any power to sustain it.

As will be suggested later, there may be some special significance to be attached to the Chief Justice's method in this case. In the meantime, however, let us forsake the opinion itself and examine what sort of a case could have been made out for the validity of the Joint Resolution. The old formula of legitimate end and appropriate means must be our guide here. It was apparently not contended before the Court, nor is it likely to be contended, that the doctrine of resultant powers could be used to maintain the right of Congress to provide outright for the readjustment of debtor-creditor relationships. Even admitting, *arguendo,* that the net effect of the various specific monetary powers delegated to the national government shows the intention, on the part of the framers, to make that government essentially sovereign in the whole field outlined by these specific powers,[36] yet even this broad grant

33. *Id.* at 316.

34. N. Y. Times, Feb. 24, 1935, pt. 2, at 1.

35. Thus Mr. Edward W. Bourne, arguing for the trustees under the railroad's mortgage in the case of United States v. Bankers' Trust Co. (decided with the Norman case), stated: "Taking what has been done so far, the attempted policy of Congress at the moment is that a silver certificate which is on a parity with the 15 grain gold dollar is also on a parity with the 25 grain gold dollar. This I contend is impossible, to maintain one thing at a parity with two other things so physically different and unequal." U. S. L. Week, Jan. 15, 1935, at 21.

36. *Cf.* M'Culloch v. Maryland, 4 Wheat. 316, 405-409 (U. S. 1819); Legal Tender Cases, 12 Wall. 457, 535-539 (U. S. 1871); Juilliard v. Greenman, 110 U. S. 421, 438 (1884).

could not be made to encompass the readjustment of debts as such.[37] The question, then, is whether the striking down of the gold clauses can be considered as an appropriate means of exercising any Congressional power—specifically, one of the monetary powers, or several of them taken together.[38]

Apparently it could only be so considered if the existence of such clauses can be said to obstruct or interfere with the power of Congress to establish and maintain a uniform currency, to regulate its value, and to make it legal tender. The parity argument has already been disposed of. Aside from that, the only way it would seem possible to contend that the gold clauses constitute such an interference is to point to the dire economic consequences to the country which might ensue as a result of the alteration in the value of money by Congress, should these contracts be allowed to stand. It would seem to be a very far-fetched interpretation to say that anything which rendered the exercise of a power unfeasible was an obstruction to the exercise of that power and therefore could be abated.[39] Even the case of *Wilson v. New,*[40] generally recognized as approaching the limit, did not go that far. There the threatened general railroad strike was certainly a potential obstruction to interstate commerce, and, as such, an obstacle to Congressional power to regulate commerce. Let us suppose that the threat of strike had extended only to the question of the eight-hour day. Suppose, nevertheless, Congress had felt that to impose the eight-hour day and to allow the railroads to pay proportionately less wages would create a serious economic situation, owing to the consequent decline in purchasing power, and had therefore decreed that daily wages should not be decreased. This would be a truly parallel case to the gold clause cases. The answer would seem to be obvious. Or, again, suppose Congress, in imposing additional liability for injuries to employees

37. *Cf.* Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation* (1934) 44 YALE L. J. 53. Mr. Nussbaum, although hoping, on broad grounds, for a favorable decision in the Gold Cases, wrote as follows: "If the Joint Resolution of June 5, 1933 is constitutionally sustained in its effort to render inoperative both gold coin and gold value clauses, it will constitute a virtual release of debts . . . on the largest scale ever recorded. . . . This must be borne in mind not only to understand the financial and historical importance of the Joint Resolution, but also to realize that the Act is not chiefly a technical monetary measure, as the title and the preamble suggests, but in reality a release of debts, and an encroachment upon the law of contract." *Id.* at 58.

38. *Cf.* Mr. Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 407-408 (U. S. 1819): "It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. . . . But it may with great reason be contended, that a government, entrusted with such ample powers, . . . must also be entrusted with ample means for their execution."

39. Thus Mr. Bourne declared, "They [the gold clauses] do not obstruct the exercise of Congress' power. They merely limit the indirect effects of such exercise. No case in this Court has ever held that a contract may not limit the indirect effects of something Congress may do. . . . The power of Congress to establish a sound and uniform currency is not for regulating prices and changing debts. Indirect effects of the exercise of a lawful power do not measure the scope of the power." *Loc. cit. supra* note 35.

The opposing contention was put forth by the Attorney General as follows: "The maintenance of the gold clause . . . would make so serious the consequences of [congressional] regulation that the exercise of this power by the Congress would be rendered impractical." *Id.* p. 431. It is interesting to note that the Court did not follow this lead.

