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THE gold clause decisions of February 18, 1935, have already taken their place among the great landmarks of American constitutional history. They have given a partial answer to some basic questions of constitutional law. Directly they have disposed of claims amounting to a total of many billions of dollars. But their further implications, both for public and private law, are of even greater magnitude; it may be many years before these wider implications are more fully understood.

The five cases, decided by the Supreme Court on the same day, all involved the constitutionality of the Congressional joint resolution approved by the President on June 5, 1933. The purpose of the resolution, as declared in its title, is "to assure uniform value to the coins and currencies of the United States." It recites, first, that "the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction," and, second, that "the existing emergency has disclosed" that obligations calling for payment "in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts." The operative language of the resolution is as follows: [1]

"(a) Every provision contained in or made with respect to

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[1] 48 Stat. 112 (U. S. C. A. tit. 31, Supp., secs. 462, 463). Section 2 of the joint resolution is an amendment to the Agricultural Relief Act of May 12, 1933, and provides that "All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations)

any obligation which purports 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, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

The five cases may be divided for purposes of discussion into two groups, (1) two cases involving the public obligations of the United States, and (2) three cases involving gold clause contracts between private parties.

I

PUBLIC OBLIGATIONS

The case of *Nortz v. United States* [2] came up to the Supreme Court on certified facts from the Court of Claims. The plaintiff sued the United States Government, claiming as holder of $106,300 in gold certificates issued by the Treasury. These certificates were in the usual form, reciting that a specified sum in gold coin had been deposited at the Treasury and would be paid to the holder on demand. Plaintiff alleged that he presented the certificates and demanded payment on January 17, 1934; that the demand was refused; and that, to avoid the penalties for the possession of gold certificates imposed by the regulations of the President and the Secretary of the Treasury, he surrendered the certificates under protest and received instead currency of the United States, which was not redeemable in gold, to the amount of

heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private. . . ."

[2] (U. S. 1935) 55 Sup. Ct. 428, Justices McReynolds, Van Devanter, Sutherland, and Butler dissenting.

$106,300. Plaintiff sued for $64,334.07 damages, representing the difference between the currency so received and the value of the gold coin described in the certificates. The Supreme Court held that the plaintiff had shown no substantial damages through the refusal to pay gold coin and that the action therefore could not be maintained.

In *Perry v. United States* [3] the plaintiff likewise sued in the Court of Claims. He claimed as the owner of a $10,000 Fourth Liberty Loan bond. He alleged that the bond was issued in 1918, was payable "in United States gold coin of the present standard of value," was called for redemption on April 15, 1934, and was presented for payment by him on May 24, 1934. Plaintiff then alleged a demand for delivery of the quantity of gold represented by $10,000 in gold coin at the time the bond was issued or, in the alternative, for payment of $16,931.25 in legal tender currency. On the refusal of the Government to pay more than $10,000 in legal tender currency the plaintiff sued for $16,931.25 damages, "the value of the defendant's obligation." As in the gold certificate case the Supreme Court held that the action could not be maintained, since no substantial damages were shown as a result of the Government's refusal to pay more than the nominal sum fixed in the bond.

The decisions denying recovery in both these cases rest initially on one basic assumption. All the opinions (including the dissenting opinion of Mr. Justice McReynolds [4]) proceed on the assumption that the legislation withdrawing gold coin from circulation and prohibiting the domestic possession or the export of gold coin or gold bullion constituted a valid exercise of the power to regulate the currency.[5] Neither

[3] (U. S. 1935) 55 Sup. Ct. 432, Justices McReynolds, Van Devanter, Sutherland, and Butler dissenting.

[4] The opinion of Mr. Justice McReynolds says (55 Sup. Ct. 407 at 423): "The authority exercised by the President and the Treasury in demanding all gold coin, bullion, and certificates is not now challenged; neither is the right of the former to prescribe weight for the standard dollar. These things we have not considered."

In another place Mr. Justice McReynolds clearly indicates his opinion that the owners of gold coin or gold bullion are entitled to compensation for its value in the event that its appropriation is authorized for governmental purposes. *Ibid.*, pp. 425-426.

[5] The withdrawal of gold coin from circulation had commenced on March 6, 1933, the day on which the bank holiday was declared. The Secretary of the Treasury then issued instructions that payments in gold in any form were to be made by the Treasury only on special license of the Secretary. Proclamation No. 2040, U. S. C. A. tit. 12, Supp., p. 44 (1933).

By the Emergency Banking Relief Act of March 9, 1933 (48 Stat. 1) this action of the Secretary of the Treasury was confirmed and the President was also authorized during periods of national emergency to "investigate, regulate, or prohibit . . . explaintiff in fact contested its validity; the plaintiff in *Nortz v. United States* expressly admitted the power of the Government to appropriate outstanding gold coin, gold bullion, and gold certificates and to compel all residents of the country to surrender them. Chief Justice Hughes, speaking for the majority, went further and declared that "these powers could not be successfully challenged." [6] The constitutionality

port, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof. . . ." By the same act the Secretary of the Treasury was authorized to require all persons to deliver to the Treasurer of the United States "any or all gold coin, gold bullion, and gold certificates" owned by them, for which they were to receive "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." Under the authority thus conferred the following orders were issued:

(1) By executive order No. 6102, signed by the President on April 5, 1933 (U. S. C. A. tit. 12, Supp., p. 68), all persons were required to deliver to a Federal Reserve Bank or to a member bank of the Federal Reserve system all gold coin, gold bullion, or gold certificates owned by them. Exceptions recognized were "Such amount of gold as may be required for legitimate and customary use in industry, profession or art within a reasonable time"; gold coin and certificates up to the amount of $100 and gold coins "having a recognized special value to collectors of rare and unusual coins"; gold coin and bullion earmarked or held in trust for recognized foreign governments or foreign central banks; and gold coin or bullion licensed for other proper transactions. Fines up to $10,000 and imprisonment up to 10 years were authorized for violation of the order.

(2) By a Presidential order of April 20, 1933, the earmarking of gold coin, gold bullion, or gold certificates for foreign account and their export to foreign countries was prohibited except on license from the Secretary of the Treasury. Executive Order No. 6111 (U. S. C. A. tit. 12, Supp., p. 46).

(3) By regulations of the Secretary of the Treasury on April 29, 1933, the export of gold coin, gold bullion, and gold certificates except on license of the Secretary was again prohibited, and the grant of licenses for domestic use was provided for in detail. (Quoted in brief for the Government, App., pp. 22-34.)

(4) By Presidential order (Executive Order No. 6260) of August 28, 1933 (U. S. C. A. tit. 12, Supp., p. 46), the earlier orders of April 5 and April 20 were revoked, but the substance of their provisions was re-enacted and detailed provisions were added for investigation into domestic ownership of gold and for report by owners and custodians of gold to local collectors of internal revenue.

Other executive orders and regulations, repeating in substance the provisions above outlined, were issued on September 12, 1934, December 28, 1934, January 15, 1934, and January 30 and January 31, 1934.

[6] (U. S. 1935) 55 Sup. Ct. 428 at 431. One of the three questions certified to the Supreme Court by the Court of Claims had purported to raise this question of constitutionality. The Court of Claims asked whether the provisions of the Emergency Banking Act and the regulations of the Secretary of the Treasury issued thereunder amounted to a taking of property within the meaning of the Fifth Amendment, in so far as they required the plaintiff to surrender the gold certificates in his possession. The Court said that this question was "academic," in view of the fact that the surrender had already occurred and in view further of its holding that no damages were shown by the plaintiff through failure to secure gold coin.

of the gold-hoarding legislation had already been affirmed by the Federal District Court for the Southern District of New York and an appeal from this decision had been dismissed by the United States Supreme Court.[7] The power of the territorial legislature to prohibit the export of silver coin had been strongly asserted in an earlier case arising from the Philippine Islands, and been explained as a by-product of the broad power to coin money and maintain its parity with other media of exchange.[8]

[7] United States v. Campbell, (D. C. S. D. N. Y. 1933) 5 F. Supp. 156, a criminal prosecution for failing to report ownership of gold bullion and for retaining ownership and possession without license. [Lower court decision discussed 32 MICH. L. REV. 405 (1934).] The opinion of Judge Woolsey declared (p. 169) that gold "is a commodity affected with a public interest as a potential source of currency and credit," sustained the power of Congress to investigate throughout the nation the location and ownership of gold coin or bullion, and asserted the right of the Government to prevent gold-hoarding. But the second count of the indictment, based on defendant's continued *possession* of gold bullion, was held insufficient on demurrer, on the ground that the power conferred on the Secretary of the Treasury to enforce the surrender of outstanding gold coin or bullion could not be validly exercised by the President. It was also suggested (pp. 170-172) that the requisitioning of gold coin or gold bullion was an exercise of the power of eminent domain and that the Government would become liable on "implied contract" for the fair value of the gold appropriated. The appeal from Judge Woolsey's decision was dismissed by the Supreme Court in 291 U. S. 686, 54 Sup. Ct. 455 (1934), and a motion to reinstate the appeal was denied in 291 U. S. 648, 54 Sup. Ct. 459 (1934). The case is discussed in 47 HARV. L. REV. 479 (1934).

[8] Ling Su Fan v. United States, 218 U. S. 302, 31 Sup. Ct. 21, 30 L. R. A. (N. S.) 1176 (1910), a prosecution for violating a law of the Philippine Legislature, prohibiting the export of silver coin or bullion. In the particular case the defendant had attempted to export silver *coin*, but the power of the Legislature to maintain the parity of silver with other monetary media was asserted in broad language. After pointing out that Congress had delegated to the Philippine Legislature the power to create a local currency, the Court said (at pp. 310-311):

> "it is said, that if the particular measure resorted to be one which operates to deprive the owner of silver pesos, of the difference between their bullion and coin value, he has had his property taken from him without compensation, and, in its wider sense, without that due process of law guaranteed by the fundamental act of July, 1902.
>
> "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. As an incident, the Government may punish defacement and mutilation and constitute any such act, when fraudulently done, a misdemeanor. Rev. Stat. §§ 5459, 5189.
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> "However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its

The denial of recovery in both cases proceeds from this point along lines which appear at first sight narrowly legalistic and which have provoked most of the adverse comment the decisions have received. The argument is that the plaintiffs in both cases, if they had been paid in gold coin, would have been required to surrender it immediately to Treasury officials. They could not have transferred it within the United States or exported it to foreign countries without violating the law and subjecting themselves to fine or imprisonment. It is therefore impossible to say that they have suffered damage, even if the non-payment of gold coin is considered a breach of contract. Accordingly, the argument is that the Court of Claims has no jurisdiction. The want of jurisdiction is not rested on the ground that the obligations in the two cases are not "contracts" on which the Government has consented to be sued; it is due rather to the fact that the damages at most are nominal. The jurisdiction of the Court of Claims extends only to cases where substantial damages can be proved.[9] The net effect of this is—the Government cannot escape liability on its gold clause obligations, but *prima facie* its promise to pay gold is met by payment of currency.

The opinion of Mr. Justice McReynolds, apart from its insistence on the immorality of the Government's conduct, suggests only two arguments by which this logic might be evaded. The first argument is this: "Congress brought about the conditions in respect of gold which existed when the obligation matured. Having made payment in this metal impossible, the government cannot defend by saying that if the obligation had been met the creditor could not have retained the gold." And the opinion later suggests the analogy of a private debtor who

outflow from the country of its origin. To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a violation of private right forbidden by organic law."

[9] This had been held in Marion & Rye Valley Ry. v. United States, 270 U. S. 280, 46 Sup. Ct. 253 (1926), an action for compensation for the value of the use and possession of a railroad taken over by the Director-General during the war. In Nortz v. United States another reason suggested by the majority for denying recovery was the fact that on January 17, 1934, the gold content of the dollar had not been legally altered. (U. S. 1935) 55 Sup. Ct. 428 at 431. It was not until January 31, 1934, that the President, acting under the authority conferred by the Gold Reserve Act of 1934, by proclamation reduced the gold content to 15 5/21 grains of gold nine-tenths fine. U. S. C. A. tit. 31, sec. 821, note.

seeks "to annul or lessen his obligation by secreting or manipulating his assets with the intent to place them beyond the reach of his creditors." Both the argument and the analogy are unconvincing. If the legislation prohibiting the possession or export of gold is valid, as the dissenting opinion apparently assumed, this exercise of the sovereign power over the currency will inevitably have the effect on private claims against the Government that is attributed to it by the majority. The second argument of Mr. Justice McReynolds, however, is more impressive. Agreeing with the majority that the gold-coin clause carries with it by implication a gold-*value* clause, he argued that the value in currency of the coin promised could be readily ascertained. He pointed out that the Government itself buys newly mined gold bullion at the rate fixed by Presidential proclamation, 15 5/21 grains to the dollar.[10] It was also urged by the claimant in *Nortz v. United States*, though the dissenting opinion does not do so, that the value of gold coin or gold bullion on foreign markets could be used as a measure of value if the court were anxious to find a basis for recovery.

The possibility of ascertaining the value of gold either by reference to the limited internal market or to foreign markets raised special difficulty in *Perry v. United States*, the Liberty Loan bond case. The court construed the gold clause there involved as creating a secondary obligation to pay *the paper-money equivalent* of gold, in the event that gold coin was withdrawn from circulation. The gold certificates involved in *Nortz v. United States* were evidently not thought to indicate the broader purpose of protecting the holder against subsequent depreciation or devaluation of the currency. By finding that the gold-coin clause in *Perry v. United States* carried with it by implication a

[10] Authority was conferred on the Secretary of the Treasury to purchase gold bullion newly mined in the United States by Executive Order No. 6261, issued August 29, 1933 (quoted in brief for the Government, App., pp. 49-50). This authority was confirmed by Executive Order No. 6359, Oct. 25, 1933 (U. S. C. A. tit. 12, Supp., p. 69); and Regulations of Jan. 31, 1934, Art. 6 (quoted in brief for the Government, App., pp. 137-141). By sec. 8 of the Gold Reserve Act of Jan. 30, 1934 (48 Stat. 337) the Secretary of the Treasury was authorized, with the approval of the President, to "purchase gold in any amounts, at home or abroad" with coin or currency of the United States, on terms and conditions fixed by him.

It will be recalled that it was through purchases of newly-mined gold bullion and foreign gold coin and gold bullion that the currency dollar was steadily pushed down by the Administration to the value now fixed by Presidential Proclamation. It could be urged, in support of Mr. Justice McReynolds' contention, that a gold value thus officially fixed by the Treasury was the best possible index of value for the gold coin claimed by the plaintiff in Perry v. United States. Indeed, for the classes of gold which the Government purchased freely from all comers, it would seem that the Government should not be allowed to contradict its own official price.

gold-*value* clause, the court was led to some of its most interesting and important remarks.

Chief Justice Hughes, speaking in this instance for himself and three of his colleagues, announced the sweeping proposition that the promise of the Government, to pay the paper-money equivalent of the gold coin specified, could not be repudiated or impaired by this exercise of the currency power. A clear distinction was declared to exist between the emancipation of private obligors from their duty to pay in gold coin or its paper-money equivalent, and a discharge of the Government from its own obligation. The power of the Government to contract against subsequent repudiation or impairment of its obligation was derived by implication from its constitutional power to "borrow money on the credit of the United States" (Art. I, sec. 8). Unless that credit could be so pledged as to preclude any subsequent act of the Government altering the substance of the obligation, the pledge would be illusory. Some support for this conclusion was found in the fourth section of the Fourteenth Amendment, providing that "The validity of the public debt of the United States, authorized by law . . . shall not be questioned." But the essential basis was shortly stated in the sentence: "The right to make binding obligations is a competence attaching to sovereignty." This was true although the obligations so assumed might interfere with a subsequent exercise of another sovereign power, the power "To coin Money, [and] regulate the Value thereof. . . ."

The notion that the sovereign has power to bind itself by contract is no novelty in political theory.[11] In American law it had been asserted in several cases.[12] The attitude of Chief Justice Hughes and his associates in these cases was foreshadowed in *Lynch v. United States*, involving an attempted abrogation of war risk insurance policies.[13] The

[11] GIERKE, JOHANNES ALTHUSIUS 76-122 (1913); I GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY, 1500 TO 1800 (translated by Barker) 107-111 (1934).

[12] Dicta in the Sinking-Fund Cases, 99 U. S. 700 at 719, 25 L. ed. 496 (1878); United States v. Smith, 94 U. S. 214 (1876); United States v. Central Pacific R. R., 118 U. S. 235 (1886); Garrison v. United States, 7 Wall. (74 U. S.) 688 (1868); Hollerbach v. United States, 233 U. S. 165, 34 Sup. Ct. 553 (1914); United States v. Northern Pacific Ry., 256 U. S. 51, 41 Sup. Ct. 439 (1921); Reading Steel Casting Co. v. United States, 268 U. S. 186, 45 Sup. Ct. 469 (1925); Grismore, "Contracts with the United States," 22 MICH. L. REV. 749 (1924).

[13] 292 U. S. 571, 54 Sup. Ct. 840 (1934). There the Court had said, speaking through Mr. Justice Brandeis (at p. 579): "That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, *unless, indeed, the action taken falls within the federal police power or some other paramount power.*" (Italics ours.)

importance of the dicta in *Perry v. United States* lies in the application of this central idea in a case where the power to contract conflicts with the exercise of an independent substantive power conferred by the Constitution. This conflict is resolved, by eight out of the nine justices,[14] in such a way that the power to contract is made paramount. The implications of this suggestion reach far beyond the scope of the gold clause cases.[15]

[14] The remarks of Chief Justice Hughes must be described as dicta, inasmuch as they do not affect the decision of Perry v. United States. Nevertheless, it should be pointed out that they were concurred in by three other Justices and the four dissenting Justices were even more emphatic in stating their view that the solemn obligation of the Government could not be repudiated or qualified by this attempted exercise of the currency power.

[15] It is uncertain how far the Chief Justice and his associates mean to carry the argument that the power to pledge the credit of the United States can be used to restrain the exercise of an independent governmental power. It might be suggested that in this case the gold clause in Government obligations is at most an indirect interference with the currency powers of Congress. It seems clear that the devaluation policy of Congress can be carried out without repudiation of the *secondary* obligation to pay the paper-money value of the coin promised. In other words, the gold clause need not be construed as a contract *not* to devalue the dollar, but rather as a contract to pay an increased sum in paper money *if* the dollar is devalued. This suggestion is not supported by any language in the opinion of the Chief Justice, but it may assist in reconciling the position taken with the decisions in a number of other cases.

It has been repeatedly held, for example, that certain phases of the police power of states and other governmental units cannot be bargained away. Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079 (1880), grant by state of right to operate a lottery for 25 years; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989 (1877), franchise granted to private corporation to sell beer; Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652 (1884), act of state legislature conferring a monopoly of the slaughter-house business in New Orleans; Newton v. Commissioners, 100 U. S. 548, 25 L. ed. 710 (1880), statute providing that county seat should be located at a particular place and "permanently established" there; Northern Pac. Ry. v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341 (1908), contract alleged to have effect of relieving railroad of duty to make repairs or improvements in its right of way; Denver and Rio Grande R. R. v. Denver, 250 U. S. 241, 39 Sup. Ct. 450 (1919), city ordinance authorizing establishment of railroad tracks in congested district of city. For a recent assertion of the same doctrine see Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 at 436, 54 Sup. Ct. 231 (1934). There would seem to be no doubt that it applies as well to contracts of the federal Government restraining the exercise of certain classes of governmental powers. North American Commercial Co. v. United States, 171 U. S. 110, 18 Sup. Ct. 817 (1897); United Shoe Machinery Corp. v. United States, 258 U. S. 451, 42 Sup. Ct. 363 (1922); Straus v. American Publishers' Ass'n, 231 U. S. 222, 34 Sup. Ct. 84 (1913). And see the careful language of Lynch v. United States, 292 U. S. 571, 616, 54 Sup. Ct. 641, 840 (1934), declaring the government bound by its contracts "unless the action taken falls within the police power or some other paramount power."

But it appears from other decisions that certain other phases of the police power can be restrained to a greater or less degree by express contract. For example, it was held in New Orleans Gas-Light Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252

A different attitude toward the issues of *Perry v. United States* appears in the concurring opinion of Mr. Justice Stone. He begins by declaring his concurrence in the Court's construction of the gold-coin clause, as containing by implication a secondary obligation to pay the paper-money equivalent of the coin promised. He then says that the only default in performance by the Government has resulted from "the regulation by Congress of the use of gold as currency." While deploring this partial repudiation of the Government's promise, he finds himself unable to say that the exercise of the currency power which is valid and effective as to private debts is any less effective as to the Government's own obligations. To hold otherwise is to assert that the power to borrow money can be so exercised as to restrain a subsequent exercise of the power to regulate the currency.[16]

(1885), that an exclusive franchise for the sale of gas in New Orleans could not be revoked or impaired through subsequent adoption in the state constitution of a policy against monopoly of such services. See also the regulation of rates of a public utility involved in Minneapolis v. Minneapolis Street Ry., 215 U. S. 417, 30 Sup. Ct. 118 (1910), and the tax exemptions involved in Piqua Branch of State Bank of Ohio v. Knoop, 16 How. (57 U. S.) 369, 14 L. ed. 977 (1853); Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558 (1878); Humphrey v. Pegues, 16 Wall. (83 U. S.) 244, 21 L. ed. 326 (1873); St. Anna's Asylum v. New Orleans, 105 U. S. 362, 26 L. ed. 1128 (1882), and numerous other cases. Compare also Baltimore v. Baltimore Trust Co., 166 U. S. 673, 17 Sup. Ct. 696 (1897), with Grand Trunk Western R. R. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303 (1912). In Lynch v. United States, *supra*, the interest of the Government in securing a general reduction of governmental expenses was held an insufficient justification for modification of war-risk insurance policies.

It would appear, then, that in prior decisions a shadowy line of distinction has been marked out between different phases of the police power and that the Government has been conceded the power to bargain away the immediate right to exercise some of them. As it is sometimes said, these phases of the police power *can be exercised* by the act of entering into contracts. It is notable that these phases are for the most part concerned with economic regulation, as distinguished from the more vital matters of public health, public safety, etc.