40. 243 U. S. 332 (1917).

on railroads, lowered wages ten per cent, so as to limit the burden on the railroads. The consequences of the doctrine being criticized are almost without limit. One of the first, and most direct, would be to allow Congress to anticipate all sorts of economic misfortunes which might result from its monetary policy, and to provide for them accordingly, as, for instance, by regulating all wages and salaries by reference to the price level.[41]

Surely we must be off the track. It cannot be that it has ever been considered by the Court that, in maintaining the right of Congress to remove obstructions to the exercise of its powers, it meant that anything which would render the exercise of a power "unfeasible" could be considered such an obstruction. Furthermore, we find strong support for this belief where, perhaps, one would least expect to find it, but where, for that very reason, it carries most weight. In the *Legal Tender Cases* themselves, Mr. Justice Strong declared:

> "It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution." [42]

This, it is submitted, is the true rule: the auxiliary power of Congress must be used to aid in the execution of primary powers; not to render their exercise more feasible by limiting their indirect results.[43]

We have yet to consider the status of the Joint Resolution with relation to the Fifth Amendment. The majority opinion does not discuss, or even mention this aspect of the problem. Just why this is so is not clear. So far as concerns the "due process" clause of that amendment, it is sometimes still maintained that it, unlike the due process clause of the Fourteenth Amendment, is not a check on the substance of legislation.[44] The Court, however,

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41. Another conceivable argument would be that the Joint Resolution was necessary to prevent a collapse of the banking system, and the drastic deflation which would follow, and that in this sense it was a regulation of the value of money. As has been pointed out elsewhere, however, this acceptance of the quantity theory of money (by implication) would clothe Congress with power to regulate all the factors involved in that theory—including the supply of goods. Eder, *Legal Theories of Money* (1934) 20 CORN. L. Q. 52, 67.

42. Knox v. Lee, 12 Wall. 457, 543 (U. S. 1870).

43. The most recent application of this doctrine was in A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935), decided at the same term of court, which appears very difficult to reconcile with the Norman case. In the Schechter case the Court declared (at p. 546): "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects." And again, "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." Apparently "states' rights" have a stronger hold upon the Court than individual rights.

44. See, *e. g.*, Collier, *Gold Contracts and Legislative Power* (1934) 2 GEO. WASH. L. REV. 303. Professor Collier's argument from Burnet v. Brooks, 288 U. S. 378 (1933), rests

seems to have settled this question beyond doubt in the case of *Heiner v. Donnan,* where it stated, "The restraint imposed upon legislation by the due process clauses of the two amendments is the same." [45]

Nor can it be successfully argued that the Court's application of the test of "legitimate end" and "appropriate means" covered the same ground as would the due process test. In the concluding sentence of the opinion, which is the only one which can be taken, even inferentially, to refer to the Fifth Amendment, it is stated: "We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed." [46]

But it still might be argued that the means which Congress chose for the removal of the interference was arbitrary. This amounts to the argument that the Joint Resolution took property from *A* and gave it to *B,* which is the classic example of taking property without due process of law. It is possible to contend that, if Congress did have the authority to void these contracts, it adds nothing to say that in doing so it has violated property rights, for its action would have been in accord with due process of law by virtue of the very fact that it was exercising a valid power. Another way of reaching the same result would be to argue, as the Court did argue, that property rights in gold contracts are created subject to a "congenital infirmity." But the Court does not always follow this line of reasoning. It departed from it very shortly after the *Gold Cases* in its decision on the Frazier-Lemke Act.[47] The act in question (a purported exercise of the power to enact bankruptcy laws, not specifically denied by the Court to be an exercise of that power) materially reduced the property rights of certain mortgagees to the benefit of the mortgagors. It would have been possible to argue that the bankruptcy power rendered all mortgages subject to a congenital infirmity admitting of such legislation as was here involved. On the contrary, however, the Court, without denying that the end in view was legitimate or holding that the means selected bore no reasonable relation to that end, nevertheless unanimously held the act unconstitutional. It declared:

> ". . . the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly

upon a misinterpretation of that case. The decision upheld a federal succession tax as applied to the intangible property of a non-resident represented by securities physically present in the United States, despite the fact that a similar state tax had previously been held to violate the due process clause of the Fourteenth Amendment in Baldwin v. Missouri, 281 U. S. 586 (1930). The distinction was not based, however, upon any alleged difference between the two due process clauses, but upon the ground that, while the due process clause merely requires that jurisdiction should be a condition precedent to taxation, the nature of our federal system imposes greater limits upon the jurisdiction of the states than on that of the federal government. See Burnet v. Brooks, *supra,* at 400, 401 (1933).