The language of the Chief Justice in Perry v. United States is sweeping. But one hesitates to ascribe to him the notion that the NIRA administration could be authorized by Congress to draft a code of fair competition in such a form as to restrict the powers of Congress in regulating interstate commerce. Could a contract by the Government for the sale and delivery of goods to a private party preclude a subsequent embargo or restriction on interstate or foreign commerce? It would appear from Horowitz v. United States, 267 U. S. 458, 45 Sup. Ct. 344 (1925), that even an express agreement by the Government not to exercise this or some other paramount power would be ineffective. Compare the patent and copyright cases of United Shoe Machinery Corp. v. United States, 258 U. S. 451, 42 Sup. Ct. 363 (1922), and Straus v. American Publishers' Ass'n, 231 U. S. 222, 34 Sup. Ct. 84 (1913).

[16] (U. S. 1935) 55 Sup. Ct. 438-439: "I do not understand the government to contend that it is any the less bound by the obligation than a private individual would be, or that it is free to disregard it except in the exercise of the constitu-

This remarkably acute opinion presents still other reasons why the majority should have withheld the views expressed in *Perry v. United States*. Not only is it no comfort to the particular litigant to be assured that he has a constitutional right to relief at some future date, but the jurisdiction of the Court of Claims may be withdrawn by Congress before substantial damages have accrued. The practical consequences of these remarks as to the Government's continued liability are still more important. For the time being it becomes impossible for the Government to restore a free gold market and resume specie payments without an automatic addition of some billions of dollars to the national debt.[17]

tional power 'to coin money' and 'regulate the value thereof.' In any case, there is before us no question of default apart from the regulation by Congress of the use of gold as currency.

"While the government's refusal to make the stipulated payment is a measure taken in the exercise of that power, this does not disguise the fact that its action is to that extent a repudiation of its undertaking. As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States, I cannot escape the conclusion, announced for the Court, that in the situation now presented, the government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability for its action. . . .

"Moreover, if the gold clause be viewed as a gold value contract, as it is in Norman v. Baltimore & Ohio R. Co., supra, it is to be noted that the government has not prohibited the free use by the bondholder of the paper money equivalent of the gold clause obligation; it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery. In that case it would seem to be implicit in our decision that the prohibition, at least in the present situation, is itself a constitutional exercise of the power to regulate the value of money.

"I therefore do not join in so much of the opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that, although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds."

[17] It is not entirely clear whether the holders of gold certificates and the owners of gold coin, gold bullion, or gold certificates who have surrendered them under pressure to the Treasury would also be entitled to sue in this contingency. The plaintiff in Nortz v. United States proposed two distinct theories of recovery—express contract to pay coin on which the Government had consented to be sued, and "implied" contract to pay the value of property appropriated for a public use. The majority opinion left open the question whether either theory could be used for recovery on the gold certificates, and disposed of the case on the ground no substantial damages were shown. There is a suggestion, however, that holders of gold certificates must be satisfied with gold coin of the new standard. 55 Sup. Ct. 428 at 430.

In the case of gold coin, gold bullion, or gold certificates *already surrendered*

The opinion of Chief Justice Hughes seems at first sight to be strangely inconsistent. An opportunity is seized to announce a proposition in constitutional law whose meaning is distinctly doubtful, and which has no bearing on the immediate decision. On the other hand, a close and technical analysis of the plaintiff's cause of action for damages leads to a denial of relief, in spite of the strong moral claim which the opinion emphatically asserts. But the inconsistency disappears on more careful examination. A broader strategy must have shaped the opinion of the Chief Justice and secured the concurrence of Justices Brandeis, Roberts, and Cardozo. The moral and political effect of the language in *Perry v. United States* should be tremendous and salutary. On the other hand, the denial of substantial damages to the claimants in *Nortz v. United States* and *Perry v. United States* has its own moral justification. The sharp rise in the value of gold is the result merely of a governmental manipulation of exchange rates. To allow the holders of public gold-clause obligations to profit by this artificial price-rise, produced by the Government itself, would indeed result, as the Chief Justice said, in their "unjust enrichment." The sponsors of the Government's gold-buying program anticipated a prompt and spontaneous response of internal prices to the rise in the value of gold. Contrary to their expectations (and in accordance with the predictions of most economists), no such spontaneous response has occurred. The devaluation of the dollar represented in itself an effort to readjust the purchasing power of the dollar after a drastic fall of the world price-level. Until that effort succeeds and the purchasing power of money has been brought down to the pre-depression level, it would be outrageous for one class of creditors to receive an unmerited advantage — to secure a free gift of purchasing power through governmental action taken in the public interest.

The gold-clause decisions will have an immediate and important

to the Treasury, the eminent domain theory would clearly be the only one available. The case of United States v. Campbell (cited above, note 7) indicates that a contract to pay the value of gold bullion can be implied *in fact* (quasi-contract claims not being included in the jurisdiction conferred on the Court of Claims by the Tucker Act). The decisions of the United States Supreme Court on this question do not permit any clear lines to be drawn, but apparently the tests for "implied contract" are met in the instant case. See 43 YALE L. J. 497 (1934), and 43 YALE L. J. 674 (1934).

In any case, whether the theory be express contract or implied contract for the value of property taken on eminent domain, presumably the damages would be measured as of the date of the breach or appropriation. A subsequent removal of restrictions on the private sale or export of gold would not, on that analysis, entitled the claimant to substantial damages.

effect on the monetary policies of the Government. On the one hand, if an attempt is made in the near future to stabilize at the present rate of devaluation and a free gold market is restored, the holders of gold obligations of the Government would automatically become entitled to substantial damages.[18] The present restrictions on private ownership, sale, and export of gold must therefore be maintained unless the Government decides to adopt one of three alternatives. (1) The dollar can be revalued to the old gold content; (2) the Government can compensate holders of gold-clause obligations, as the Supreme Court has said it is morally bound to do, and thereby add approximately three billion dollars to the national debt; (3) the repudiation of the gold clause can be made complete by withdrawing the government's consent to be sued in the Court of Claims on gold-clause obligations.[19] Any one of these alternatives contains the materials for a major political explosion. For some time to come we must expect to remain as we now are, on a gold-

[18] The volume of outstanding gold-clause obligations is sufficiently large to require serious attention to this possibility. By February 18, 1935, the total of bonds and treasury notes containing the gold clause had been reduced from their peak of over $20,000,000,000 to $14,565,727,180. New York Times, issue of Feb. 19, 1935, p. 13. Partly for the saving of interest charges and partly, no doubt, to escape prospective liability on the gold clause, the Treasury has undertaken extensive conversion operations. Between now and October 15, 1935, the Treasury will be in a position to redeem treasury notes and bonds (particularly the large issues of the First and Fourth Liberty Loan) to a total of over $6,000,000,000. These issues have already been called for redemption in most instances. This would leave somewhat more than $8,000,000,000, however, a large percentage of which will not be callable before 1940.

[19] In the able brief for the Government in Perry v. United States it was argued (pp. 80-83) that the Joint Resolution of June 5, 1933, by implication withdrew the consent of the Government to be sued on gold clause obligations. This contention was apparently rejected by the Supreme Court. Whether Congress will resort to an express restriction of the jurisdiction of the Court of Claims in this class of cases is a question of morality and political expediency on which no predictions are possible. It is to be hoped that this desperate expedient will not be necessary, if only for the reason that the position of a great creditor country would be thus irretrievably jeopardized in the international sphere.

The position of foreign holders of government gold-clause obligations deserves additional comment. Aliens can sue in the Court of Claims if their governments extend a similar privilege to citizens of the United States. 36 Stat. 1139, U. S. C. A. tit. 28, sec. 261. Both this class of aliens and United States citizens resident abroad could therefore bring suit against the United States Government under the present Judiciary Act. Nevertheless, since the bonds are payable at the Treasury, such persons would be in the same position as domestic holders and would suffer no substantial damage so long as the present restrictions on sale and export of gold are maintained. Although the moral claims of foreign private bondholders are strong, it is unlikely that the Supreme Court will discriminate in their favor. As a practical matter, to admit such discrimination would make it possible for domestic holders to sell Government bonds abroad and thus evade the policy of Congress.

bullion standard, with a government monopoly of the gold supply and with free export and import of gold only on the Government's account.

On the other hand, the maintenance of the present restrictions on private ownership and sale of gold will not in itself guarantee an immunity of the Government from suit. The opinion of the Chief Justice in *Perry v. United States* contains some significant language on this point. In demonstrating that the plaintiff in that case had suffered no substantial damage, the opinion argues that the value of the gold coin to which the plaintiff was entitled could only be determined by "a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the simple measure of value as established by the legislation of Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment." [20]

The reference to the purchasing power of the dollar as a standard for the measurement of damages opens up some important possibilities. In the first place, it promises to project the courts much further than any American court has yet gone into calculations of monetary value on the basis, presumably, of commodity-price indices. In this respect it lends some weight to the proposal later made in this article, for a general adoption of price-indices in private contracts. In the second place, the risk of liability on outstanding gold-clause bonds should impose a drastic check on purely monetary devices, used for the purpose of securing a general rise in prices. In so far as a fall in the purchasing power of the dollar is traceable to monetary factors there will be the prospect of an automatic and proportionate increase in the national debt (unless the jurisdiction of the Court of Claims is withdrawn).

It is precisely on the issue of causation, however, that the greatest difficulty will arise. Most of the agencies of the Government are now engaged in activities that aim to produce, directly or indirectly, a rise in commodity prices. The production-control and wage policies of the NRA administration, the crop-restriction program of the Department of Agriculture, the expenditures of the federal Government on relief and public works, the credit policies of the Federal Reserve System,

[20] (U. S. 1935) 55 Sup. Ct. 432 at 438.

all form part of an impressive program, not consistent in all its details but aimed broadly at the same general objective. As a result of these efforts and of other co-operating factors a rise in wholesale commodity prices has already occurred since March 1933, in the ratio of about 31 per cent.[21] The devaluation of the dollar has contributed some share to this price-rise, particularly through its effect on foreign trade, on the speculative markets, and on public psychology; and through the broader base it has supplied for financing government expenditure. Through the other activities of the Government, however, and through the accident of a major drought in agricultural areas, a considerable rise in prices could have been achieved without devaluation and without further additions to the supply of currency and credit. Will it be enough for the holder of a Liberty Bond to show that the purchasing power of the dollar is less than it would have been if the concerted program of the Roosevelt Administration had not been undertaken? If it is enough merely to compare the purchasing power of the dollars lent to the Government with the purchasing power of the dollars repaid, should the holders of bonds issued before 1929 recover anything? Ordinary principles of causation would seem to require that the reduction in purchasing power of the dollars received should be traceable to the devaluation policy, or, more specifically, to the Government's refusal to pay in gold coin of the former standard. In short, the Supreme Court will be faced soon with the necessity for isolating the influence of purely monetary factors on the quantum of damages for breach of contract. The distinction thus required is difficult enough as a matter of general monetary theory; in the practical administration of judicial remedies it will lead to intolerable confusion and debate. More than any other factor involved in the gold-clause decisions, it may make the Supreme Court regret the entirely laudable but premature remarks of the Chief Justice in *Perry v. United States*.

[21] See the Bureau of Labor Statistics Index of wholesale prices published in the SURVEY OF CURRENT BUSINESS, SUPPLEMENT, for March 21, 1935. On a basis of 1926 as 100, an average of prices for 784 commodities for the week of March 11, 1933, gave an index number of 60.2. After a considerable jump during the spring and early summer of 1933, prices rose more slowly through 1934. For the week of March 9, 1935, the index number had reached 79.6.

There is still some distance to go before the general level of 1926 prices, the declared objective of the Administration, will be restored; and wholesale prices are still approximately half their war and post-war peak. See the Index Numbers of Wholesale Prices published by the United States Department of Labor in 40 MONTHLY LABOR REV., No. 1, p. 239 (Jan. 1935).

II

PRIVATE OBLIGATIONS

The cases involving the validity of the gold clause in private obligations came to the Supreme Court on two appeals, one from the Court of Appeals of New York in *Norman v. Baltimore and Ohio R. R.*,[22] and one from the Federal District Court for the Eastern District of Missouri, *In re Missouri Pacific R. R.*[23]

The action in *Norman v. Baltimore and Ohio R. R.* was brought to enforce payment of an interest coupon for $22.50, payable February 1, 1934, on a $1000 bond issued by the railroad February 1, 1930. The bond provided that principal and interest should be payable "in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930." The bond and mortgage for $1000 involved in *In re Missouri Pacific R. R.* was issued May 1, 1903. It was payable May 1, 1933, in "gold coin of the United States of the present standard of weight and fineness." Writs of certiorari were granted by the United States Supreme Court to review the judgments rendered below, which were based on the conclusion that the obligations in each case could be discharged by payment in legal tender currency, dollar for dollar, of the nominal amounts due. In both cases the judgments were affirmed.[24]

Chief Justice Hughes, delivering the majority opinion, first reviews the currency legislation of which the Joint Resolution of June 5, 1933, forms an integral part. He considers the meaning and purpose of the gold clauses in suit. Contrary to the contention of the obligors in both cases that the clauses were exclusively "gold coin" clauses which became inoperative when payment in coin became impossible, the opinion declares (p. 413) that their purpose was "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." That this was the meaning of the parties hardly admits of doubt.[25] Against this construction of the

[22] 265 N. Y. 37, 191 N. E. 726, 92 A. L. R. 1523 (1934).

[23] (D. C. E. D. Mo. 1934) 7 F. Supp. 1. This suit involved two cases. The original proceeding was a reorganization of the Missouri Pacific Railroad under the 1933 amendment to the Bankruptcy Act. The Bankers' Trust Co. and another intervened, the United States and the Reconstruction Finance Corp. intervened jointly in opposition to its claim, and the two causes were consolidated below for hearing.

[24] (U. S. 1935) 55 Sup. Ct. 407, Justices McReynolds, Van Devanter, Sutherland, and Butler dissenting.

[25] The English House of Lords and the Permanent Court of International Justice had likewise held that gold-coin clauses were secondarily gold-value clauses, so that the

contracts there were only two points that could be urged. First, as the obligors here contended, the instruments would thereby be rendered non-negotiable, since they would not call for "a fixed sum of money" but for a sum that would fluctuate with the value of gold coin. The Court's opinion does not definitely answer this objection. Whether its construction would affect the negotiability of the bonds is not stated. It was enough for the immediate purpose to hold that in any event the gold clause revealed an overriding intent to protect the obligee against the risk of monetary depreciation.[26] The second obstacle to the construction adopted was the language of earlier Supreme Court decisions, describing similar provisions as promises to deliver, not the specified sum in gold coin, but a certain weight of gold bullion, viewed as a commodity.[27] The Court had no difficulty in disposing of this language. It had been unnecessary to the decisions and had been repudiated in later Supreme Court cases.[28] It appears, then, that neither of these points controverts the Court's interpretation of the terms of the contracts, and the Court's construction seems unquestionably correct.

obligee was entitled to the paper-money equivalent of the coin promised when a discrepancy appeared between them. Feist v. Société Intercommunale Belge d'Électricité, [1934] A. C. 161; Cases of Serbian and Brazilian loans, Publications of the Permanent Court of International Justice, Series A, Nos. 20/21. See also the decisions of other foreign courts cited by Nussbaum, "Comparative and International Aspects of American Gold Clause Abrogation," 44 YALE L. J. 53 at 57 (1934).

The contrary decisions of the German Reichsgericht are severely criticized by Professor Nussbaum, *ibid.*, at p. 56, and in his book DAS GELD 84-89, 179-183 (1925), and the JURISTISCHE WOCHENSCHRIFT, 1925, p. 1483. These decisions rested in part on art. 245 of the German Civil Code, providing that clauses specifying a particular kind of coin should be ignored when the specified kind of coin disappeared from circulation. They also depended in the case of mortgage obligations on the requirement of the land registry laws that mortgages, in order to be registered, must be for a fixed sum of money. DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 101, p. 141 (Dec. 18, 1920); vol. 103, p. 384 (Jan. 11, 1922); vol. 121, p. 110 (Apr. 26, 1928); JURISTISCHE WOCHENSCHRIFT, 1925, p. 1483 (Dec. 3, 1924).

[26] If there were any purpose now in making such a contention, it could be argued that the obligations in suit were, at the time they were made, for a "fixed sum of money" (i.e., a fixed sum in gold coin) and that the subsequent devaluation of the dollar does not deprive them of the quality of negotiability then acquired. Even in contracts made after the devaluation had occurred, it would still be true that they expressed a fixed sum in lawful money, even though gold coin by executive order is withdrawn from circulation. This question has now become academic. The problem of negotiability is more serious and is still active in connection with promises to pay a sum of money computed on a commodity price base. See the next article, entitled "Contracting by Reference to Price Indices," infra, p. 685.

[27] Bronson v. Rodes, 7 Wall. (74 U. S.) 229, 19 L. ed. 141 (1868); Butler v. Horwitz, 7 Wall. (74 U. S.) 258, 19 L. ed. 149 (1868).

[28] Trebilcock v. Wilson, 12 Wall. (79 U. S.) 687, 20 L. ed. 460 (1871); Thompson v. Butler, 95 U. S. 694, 24 L. ed. 540 (1877).

The second and third branches of the Chief Justice's opinion discuss the constitutional power of Congress over the currency and its power to invalidate contractual provisions that interfere with currency control. The powers of Congress over the monetary system had already been recognized by the decisions in exceedingly broad terms. The *Legal Tender Cases* had decided that Congress could create a non-metallic medium and attach to it the legal-tender quality, in spite of the frustration of the intent of private parties that might result.[29] Even earlier it had been held in *Veazie Bank v. Fenno* that a tax could be imposed on bank notes for the purpose and with the effect of discriminating against such currency and insuring freer circulation of the national currency.[30] In *Juilliard v. Greenman*, the last of the *Legal Tender Cases*, the power of Congress to declare paper money legal tender even in times of peace had been derived from the aggregate of the broad powers to lay and collect taxes, to pay the debts and borrow money on the credit of the United States, and "To coin Money, [and] regulate the Value thereof, and of foreign Coin." [31] More recently the power of the Government to control the use and especially the export of the precious metals, for the purpose of regulating currency values, had been asserted in strong terms.[32] Finally, there was in other fields abundant authority to the effect that contracts between private parties could not stand in the way of the exercise of an acknowledged governmental power.[33]

The main issue was thus narrowed to the single question discussed in the fourth branch of the Chief Justice's opinion. Should the Court accept the finding of Congress that the gold clause in private contracts interfered with the exercise by Congress of its power to regulate the currency? It was on this point that the Court divided. In order to demonstrate that there was some foundation in fact for this finding, the Chief Justice considered first the effect of a literal enforcement of such contracts through payment in gold coin. He declared [34] that their literal enforcement "would be calculated to increase the demand for

[29] Knox v. Lee, 12 Wall. (79 U. S.) 457, 20 L. ed. 287 (1871).

[30] 8 Wall. (75 U. S.) 533, 19 L. ed. 482 (1869).

[31] Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1884).

[32] Ling Su Fan v. United States, 218 U. S. 302, 31 Sup. Ct. 21, 30 L. R. A. (N. S.) 1176 (1910), quoted above, note 8.

[33] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96 (1899); Louisville and Nashville R. R. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671 (1911); Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44 (1912), among many others.

[34] 55 Sup. Ct. 407 at 418.

gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin." The power of Congress to conserve the gold resources of the Treasury by withdrawing gold coin from circulation and prohibiting its export was reasserted at this point, as it was in connection with the public obligations of the Government. In determining whether the enforcement of gold-coin clauses would endanger the monetary resources of the Government, it was entirely proper for Congress to take account of the enormous volume of debts containing the gold clause. The finding that danger existed could not be described as unreasonable, and accordingly the legislation in this respect was valid.

But this line of argument would not dispose of the problem raised by the alternative obligation to pay gold *value* when the payment of gold *coin* was forbidden. The Court had already declared that a promise to pay the value in currency of the gold coin was to be implied in gold-clause obligations. Here it could not be argued that the enforcement of the gold clause would deplete the supply of precious metals or violate the emergency restrictions on ownership, sale or export of coin. The argument took a different form. On June 5, 1933, the date of the resolution abrogating gold clauses, devaluation of the dollar had not yet occurred but it was in prospect. Although the precise point at which the new gold content would be fixed was as yet not determined, Congress could anticipate a discrepancy between the values of paper money and gold coin defined by the old standard. The economic consequences of preserving the old standard as a measure of value for paper-money debts were declared to justify a general leveling down of all gold-clause obligations. The language of Chief Justice Hughes is significant:[85]

> "The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, states and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their 'gold bonds' must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. It is common knowledge that the bonds issued by these obligors have generally contained gold clauses,

[85] 55 Sup. Ct. 407 at 419.

and presumably they account for a large part of the outstanding obligations of that sort. It is also common knowledge that a similar situation exists with respect to numerous industrial corporations that have issued their 'gold bonds' and must now receive payments for their products in the existing currency. 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 $1.69 in currency while respectively receiving their taxes, rates, charges, and prices on the basis of $1 of that currency."