45. 285 U. S. 312, 326 (1932).
46. 294 U. S. at 316.
47. Louisville Jt. Stock Land Bank v. Radford, 295 U. S. 555 (1935).

public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain. . . ." [48]

Let us, then, look more carefully at cases in which the total or partial destruction of property rights has been held a "taking" of property in the constitutional sense, and so to require compensation. First of all, contracts may create property rights, as is admitted by the Chief Justice in this case,[49] and as was recently held in the case of *Lynch v. United States*.[50] The gold clauses, then, clearly do create such rights. (This statement is made without prejudice to the "congenital infirmity" argument.) Nor need property be "taken" in the literal sense in order that compensation may be required. In the leading case on the subject,[51] a dam constructed in accordance with law caused the permanent flooding of plaintiff's land, thereby rendering it virtually valueless. The argument that the damage was a mere consequential result of the use of the stream to which the government admittedly had a right was overruled. The action of the state was held to violate the provision of the Wisconsin Constitution which declares that "The property of no person shall be taken for public use without just compensation therefor." [52]

48. *Id.* at 602. The relationship of the two opposing and alternative lines of approach outlined above is illuminated by reference to the following remarks of Mr. Justice Holmes: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the right of eminent domain." Hudson County Water Co. v. McCarter, 209 U. S. 349, 355 (1908). Similarly, in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413 (1922), Mr. Justice Holmes declared: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution."

49. 294 U. S. at 327.

50. 292 U. S. 571 (1934).

51. Pumpelly v. Green Bay Canal Co., 13 Wall. 166 (U. S. 1871).

52. Wis. Const. art. I, § 13. The Court spoke as follows: "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for the protection and security of the rights of the individual as against the government . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely . . . without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use." 13 Wall. at 177, 178. The case has been widely followed, sometimes distinguished, but never reversed. Thus, in the frequently cited case of Manigault v. Springs, 199 U. S. 473 (1905), compensation was denied on the ground that damage to property was not great enough to constitute a taking. The Court discussed the Green Bay and other cases, concluding: "We think the rule to be gathered from these cases is that where there is a practical destruction, or material impairment of the value of plaintiff's lands,

A series of cases have held the same doctrine applicable to the government of the United States, under the Fifth Amendment.[53] The case of *Omnia Commercial Co. v. United States*[54] is frequently referred to in this connection, and was mentioned by the majority opinion in the *Gold Cases.* This was a war time case involving a government requisition of the full production of a steel plant with the result that the plant was unable to supply steel contracted for by plaintiff. This was held to be a case of consequential loss from lawful action of the government for which there was no remedy. The point was made that it was the steel and not the contract which was requisitioned. The argument that the necessary result of the government's action was to destroy (and thus to "take") plaintiff's property right in the contract was not considered in the Court's opinion. It is important to note, however, that the Court stressed the fact that the government dealt only with the steel company and not with the plaintiff.[55] The Joint Resolution involved in the *Gold Cases,* on the other hand, dealt, of course, solely and directly with the parties to the contract to pay in gold, and destroyed the right of the beneficiary of the contract as completely and directly as anything could. There was no question of a consequential result of a lawful action.

One other case should also be considered in connection with, and in limitation of the *Omnia* case: that of *International Paper Co. v. United States.*[56] Here a government requisition of water power under the National Defense Act was held to require compensation regardless of the fact that the government did not itself use the water, but directed it to other uses. It is particularly significant to note that the government's contention that the interference with plaintiff's property was, at most, a result of the exercise of the power of the United States to regulate industry and the use of material resources in time of war, for which no compensation was payable, did not prevail.

Finally, we must refer again to the *Radford* case,[57] this time with specific application to the sort of "taking" involved in the *Norman* case rather than just to the general principle that the Fifth Amendment limits the "necessary and proper" clause. The parallel between it and the Joint Resolution is indeed striking. In both cases an Act of Congress directly and expressly

there is a taking, which demands compensation, but otherwise where as in this case plaintiff is merely put to some extra expense in warding off the consequences of the overflow." *Id.* at 484, 485.

53. In United States v. Lynch, 188 U. S. 445 (1903), the turning of a valuable rice plantation into an irreclaimable and valueless bog as the necessary result of river improvement by the United States was held a taking of the land within the protection of the Fifth Amendment. See, similarly, United States v. Cress, 243 U. S. 366 (1917); Jacobs v. United States, 290 U. S. 13 (1933). In the case of Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327 (1922), the installation of batteries to fire over plaintiff's land, which was chiefly valuable as a summer resort, was held a taking in the constitutional sense.

54. 261 U. S. 502 (1923).

55. *Id.* at 511.

56. 282 U. S. 399 (1931).

57. Louisville Jt. Stock Land Bank v. Radford, 295 U. S. 555 (1935), cited *supra* note 47.

altered the legal effect of the terms of private contracts, to the detriment of creditors. In both, justification was sought in the theory that the act was auxiliary to the exercise of an acknowledged power of Congress. Although in the *Radford* case it was argued that the statute in question was not really a bankruptcy law, and so did not come under the power of Congress to enact bankruptcy legislation, that question was not answered. Therefore, Mr. Justice Brandeis's concluding sentence, quoted above,[58] can mean nothing but that direct destruction of contractual property rights by Congress, even though contributory to an end which Congress may legitimately pursue, constitutes a taking of property for which compensation is required. This is also in line with other cases discussed above. The conclusion that the Joint Resolution falls in the same category seems inescapable.

Assuming that the Court was determined to sustain Congress if at all possible, at least two alternative lines of reasoning not in fact used by the Court suggest themselves. As it seems probable that either of them would have been logically preferable to the line actually followed, it is interesting to speculate as to why the Court chose the path it did. One of the alternatives, as has already been suggested, would have been to have treated the gold clauses as obstacles to the will of Congress. Although the Court does refer to them as such, the decision, as we have seen, actually goes on the theory that they interfered specifically with the uniformity of the currency. The broader argument that the very fact of the tremendous economic dislocation which would result from devaluation apart from cancellation of the gold clauses would constitute an interference such as Congress could lawfully remove without compensation was not utilized by the Court. True, it has been argued here that that line of reasoning is not sound. Nevertheless, it would seem to possess greater plausibility than the Court's brief and obscure development of the "parity" argument. As was noted above,[59] however, the acceptance of that line of argument involves serious and extreme consequences. It may well be that that accounts for the fact that the Chief Justice chose the "parity" argument. Whatever is to be said of its logic, at least its application must be confined to the power over the currency. Thus it cannot be used to justify the extension of other federal powers at the expense of private rights. This might well have bulked large in the minds of the Chief Justice and his concurring brethren.

The other alternative would have been to have interpreted the gold clauses as "gold coin" clauses instead of as "gold value" clauses. This interpretation was warmly supported in the arguments. To quote the Court's own paraphrasing of the contention: "The parties . . . intended that the

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58. *Supra*, p. 206.

59. *Supra*, pp. 203, 204.

instrument should be negotiable and hence it should not be regarded as one 'for the payment of an indeterminate sum ascertainable only at date of payment.' "[60] Payment in gold coin now being impossible, the argument continues, this part of the contract falls, leaving the obligation to pay in dollars. This theory is open to two objections. In the first place, it would be difficult to prove that the requirement of gold value is incompatible with the "certainty of amount" requisite for negotiability. But, aside from this technical point, a more fundamental objection to the contention is that, although the parties intended the instrument to be negotiable, they also intended its value to be fixed in terms of gold. If the time should come, through action of the state in regulating money, that the instrument could no longer remain negotiable if interpreted as a gold value contract, then, clearly, their intention to have it so interpreted would over-ride their desire to have it negotiable. Otherwise, their intention to fix the value would cease to be effective just when it was needed. The limitation thus imposed upon negotiability, on the other hand, would not be serious, for it would be effective only under very exceptional circumstances—circumstances so exceptional and so serious as to render the question of negotiability clearly secondary.[61]

Yet the "gold coin" argument did offer an avenue of escape. The Court refused to take it, without going into the above reasoning. It contented itself with stating its conclusion that the contracts are "gold value" rather than "gold coin" contracts, after reciting the arguments of counsel based upon the wording of the clause (as indicating intention to anticipate a possible change in the standard) and upon a decision of the House of Lords[62] and two decisions of the Permanent Court of International Justice.[63] In the *Feist* case, relying in part upon the *Serbian Loans Case,* Lord Russell of Killowen declared: "I would construe clause 1[64] not as meaning that 100 *l.* is to be paid in a certain way, but as meaning that if the obligation is to pay a sum which would represent the equivalent of 100*l.* if paid in a particular

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60. 294 U. S. at 298 (1934).