In analyzing the reasons of the majority for sustaining the legislation it seems important first to consider the general scope of the currency power.[36] The Constitution grants to Congress the power "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures" [Art. I, sec. 8 (5)]. It has frequently been observed that the contrast between the power to "regulate the Value" of money and the power to "fix the Standard" of weights and measures implies a power to alter the monetary standard and control the fluctuations in the value of money. How far may Congress go in regulating the value of money? First, it seems clear that Congress has plenary power to decide what commodity shall constitute the monetary medium. Thus, it could now impress the quality of money on wampum, wheat, or tobacco, and even, perhaps, make them

[36] The arguments of the dissenting opinion against this result attracted public attention on account of the fervor and eloquence with which they were stated. Mr. Justice McReynolds argued that promises to pay in gold coin had been lawful when made, that the withdrawal of gold coin from circulation left untouched the secondary obligation to pay its present value in paper money, and that the destruction by Congress of this obligation was a taking of "property" forbidden by the Fifth Amendment. He declared that the legislation aimed ostensibly at regulation of currency values, but that its real purpose was the destruction of private obligations, so that its end was not "legitimate." In support of this statement he resorted to evidence that seems wholly inadmissible for the purpose—a statement in the Senate by Senator Thomas, in sponsoring the Thomas Amendment to the Agricultural Adjustment Act. Senator Thomas had said that the purpose of the proposed amendment was to cheapen the dollar so as to raise agricultural prices and that its *effect* would be to transfer wealth within the United States to the extent of almost $200,000,000,000. Even if this statement, made in support of another bill than the one in question, could be taken into account at all, the motives that induced Congress to devalue the dollar seem in this instance to lie outside the scope of judicial review. The argument of Mr. Justice McReynolds, which seems to imply the contrary, can scarcely be accepted at its face value. After devaluation had been decided upon, it became simply a question of fact whether outstanding gold-clause obligations interfered with the exercise of a constitutional power. It is on this last question that there is room for difference of opinion.

a legal tender.[37] Second, if paper money remains the basic medium of exchange, Congress can select the standard in terms of which the nominal par of the currency will be fixed. Thus, it is believed, Congress has a wide discretion in fixing or altering the *quantity* of gold, silver, wampum, wheat, or tobacco which would be represented by the currency dollar.[38] If more than one commodity were used as a standard, as in a period of bi-metallism, Congress could undoubtedly alter the relations between the commodities used by changing the quantity of either one which the "dollar" would represent.[39] Finally, there would seem to be no constitutional objection to expressing the value of the dollar in terms of commodity-price indices.[40]

In addition to such changes in the monetary *medium* and the monetary *standard*, there are numerous devices by which Congress can determine *indirectly* the purchasing power of money. The power to pledge the credit of the United States can be used to issue paper promises to pay. If issued in excessive quantities, and especially if the legal tender quality is attached, such promises may circulate as the standard money

[37] All these commodities and various others were adopted as official currencies by the legislatures of the colonial period, and at times the legal tender quality was attached. BULLOCK, THE MONETARY HISTORY OF THE UNITED STATES, Part II, c. 2 (1900); HEPBURN, A HISTORY OF CURRENCY IN THE UNITED STATES 1-4 (1924); WHITE, MONEY AND BANKING 2-6 (1914). There is nothing, however, in the legal tender cases after the Civil War to indicate that these unorthodox monetary media could themselves be made legal tender, unless it be the broad language used in sustaining the legal tender quality of paper money.

[38] The dissenting opinion of Mr. Justice McReynolds in the gold-clause cases appears to include in its sweeping denunciation the whole devaluation policy of Congress. If it appeared that the *sole* purpose in changing the gold content of the dollar was to destroy lawfully acquired rights, it is undoubtedly true the action of Congress, even under an acknowledged constitutional power, would be subject to judicial nullification. The decision of the majority, then, must be construed as a decision that a change in the monetary standard lies within the currency power of Congress and that in this case other motives appeared than the one attributed to Congress by the dissenting opinion.

[39] This occurred in 1834, when the gold content of the dollar was reduced by 6 per cent to compensate for the fall in the value of silver and to restore parity between gold and silver coins. Mr. Justice McReynolds, in discussing this incident, was able to distinguish it from the devaluation of 1933-1934 on the ground that "The purpose was to restore the use of gold as currency—not to force up prices or destroy obligations. There was no apparent profit on the books of the Treasury. No injury was done to creditors; none was intended." Norman v. Baltimore and Ohio R. R., (U. S. 1935) 55 Sup. Ct. 407 at 423.

[40] The "commodity dollar" proposed by Professor Irving Fisher would not, of course, require the adoption of price indices as the legislative standard of value for the dollar. Gold would be retained as the standard, but the gold content would be periodically altered to adjust the purchasing power of the dollar to the movements of prices. See FISHER, STABILIZING THE DOLLAR, c. 4 (1920).

and produce a drastic shift in the level of prices.[41] The machinery now developed for influencing the credit policies of commercial banks also provides an indirect but effective means for continuous control of monetary values. In an economic system where deposit credit has become the principal medium of exchange, governments can scarcely be expected to ignore so promising an avenue for indirect regulation.[42] Nor is this list exhaustive. New avenues may be developed. The gold-clause decisions themselves suggest that any commodity or credit mechanism which becomes invested with the quality of money and which vitally affects the foundations of the financial structure may thereby become subject to Congressional control.

Does it follow that Congress can by legislation determine *the value at which money shall circulate?* Literally construed, the power to "regulate the value of money" would include the power to fix its purchasing power in terms of commodities. This of course is another way of saying that Congress may set a general legislative scale of prices. In periods of rapid monetary depreciation a price scale has occasionally been attempted through legislation.[43] Of the great modern industrial countries the only one in which such legislation could hope to succeed is Soviet Russia. In our own country "price-fixing" has lost some of the ominous implications that it possessed until very recently. But the caution shown by the Supreme Court in extending the limits of price-regulation by the states is a sufficient index of its views toward Congressional regulation of prices under the currency power.[44]

[41] This occurred, as is well known, through the issues of greenbacks during the Civil War. The economic and legal effects of the Northern greenback inflation will be more fully discussed in the April issue of this REVIEW.

[42] The various devices by which the value of money can be controlled through governmental agencies, particularly by the regulation of bank credit, have been the subject of a voluminous modern literature. It will be enough here to cite 2 KEYNES, A TREATISE ON MONEY (1930), and CURRIE, THE SUPPLY AND CONTROL OF MONEY IN THE UNITED STATES, Part II (1934).

[43] During the extreme inflation of the French Revolution, legislative control of prices has been thought by a modern writer to have had some effect in checking the general rise. HARRIS, THE ASSIGNATS, c. 6 (1930). During the inflation in Germany after the Great War governmental control of prices likewise had some effect on certain groups of commodities, though it merely postponed the inevitable disaster. GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 78-79 (1930).

[44] See Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505 (1934), discussed in 32 MICH. L. REV. 832 (1934).

For a recent article in which similar views are expressed as to the limits of the power to "regulate the value" of money, see Eder, "Legal Theories of Money," 20 CORN. L. Q. 52 at 66-68 (1934).

The control of prices as an incident to the regulation of interstate commerce

On a narrow view the gold-clause resolution of June 5, 1933, could be described as a special form of price-fixing. It applies in terms only to "obligations . . . payable in the money of the United States." It invalidates any clause in such obligations which requires payment "in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby." Contracts for the delivery of a specified quantity of gold bullion (in other words contracts dealing with gold as a commodity) would clearly fall outside the scope of the resolution.[45] But in obligations for the payment of "money," it is now impossible to contract either for payment in gold coin or for the value in paper money that such gold coin may possess. Even if gold coin is returned to general circulation, no person can ask more for gold coin promised in "money" obligations than the nominal value affixed to that coin by the monetary authorities.

But this is far from a recognition of a general power to fix the value of money in terms of commodities, that is to say, a power to fix a scale of commodity prices. The objective of the gold-clause legislation is to ensure complete parity in value between two kinds of *United States currency*, and to preserve their equality in debt-discharging power. To understand the extension of the currency powers of Congress that is involved in the gold-clause decisions, it is necessary to approach them

has, of course, been undertaken on a large scale under the NIRA. How far the Supreme Court will sustain the legislation in this respect is as yet uncertain. The current of decisions in the lower federal courts has, until very recently, been quite uniformly in favor of the power to regulate prices for this purpose. See 44 YALE L. J. 90 at 95-96 (1934).

[45] This appears from the text of the resolution itself. The "obligations" in which gold clauses are invalidated are defined in sec. 1 (b) of the resolution as "obligations payable in money of the United States." Obligations for the delivery of a specified *weight* in gold bullion (or even in gold coin?) would appear to be contracts for a commodity and not "money" obligations. It is submitted that in this respect we are now in the situation where state courts found themselves after the Civil War, during the period when gold clauses were held to be invalidated merely by implication drawn from the legal tender legislation (state cases reaching this result are cited below, note 54). It came then to be recognized that contracts for the delivery of a specified *quantity* of coin or bullion were valid. Essex Co. v. Pacific Mills, 14 Allen (96 Mass.) 389 (1867); Sears v. Dewing, 14 Allen (96 Mass.) 413 (1867); Mather v. Kinike, 51 Pa. St. 425 (1866); Christ Church Hospital v. Fuechsel, 54 Pa. St. 71 (1867). In their construction of the language of particular contracts, however, these cases can scarcely be considered good authority at the present time. See, for example, Butler v. Horwitz, 7 Wall. (74 U. S.) 258, 19 L. ed. 149 (1868); Dewing v. Sears, 11 Wall. (78 U. S.) 379, 20 L. ed. 189 (1870).

It follows from the text of the joint resolution that *money* obligations in which gold is used as a standard of value are invalid. This would appear true whether gold coin or gold *bullion* be used as a standard.

from still another point of view, by considering the scope of prior legal-tender legislation.

The legal-tender acts of the Civil War period were in a sense an attempt to "regulate the value" of money. They provided in substance that the Treasury notes there authorized were to be a legal tender for the discharge of all "debts," public and private (with enumerated exceptions).[46] All "debts" expressed in fixed sums of money, either through private contract, statute, or judgment, could then be discharged by payment of the nominal sum fixed in legal tender notes. The economic effect of the legislation, in the special field where it applied, was equivalent to a "regulation of the value" of money. Creditors were obliged to accept paper money in payment of "debts" arising through the sale of land, goods or services, in spite of the loss they might suffer through the intervening depreciation. But it must be emphasized that the legal tender acts in themselves had no effect on the processes by which the quantum of any "debt" would be determined. Where the debt arose out of express agreement the amount that would be paid was left for free negotiation between the parties. Mr. Justice Strong, speaking for the majority in the second legal tender case,[47] repudiated the contention that the legal tender acts had anything to do with the "regulation of the value" of money. In *Juilliard v. Greenman*, the last of the legal tender cases, the Supreme Court made it abundantly clear that the legal tender acts were not an exercise merely of the currency power. The power to make paper money a legal tender for the discharge of "debts" was derived from an *aggregate* of constitutional powers: to lay and collect taxes, to pay the debts of the United States, to provide for the common defense and

[46] 12 Stat. 345, 532, 709.

[47] The remarks on this point by Mr. Justice Strong, speaking for the majority, were suggested by the argument that "the unit of money value must possess intrinsic value." In disposing of this contention, Justice Strong said:

> "The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. . . . It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making money that which has no intrinsic value." Knox v. Lee, 12 Wall. (79 U. S.) 457 at 553 (1870).

general welfare, to borrow money, to regulate interstate and foreign commerce, and to coin money and regulate the value thereof.[48]

In none of the cases of the greenback period was it suggested that the derived power to issue legal-tender notes would justify the leveling to a single nominal sum of debts expressed in different amounts. Suppose, for example, that the same parties entered into two separate contracts, one for the payment of $100 and the other for the payment of $169. Congress did not provide in the legal tender acts, and clearly could not have provided, that both debts should be satisfied on tender, in each case, of $100. This, however, is substantially the effect of the gold-clause resolution, in view of the Court's implication of gold value obligations as alternative to gold coin obligations. Suppose, for example, that in 1930 two parties entered two separate contracts, one for the payment of $100 and one for the payment of $100 "in gold coin of the present standard of weight and fineness." By the Court's construction the second of these obligations was, after January 31, 1934, an obligation for the payment of $169. But both may now be discharged on payment of $100.

It appears from the majority's treatment of the public obligations of the Government that this alteration in the amount specified in paper-money debts is an exercise of the currency powers of Congress only in a secondary sense. The gold certificates involved in *Nortz v. United States* were evidently not construed by the majority to contain a gold-*value* clause, which could still survive a change in the gold content of the dollar. There is a strong suggestion in the opinion of Chief Justice Hughes that the devaluation of the dollar was an exercise of the sovereign power over the currency, which would override even an express contract to pay a specified quantity of gold coin.[49] The question would

[48] Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1884).

[49] In Nortz v. United States, (U. S. 1935) 55 Sup. Ct. 428 at 430, the Chief Justice says that the Court can lay aside the question whether gold certificates constitute express contracts on which the United States has consented to be sued. The opinion declares that on this theory the plaintiff has shown no substantial damages and cannot sue in the Court of Claims. But before announcing this conclusion the Court says, "Compare Horowitz v. United States, 267 U. S. 458, 461, 45 S. Ct. 344, 69 L. ed. 736," and proceeds to quote in the margin from United States v. State Nat. Bank, 96 U. S. 30, 24 L. ed. 647 (1877).

The Horowitz case, decided in 1925, was an action to recover damages for breach of contract for the sale of silk to the plaintiff, made by the Ordnance Department in December 1919. Shipment of the silk to plaintiff in New York was delayed by an embargo placed on freight shipments by the United States Railroad Administration. When the silk finally arrived, the price of silk had declined greatly on the New York market. In holding that the petition was properly dismissed on demurrer, the then arise—is not the repudiation of the gold clause in Liberty Bonds an exercise of the currency power which emancipates the Government from all legal obligation? It was precisely on this ground that Mr. Justice Stone found himself unable to concur in the reasoning of the Chief Justice in *Perry v. United States.*[50] On grounds of strict logic the position of Mr. Justice Stone seems unassailable. The solution to the riddle seems to lie in a conviction of the Chief Justice and his associates that the gold-*value* clauses interfere only indirectly with the devaluation policy and that this interference is not so clear as to justify repudiation of the Government's own obligations.

The question would become more acute if Congress should try to prevent the reference by private parties to some standard of value which was not impressed with the quality of money. Suppose, for example, that an obligor agreed to pay the sum of money necessary to purchase, at the maturity of the debt, one hundred bushels of wheat. If the positions so far taken are correct, Congress could not, under its power to "regulate the value of money," fix the value which paper money shall possess in terms of wide groups of commodities. In the absence of some special ground for price-regulation (such as the regulation of interstate commerce), Congress cannot fix the sum which will be paid for a particular commodity on a cash sale. No more can it fix the quantum of damages which shall be paid for breach of a contract to deliver the particular commodity. Nor, it is believed, can Congress under the currency power provide that a promise to pay a sum of money, measured by the value of a non-monetary commodity, shall be discharged by the payment of any particular sum of money. This would appear to be true (though here our footing becomes more precarious) even if the commodity in question (e.g., wheat) were widely used as a standard of value, and although the forces of supply and

Supreme Court quoted with approval from a decision of the Court of Claims as follows (p. 461): "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. . . . Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

In citing United States v. State Nat. Bank, supra, the Chief Justice is concerned only with showing that the power of the Government to modify or abrogate its contracts was not there involved. Money or property which had been received by the Government "by means of a fraud to which its agent was a party" was there held to be recoverable on "implied contract." The Chief Justice quotes language from the case to the effect that in such a case the sovereignty of the United States was "in no wise involved."

[50] Quoted above, note 16.

demand had driven up its market value and thereby increased the real weight of a large mass of money obligations.[51]

The joint resolution of June 5, 1933, must therefore be understood as an effort to preserve parity in value between different types of United States currency. This purpose is written large over the text of the resolution itself. It clearly appears from the opinion of Chief Justice Hughes that he so understands its purpose and effect.[52] He describes at some length the economic consequences of maintaining gold clauses in force, but in this description attention is directed throughout to the effects of preserving two distinct *monetary* standards in domestic transactions. It is true that the resolution invalidates all references to "gold" as a standard of value, and thus includes gold bullion as well as United States gold coin. The broad sweep of its provisions at this point is justified by the fact that gold, whether in the form of coin or bars, is still the basic monetary medium and standard of reference of most of the world's currency systems.

In holding that devaluation policies are hampered by the use of

[51] If it were conceivable that any single commodity or small group of commodities (other than gold or silver) could be adopted very widely as a standard of value for money obligations, it is possible that the currency power could be extended to include the regulation of their value, as it has been in the case of gold. It is believed, however, that a real interference with Congressional policy would have to be made out before such extension would be justified. The commodity or commodities in question would have to perform the function of a general standard of value to something like the extent that this function is performed by gold. In the not distant future this position may be resumed by silver. It seems unlikely that any others will appear.

One other possibility should be suggested. Can Congress altogether prohibit the resort to particular commodities or to price-indices as standards of value? A recent writer has argued that such a prohibition would be an unconstitutional invasion of freedom of contract. Eder, "Legal Theories of Money," 20 CORN. L. Q. 52 at 67-68 (1934). At least it seems clear that the interference of such contracts with Congressional control over the currency would have to be established before a blanket prohibition could be justified. Even though the standard of value chosen was in fact unstable, or the methods of computing the sums due were complex, it would hardly seem that the currency power could be used to prohibit them entirely.

[52] Norman v. Baltimore and Ohio R. R., (U. S. 1935) 55 Sup. Ct. 407 at 414: "The Constitution 'was designed to provide the same currency, having a uniform legal value in all the States.' It was for that reason that the power to regulate the value of money was conferred upon the federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. . . . The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency." In another passage, at p. 418, referring to the fact that at the time of the Joint Resolution devaluation was in prospect and "a uniform currency was intended." Again, at p. 419: "the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts."

gold clauses in private contracts, the Supreme Court has not only recognized a perfectly apparent fact but has reached the conclusion which a number of foreign countries at various times have reached. In spite of the hardship to creditors and in spite of the destruction of private rights entailed, foreign legislatures have not hesitated to strike down the gold clause, for the purpose of maintaining the parity of devalued currency.[53] The experience of foreign countries is not decisive on a question of American constitutional law, though it serves to cast some light on the purposes and the fairness of Congressional policies. Even more persuasive is the impressive body of state court decisions at the time of the legal tender acts, holding that gold clauses were *by implication* invalidated by the legislation of Congress making paper money legal tender. The strongest courts in the country, with almost perfect unanimity, struck down the gold clause without the aid of express legislation.[54] The contrary decisions of the United States Supreme

[53] See the references in Nussbaum, "Comparative and International Aspects of American Gold Clause Abrogation," 44 YALE L. J. 53 at 60-61 (1934).

In France, without express legislation, gold clauses were held invalid by the courts, except in transactions of an international character. The confused and unsatisfactory results of this judicial legislation are described by Nussbaum, *ibid.*, 44 YALE L. J. 53 at 61-62, and more fully by the same author in his book VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTES 11-25 (1928). Some French tribunals even went so far as to invalidate money obligations defined in terms of commodity prices. See decisions cited by Nussbaum, VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTES 14-15 (1928).

[54] Wood v. Bullens, 6 Allen (88 Mass.) 516 (1863); Howe v. Nickerson, 14 Allen (96 Mass.) 400 (1867); Tufts v. Plymouth Gold Mining Co., 14 Allen (96 Mass.) 407 (1867); Thayer v. Hedges, 23 Ind. 141 (1864); Frothingham v. Morse, 45 N. H. 545 (1864); Henderson v. McPike, 35 Mo. 255 (1864); Appel v. Woltmann, 38 Mo. 194 (1866); Whetstone v. Colley, 36 Ill. 328 (1865); Buchegger v. Shultz, 13 Mich. 420 (1865); Warnibold v. Schlichting, 16 Iowa 243 (1864); Wilson v. Triblecock, 23 Iowa 331 (1867); Rodes v. Bronson, 34 N. Y. 649 (1866); Schollenberger v. Brinton, 52 Pa. St. 10 at 100 (1866); Brown v. Welch, 26 Ind. 116 (1866); Galliano v. Pierre & Co., 18 La. Ann. 10, 89 Am. Dec. 643 (1866); Olanyer v. Blanchard, 18 La. Ann. 616 (1866); Shaw v. Trunsler, 30 Tex. 390 (1867). In some states the refusal to give effect to gold clauses was due chiefly to the supposed inability of courts to specify the kind of currency in which the judgment would be payable. Gist v. Alexander, 15 Rich. Law (S. C.) 50 (1867); Spear v. Alexander, 42 Ala. 572 (1868). In Nevada and Idaho it was even held that the legal tender acts by implication invalidated express state legislation, authorizing judgments for coin on written contracts calling expressly for coin. Milliken v. Sloat, 1 Nev. 573 (1865); Hastings & Co. v. Burning Moscow Co., 2 Nev. 93 (1866); Betts v. Butler, 1 Idaho 185 (1868). In California, however, similar legislation was held constitutional. Carpentier v. Atherton, 25 Cal. 564 (1864).

In Brown v. Welch, 26 Ind. 116 (1866), and Jones v. Smith, 48 Barb. (N. Y. Sup. Ct.) 552 (1867), it was likewise held that contracts calling expressly for gold

Court enforcing specie contracts by way of judgment for gold or silver coin were, at the time, a real innovation.[55]

The economic situation in which we now find ourselves provides a further moral justification for the Court's decision. The devaluation policy has not resulted in a prompt and spontaneous rise of internal commodity prices. Until a corresponding rise has occurred the enforcement of the gold clause in private contracts would result, as in the case of public obligations, in the creditor's "unjust enrichment." The value of gold has been deliberately and artificially raised by the Government, in the course of a concerted effort to induce a general rise in prices. The argument of Chief Justice Hughes is chiefly directed to the effects on debtors of enforcing payment of $1.69 for every dollar promised, when their incomes and assets are measured in dollars whose purchasing power is unchanged. On the converse side, the gain to creditors would represent an increment owed not to their own industry or to an equivalent value contributed by them, but to governmental action undertaken in the public interest.

The gold clause is now invalidated in private contracts for the long future, and not merely for the time being. If and when internal prices rise above their present level, the holders of private gold-clause obligations cannot hope for compensation, as can the holders of government gold-clause bonds. But no real hardship to them will result unless and until internal prices rise above the world price of gold, as defined in terms of the old standard. If they rise to exactly that point,

coin or for its "equivalent" in paper money could be discharged in the same sum in legal tender notes.

To be set against this formidable array of authorities were the decisions in Myers & Marcus v. Kauffman, 37 Ga. 600 (1868); Chesapeake Bank v. Swain, 29 Md. 483 (1868); some dubious decisions in North Carolina [Gibson v. Groner, 63 N. C. 10 (1868), and Mitchell v. Henderson, 63 N. C. 643 (1869)]; and some cases in Kentucky enforcing gold clauses in equitable actions [Hord v. Miller, 2 Duvall (63 Ky.) 103 (1865), and Hall v. Hiles, 2 Bush (65 Ky.) 532 (1866)].