61. A similar argument has recently been acutely elaborated by Professor John Dickinson, who contends that the susceptibility of the gold clause to legislative abrogation is the price paid for negotiability. Admitting that the bond is a gold value contract, he argues that, because the parties intended negotiability, they necessarily subjected the contract to that power of Congress (the power to change the value of the contract) without which no negotiability could be insured. Dickinson, *supra* note 23, at 717, 718. The answer to this contention is the same as that given above; the intention to fix the value over-rides the design to render the evidence of debt negotiable.

62. Feist v. Société Intercommunale Belge D'Electricité, [1934] A. C. 161.

63. Serbian and Brazilian Loans Cases, Publications of the Permanent Court of International Justice, Series A, Nos. 20/21 (1929).

64. The clause read: ". . . the sum of 100*l.* in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928." [1934] A. C. 161, 166.

way. . . ." [65] A quotation from the case of the *Serbian Loans* is interesting and in point. It reads:

> "As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word 'gold' cannot be ignored, the question is: What must be deemed to be the significance of that expression? . . . In so contracting, the Parties were not content to use simply the word 'franc', or to contract for payment in French francs, but stipulated for 'gold francs'. It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it." [66]

Perhaps the most significant fact about these decisions as far as concerns the gold cases, however, is the fact that Mr. Hughes was a member of the Court which delivered the opinions and judgments. Counsel were quick to point this fact out. It is at least possible that here we have the deciding reason why the Court chose the gold value interpretation of the gold clauses and thus forced itself into the further difficulties pointed out above. It must be said, however, that any path which it might see fit to follow in order to uphold the Joint Resolution presented difficulties enough to stagger weaker men.

It is not within the province of this article to speculate as to what devices may be resorted to in the future in the attempt to encompass the object which the gold clauses failed to attain. Some of the possibilities, however, suggest interesting problems which the Court may yet be called upon to solve. Take, for instance, the case of a contract of debt stated in terms of currency (dollars) with an explicit provision that in the event of depreciation of the dollar (defined in some way or other) the debt should no longer be in currency (no longer be intended to be negotiable), but should be measured in terms of gold on the London market (or what not). Or, suppose insurance companies are organized to sell policies expressly designed to protect creditors against currency depreciation in proportion to their long-term credits. Suppose, further, that resort to these policies should become as common as the use of the gold clause in the past. In circumstances such as those which called forth the Joint Resolution, could these policies be abro-

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65. [1934] A. C. at 172. The following remarks of the Court in the Serbian Loans Case are also of interest in relation to the Gold Decisions: "The conclusion at which the Court has thus arrived is not affected by the fact that, for more or less extended periods gold specie in francs or a franc at gold parity was not quoted on the money market, as was the case at the time when the loans were issued; for the value can always be fixed either by comparison with the exchange rates of currency of a country in which gold coin is actually in circulation, or, should this not be possible, by comparison with the price of gold bullion." At p. 36.

66. At p. 32.

gated? If faced by either of these situations, the Court certainly would be driven to abandon its "parity" argument as inapplicable. Nor could reliance upon a different interpretation of the contract meet with any greater success. The only possible escape which occurs to the writer would be to adopt the broadest interpretation of the interference argument, which even in the present case the Court apparently was not satisfied with; while in the cases suggested (especially the second) its application would require even more far-fetched reasoning than it would have in the *Norman* case.

Furthermore, the adoption of such reasoning by the Court would involve the virtual nullification of the due process clause of the Fifth Amendment as a substantive limitation on powers of the federal government (as applied in the *Radford* case).[67] This would be true even when such powers are deduced by the extremely broad application of the "necessary and proper" clause which was categorically banned in the *Schechter* case.[68]

It would seem, then, that there is no logically sound basis on which to rest the decision in the *Norman* case; that, in selecting the "parity" argument upon which to base its case, the Court chose the alternative which, from the point of view of not opening the way to further extensions of power over private contracts, was safest, but which could hardly be called the least illogical; and, finally, that, following some future crisis, the Court may well be faced with the dilemma of having either to overrule its past decisions to the effect that the due process clause of the Fifth Amendment limits the "necessary and proper" clause or to declare unconstitutional an exercise of Congressional authority analogous to that involved in the *Norman* case.

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67. *Supra*, pp. 205 *et seq.*
68. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).