[55] The Supreme Court decisions were rendered in the well-known cases of Bronson v. Rodes, 7 Wall. (74 U. S.) 229, 19 L. ed. 149 (1869), and Butler v. Horwitz, 7 Wall. (74 U. S.) 258, 19 L. ed. 149 (1869). It will be recalled that Mr. Justice Miller dissented in both these cases and that Mr. Justice Bradley joined in his dissent in the later case of Trebilcock v. Wilson, 12 Wall. (79 U. S.) 687 (1871). These decisions were in general treated as binding authorities and were followed in state courts. Independent Ins. Co. v. Thomas, 104 Mass. 192 (1870); McCalla v. Ely, 64 Pa. St. 254 (1870); Chrysler v. Renois, 43 N. Y. 209 (1870); and numerous other cases cited in 84 A. L. R. 1510-1511 (1933). Sporadic decisions still appeared holding gold clauses unenforceable. Killough v. Alford, 32 Tex. 457 (1870); Van Alstyne v. Sorley, 32 Tex. 518 (1870); Brassell v. McLemore, 50 Ala. 476 (1874). But see Smith v. Wood, 37 Tex. 616 (1872), and Holt v. Given & Co., 43 Ala. 612 (1869).

the gold that creditors demand will be worth no more to them than the currency they receive and debtors will presumably be willing to pay gold coin rather than paper money. If internal prices rise *beyond* that point some hardship may arise. But so long as the national currency remains tied to gold, this hardship will be traceable to reliance by creditors on a commodity whose world price is subject to all the influences of ordinary supply and demand and is subject also to political control.[56] It is only in the event that the gold standard is wholly abandoned that the claims of such creditors should provoke sympathy and initiate a movement for their protection.

The outlawry of the gold clause in private obligations seems, then, to be fully justified by considerations of expediency. Nor need there be regret on account of its immediate effects on money obligations. Monetary history has provided no basis for the widespread faith in gold as a stable index of value. The events of the last decade have done much to shake that faith. To insist now upon strict enforcement of gold-clause obligations would not only place an intolerable restraint on governmental control of the monetary system but would preserve a legal device that can no longer perform its economic function. In England and the United States metallic coin has been largely displaced as a medium of exchange by bank credit. In countries where paper currency still serves as the principal monetary medium, an increasing governmental control of the financial structure makes possible a more effective control of monetary values. Within the framework of the gold standard great fluctuations in the value of money are possible. Against these fluctuations the gold clause can provide no protection. The gold-clause decisions of 1935 are significant, then, for two main reasons: (1) they mark out an important but inevitable extension of the currency powers of Congress;[57] and (2) they may stimulate the

[56] It is clear that credit inflation can produce a considerable rise in commodity prices (and a corresponding decrease in the value of gold), while the country is still officially on the gold standard. The doubling of prices in the United States during and after the Great War is a sufficient illustration. It might be argued that creditors in gold-clause obligations have at least a moral claim to the increased value of gold during periods of falling commodity prices, if they are thus subjected to the risk of a depreciation in its value. But creditors have already secured a considerable increase in the purchasing power of money owed or paid to them, as a result of the drop in prices during the world depression. It was precisely for the purpose of correcting the resultant maladjustments in the economic system that the present concerted effort to raise prices was undertaken.

[57] That the gold-clause resolution would be sustained by the Supreme Court was predicted in all the published discussions of the subject. Nussbaum, "Comparative and International Aspects of American Gold Clause Abrogation," 44 YALE L. J. 53 (1934);

development of new devices for protecting money obligations against the risk of monetary fluctuation.

The lines along which such development may occur will be considered briefly in the concluding section of this article.

III

REMAINING POSSIBILITIES FOR STABLE VALUE CONTRACTS

1. *Clauses Referring to Monetary Media*

The joint resolution of June 5, 1933, does not restrict its attack to contracts calling for payment in gold coin. By its terms it invalidates any provision for payment "in gold or a particular kind of coin or currency or in an amount in money of the United States measured thereby." The broad language used by the Supreme Court in sustaining the legislation indicates that any express reference to a particular kind of United States coin or currency, either as a medium of payment or as a standard of value, is now precluded.

Gold bullion deserves special attention. It has been suggested above that a contract for the delivery of a specified quantity of gold bullion is not a "money obligation" within the language of the resolution. When the present restrictions on the ownership and sale of gold coin and gold bullion are removed, there should be no obstacle to "commodity" contracts involving gold bullion. The same would be true if a quantity of gold *coin* were sold by weight. Here, however, great care would have to be exercised in describing the coin by weight rather than by its nominal value as money, to avoid crossing the line into "money" obligations.[58]

If gold bullion were referred to *as a standard of value* in a "money" obligation, the language of the joint resolution would apply. The Supreme Court has not been asked to decide whether the legislation in this respect is constitutional. In the gold-clause cases gold *coin* was provided primarily as the medium of payment and secondarily as the

Collier, "Gold Contracts and Legislative Power," 2 GEO. WASH. L. REV. 303 (1934); Johnson, "Constitutional Limitations and the Gold Standard," 67 U. S. L. REV. 187, 239 (1933); EDER, THE LAW AS TO THE GOLD CLAUSE IN INTERNATIONAL CONTRACTS (1933); and comments in 31 MICH. L. REV. 953 (1933); 9 WIS. L. REV. 295 (1934); 2 UNIV. CHI. L. REV. 138 (1934); 83 UNIV. PA. L. REV. 88 (1934). A less confident prediction was made by Post and Willard, "The Power of Congress to Nullify Gold Clauses," 46 HARV. L. REV. 1225 (1933), and Payne, "The Gold Clause in Corporate Mortgages," 20 A. B. A. J. 370 (June 1934).

[58] See above, note 45.

measure of value. It would be altogether unsafe to rely on this fact element as indicating a limit to the constitutional powers of Congress. The almost universal use of gold as a standard of value in international transactions impresses it to a peculiar degree with the quality of money. The power to maintain the parity of all kinds of United States currency would need only a slight extension to include this regulation of parity with gold bullion, the basic international standard.

Silver bullion, on the other hand, falls entirely outside the scope of the joint resolution. Not only would it be permissible to contract for delivery of silver bullion as a commodity, but a "money" obligation could refer to it as a standard of value. The objections to the use of silver bullion for the purpose of stabilizing values are economic, not legal. The abandonment of the bi-metallic standard by the great industrial countries has left silver free for its wild gyrations on world markets in recent years. The efforts of the United States Government to stabilize its value have had some effect, but its future is still dark.[59]

One other important possibility is to be found in foreign currencies, which can be used in domestic debts both as media of payment and as standards of value.[60] But political and economic risks threaten the currencies of Europe quite as greatly as they do our own. It is not to be expected that private persons in this country will willingly stake their fortunes on the stability of any monetary system in so confused and troubled a world.

Accordingly, we feel justified in concluding that neither through the precious metals nor through the official currency of any country can we now attain the security that the gold clause was intended to provide.

2. *Clauses Referring to Particular Commodities*

The gold-clause resolution would clearly not prevent the adoption of particular commodities or groups of commodities as standards of value in money obligations. In an earlier section of this article it was argued that Congress would exceed the limits of the currency powers if it undertook to level down such obligations to a single basic standard.

[59] One ounce of gold would purchase 38.22 ounces of silver in 1910, 15.31 ounces in 1920, and 53.38 ounces in 1930. 1 LAUGHLIN, A NEW EXPOSITION OF MONEY, CREDIT AND PRICES 95-96 (1931); WARREN AND PEARSON, PRICES 139 at 144 (1933). See also Smith, "Silver—Its Status and Outlook," 13 HARV. BUS. REV. 44 (1934).

[60] The gold-clause resolution, sec. 1 (b), defines the "obligations" within its scope as obligations "payable in money of the United States"; and defines the "coin or currency" in which such obligations are payable or by which such obligations are measured, as "coin or currency of the United States."

Nor does it seem that Congress could directly prohibit the resort to *non-monetary* standards of performance, even as the measure of money obligations. If this argument is mistaken, it is enough to say that Congress has not undertaken to do so and is unlikely to do so, unless the widespread use of such devices clearly interferes with Congressional control of money.

The obstacle to the use of particular commodities for this purpose is the instability in market value resulting from uncontrolled conditions of demand and supply. The survival of gold as the foundation for modern monetary systems is not due merely to historical accident. Not only can gold be handled conveniently in small quantities (this is true of iron and copper), but the limited world supply gives some assurance against a sudden flooding of world markets and wide fluctuations in its price. There have been such fluctuations in the past. But with commodities that enter more widely than gold into general consumption, there would be not only the risk of excessive increase in supply, but also wider variations in demand.

The adoption of particular commodities as a measure of money obligations would not be a novel experiment. Some American colonies, indeed, made wampum, tobacco, wheat, and corn their basic monetary media and in some instances impressed them with the legal tender quality.[61] The depreciation of paper currency during the American Revolution led Massachusetts to issue a tabular standard, based on the values of four commodities, for computing the wages of soldiers.[62] In the period after the Revolution there are records of private contracts adopting a similar device for measuring the sum due in private debts.[63]

[61] See above, note 37.

[62] The standard was calculated on the prices of beef, corn, wool, and leather. See FISHER, STABLE MONEY 12 (1934); Fisher, "The Tabular Standard in Massachusetts History," 27 QUAR. J. OF ECON. 417 at 437 (1913).

[63] Professor Fisher refers to a 1000-year lease executed in Boston on September 8, 1817, with a yearly rental of 10 tons of first quality iron which was in fact paid in the currency value of such iron. FISHER, THE MONEY ILLUSION 116 (1928).

The legal effect of such an agreement was considered in Faulcon v. Harriss, 2 Hen. & Munf. (12 Va.) 550 (1808), where plaintiff, an administrator, sued on a bond for the purchase price of land sold by his intestate on May 3, 1782. The bond provided that defendant would pay "1000 l. specie, or such further sum as shall be equal to the said 1000 l. in the year 1774, that is to say, to purchase as much land and negroes, as it might have done in ready money, at the aforesaid time." It was further provided that if the parties could not agree on the sum to be paid, three arbitrators should determine it. The plaintiff sued in an action of debt, alleging nonpayment of the sum due but not alleging the exact amount to which plaintiff was entitled. The case finally went off on the ground that this declaration entitled plaintiff to only £1000 recovery. Evidence introduced by plaintiff to show that £1000 would

More recent monetary disasters have had the same effect in stimulating resort to commodity prices as a more stable index of value than the monetary medium.[64] The richest experience with this device is that of Germany in the great inflation of 1918-1923. A great variety of commodities and services were there used at various stages of the inflation—rye, wheat, iron, wood, coal, potash, and electric light.[65] Also by express legislation in the later stages mortgages were authorized whose amount would be measured by the value of rye, wheat, potash, and coal.[66] At the same time legislation authorized the issue of negotiable drafts in which the principal sum due could be defined by any standard expressed in the instrument itself.[67] Even before this legislation, "rye-mortgage" banks had been organized and "rye mortgages" were executed in enormous volume.[68] The difficulties in translating the values defined in terms of rye into a rapidly depreciating currency made this device wholly unsatisfactory for use by large credit institutions.[69] The

purchase only half as much land and half as many slaves between 1782 and 1786 as it would in 1774 was held inadmissible under these pleadings. One judge, however, said (at p. 554): "Smarting, *possibly*, under the effects of the then recent depreciation of paper money, and wishing, in any event, to receive the value of his land; the intestate of the appellant, stipulated for an eventual resort to a standard more stable than money, which is liable to be diminished in its value by casual and fortuitous circumstances, and even by a natural and progressive depreciation. A resort to this standard is no more unlawful and usurious, than a reference to *corn* or any other article of the first necessity."

[64] See, for example, the proposal of the Secretary of the Treasury of the Confederate States in 1864, for a "multiple standard of value, founded on the agricultural staples of cotton, corn, and wheat," to be used by the Treasury in its fiscal operations. SMITH, "History of the Confederate Treasury," 5 PUBLICATIONS OF THE SOUTHERN HISTORICAL ASSOCIATION 188 at 196 (1901).

[65] GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, p. 72 (1930); Süskind in the JURISTISCHE WOCHENSCHRIFT, 1923, p. 107.

[66] Gesetz über wertbeständige Hypotheken (June 23, 1923), REICHSGESETZBLATT, 1923, I, 407, and complementary legislation of June 29, 1923 (REICHSGESETZBLATT, 1923, I, 482), and Oct. 5, 1923 (REICHSGESETZBLATT, 1923, I, 933). This legislation allowed reference only to the "officially published" prices of these commodities. It was especially necessary in the field of land mortgages because of the requirement in the land registry laws that mortgages, for public registry, must be expressed in fixed sums of money.

[67] Gesetz über die Ausgabe wertbeständiger Schuldverschreibungen auf den Inhaber (June 23, 1923). REICHSGESETZBLATT, 1923, I, 407.

[68] Professor Nussbaum quotes an estimate of the mortgages of this type still outstanding in 1927 at a total of over 19 million hundredweight of "rye value." VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTES 76 (1928).

[69] This was clearly shown in the litigation involving the Roggenrentenbank, reported in DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 109, p. 174 (Nov. 13, 1924). An action was there brought for the value of an installment of in-

fluctuations in the value of the commodities used and the extreme inconvenience in calculating money values by such standards led finally to legislation which redefined these mortgages simply in terms of money.[70]

A recent analysis of price movements has led to the conclusion that for an adequate index of the general level of prices, no less than 50 commodities must be taken into account.[71] It is clearly impracticable for private contracts to provide so formidable a list, with the necessary details as to weight and volume of each commodity involved. Even if this recital were made, the difficulties in fixing the relative weights to be given price-changes in each commodity group and the physical labor of collecting current market prices would present insuperable obstacles and provoke dispute.[72] The costs of litigating these compli-

terest, due January 1, 1924, on a bond issued by the mortgage bank, whose assets consisted of "rye mortgages" given by borrowers from the bank. The bond held by the plaintiff provided expressly that interest payments should be measured by the official price of rye six weeks before the installment was due. This provision was made necessary by the financial operations involved in collecting from the mortgagors the sums in paper marks which would eventually be paid out as interest to bondholders. Because of the possibility that the price of rye on a particular day might be influenced by artificial factors, an *average* was used for the month prior to the date fixed. Thus the installment due January 1, 1924, was calculated on the basis of average prices for rye from October 15 to November 14, 1923. In an admirable discussion of the whole economic problem the Reichsgericht came to the conclusion that the risk of currency depreciation in this interval must fall on the holder of the bond, and that it would "correspond neither with the purpose nor the organization" of the mortgage bank for it to assume this risk, since it was merely an "intermediary" between the investing creditor and the borrowing land-owner.

It should be pointed out, however, that the loss through money depreciation which was thus assumed as well as the loss through fluctuations in the value of rye could not be compared with the loss which creditors in simple money obligations suffered through the accelerating decline of the mark.

[70] NUSSBAUM, VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTES 75-76, 79 (1928).

[71] FISHER, THE MAKING OF INDEX NUMBERS 340 (1923). Other students of monetary problems would undoubtedly disagree with the choice of any particular number of commodities for this purpose. As will be pointed out in the next article, some current price-indices are based on less than this number and some are based on considerably more. Professor Fisher's own series is based on 120 commodities.

[72] The problem of weighting will be referred to in the next article entitled "Contracting by Reference to Price Indices," infra, p. 685. The practical difficulties in collecting quotations for particular commodities are described by Mitchell, "The Making and Using of Index Numbers," BULLETIN NO. 284 OF THE UNITED STATES BUREAU OF LABOR STATISTICS 7 at 25-31 (1921). As Professor Mitchell there points out (at p. 25):

> "We commonly speak of *the* wholesale price of articles like pig iron, cotton, or beef as if there were only one unambiguous price for any one thing on a given day, however this price may vary from one day to another. In fact there are many different prices for every great staple on every day it is dealt in, and most of these

cated questions of fact would greatly exceed the saving to the parties through the adoption of such multiple standards of value.

Any reference to the general level of commodity prices for stabilization of contracts must therefore adopt a more simplified device for registering changes. It is believed that this device must be developed through the commodity price index, some form of which must apparently be adopted if private contracts are to be adequately protected against monetary fluctuation.

3. *Commodity Price Indices*

The modern commodity price index is merely a more scientific and exact method of recording movements in the commodity prices selected for study. The method chosen for the purpose results primarily from the difficulty of comparing the prices of different commodities directly. If butter is 40 cents a pound and wheat is $1.00 a bushel, one must make a comparison with previous prices before one can judge which of these is relatively high or low. Discrepancies due to differences in quantity and price can be eliminated, however, if the *percentage* in the rise or fall can be measured for a given quantity of the same commodity at different periods of time. Professor Irving Fisher, the most prominent modern protagonist of the index system of calculation, has defined the index number as a "figure which shows the average percentage change in the prices of a number of representative goods from one point of time to another." [73] By combining the percentages of change in the prices of numerous commodities into an average, some notion may be secured of the movement of prices over a fairly wide area. By selecting the prices of the chosen commodities on a given date as a base, the relative change over long periods of time (both forward and backward) may be described.

The device of the index number is not a new invention. It first appeared in economic literature over 170 years ago.[74] The price fluc-

> differences are of the sort that tend to maintain themselves even when markets are highly organized and competition is keen."

Among the factors suggested as producing variations in price quotations are differences in grade and quality, differences in prices for large and small quantities, differences in prices paid by manufacturer, jobber and local buyer, variations from place to place, cash discounts, premiums, and rebates. In the field of retail prices and wages all these complicating factors are, it may be assumed, enormously multiplied.

[73] FISHER, THE MONEY ILLUSION 19 (1928).

[74] The information summarized in this paragraph is derived from Mitchell, "The Making and Using of Index Numbers," BULLETIN No. 284 OF THE UNITED STATES BUREAU OF LABOR STATISTICS 7-10 (1921); and the briefer account in FISHER, THE MAKING OF INDEX NUMBERS, App. IV (1923).

tuations of the nineteenth century produced an increasing interest in the causes of this phenomenon and an increasing resort to the index method of calculation. The theoretical bases of modern systems were well laid before the end of the nineteenth century and some regular series of index numbers had reached the stage of publication. But it was not till the twentieth century that price-indices were subjected to prolonged and intensive study and a variety of different series were continuously maintained. An enormously complicated statistical apparatus has been devised for the construction of price-indices. This should not disguise the fact that the ultimate standard of reference is the current price of specified commodities.

It seems plain that there is nothing in the language of the gold-clause resolution to prohibit the use of this device in private contracts for the payment of money. It has been urged in the earlier sections of this article that the currency power of Congress could not be used to invalidate a clause adopting price indices as a basis for calculation or to prohibit altogether the adoption of this device. If the price-index method of contracting could be shown to be a practicable method for adjusting money obligations to changes in the purchasing power of money, any legislature would be convicted of an arbitrary and destructive purpose in attacking such contractual provisions.[75]

The regulation of currency is a subject withdrawn from the competence of the states and committed to the federal Government.[76] For this reason the attitude that the Supreme Court of the United States might adopt toward contracts of this type is especially important. The Supreme Court has in the past asserted a broad power to review state decisions on currency questions, not only as to the form of judgment

[75] It is assumed that the due process clause of the Fifth Amendment operates as a limit on Congressional action, even within the sphere of admitted constitutional power. Effort has been chiefly directed in this article to suggesting the limits of Congressional power over the currency, either through the express grant of power "To coin money, [and] regulate the Value thereof" or through related powers that may be used for similar purposes. At the outer limits of Congressional action, the question as to the existence of power and the question of due process converge. Unless legislation invalidating price-index provisions had some reasonable relation to the purposes which Congress was authorized to achieve, it would appear that Congress had exceeded its power and that the due process clause would also be violated.

[76] Chief Justice Hughes in Norman v. Baltimore and Ohio R. R., (U. S. 1935) 55 Sup. Ct. 407 at 414. It was on this ground that the Washington Supreme Court held invalid an act of the state legislature which, like the gold-clause resolution of 1933, abrogated any provision in contracts which attempted to distinguish between classes of lawful money of the United States. Dennis v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302 (1898).

which should be rendered on money obligations,[77] but as to the construction of contracts calling for payment in money.[78] But there is nothing in the gold-clause decisions or in prior Supreme Court cases to indicate that the sum due in a money debt cannot be made to fluctuate with the purchasing power of money. In one case it was assumed that a contract providing for such fluctuation was perfectly valid.[79]

The adoption of price-indices for the measurement of money obligations involves serious technical difficulties. There are important classes of debts for which this device is wholly unsuitable. For its successful application the co-operation of lawyers and economists will be required, and a new technique must be developed. It is believed, however, that the difficulties are not insurmountable.[80]

The abrogation of the gold-clause has coincided with a new and more determined search for monetary stability. The gold clause was struck down in an effort to dethrone gold from its high place as an international standard of value. It is too soon to say what new standards will emerge, or what new devices will be found for deliberate governmental control of currency values. The "commodity dollar," with its automatic adjustment of the gold content to the movement of commodity prices, seems as yet too hazardous an experiment. Until order has been restored in the monetary systems of the world and we are better able to see where these new paths will lead, a whole economic system should not be exposed to the risk of continued shift in currency values. In a money economy built on the essential foundation of long-term credit, an imperative need for monetary stability cannot await the results of political action. And in the end, if political action should achieve the grand objective, the stabilization of money values through private contract would promote and not defeat its purpose.[81] By turning energies in new directions the elimination of the gold clause in private contracts may contribute in a wholly unexpected manner to the achievement of monetary stability.

[77] Bronson v. Rodes, 7 Wall. (74 U. S.) 229, 19 L. ed. 141 (1869); Butler v. Horwitz, 7 Wall. (74 U. S.) 258, 19 L. ed. 149 (1869).

[78] Butler v. Horwitz, 7 Wall. (74 U. S.) 258, 19 L. ed. 149 (1869); Dewing v. Sears, 11 Wall. (78 U. S.) 379, 20 L. ed. 189 (1871); Woodruff v. Mississippi, 162 U. S. 291, 16 Sup. Ct. 820 (1896). The last case, in particular, is instructive.

[79] Ames v. Quimby, 96 U. S. 324, 24 L. ed. 635 (1878), where the standard of value referred to was gold.

[80] See the next article entitled "Contracting by Reference to Price Indices," infra, p. 685.

[81] See the suggestion to the same effect by Terpenning, "Standardizing Values Instead of Trying to Nail Down the Restless Dollar," 87 FORUM 56-61 (1932).