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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

The Court of Claims of the United States, by an order dated November 15, 1934, certified to this Court certain facts and two questions of law concerning which it desired the instruction of this Court for their proper decision. The facts certified in effect constituted the entire petition of the claimant together with the additional statement that the defendant had filed a demurrer on the ground that the petition did not state a cause of action against the defendant, thereby admitting the truth of the facts stated in the petition. The certificate is set out in full in the Appendix, page i; the facts stated therein are briefly as follows:

The claimant is, and has been for a number of years, the owner and registered holder of an obligation of the United States of America, in the principal amount of $10,000., issued in 1918 and known as Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, Serial Number 19831, wherein and whereby the defendant promised to pay to the claimant, or his registered assigns, on October 15, 1938, or at any time after October 15, 1933, at the pleasure of the defendant, said principal sum "in United States gold coin of the present standard of value", and to pay interest in like gold coin on said principal sum at the rate of 4¼% per annum, from April 15, 1920, on April 15 and October 15 in each year, until the principal thereof should be payable.[1]

At the time of the issuance of said bond, and at the time of the acquisition of the same by the claimant a dollar in gold consisted of 25.8 grains of gold .9 fine.[2] The claimant was, therefore, entitled to receive from defendant at the time of the maturity of said bond, whether by redemption or otherwise, 10,000 gold dollars, each containing 25.8 grains of gold .9 fine, or its equivalent in legal tender currency as hereinafter set forth.

On October 12, 1933, the defendant, through and by the Secretary of the Treasury, called for redemption on April 15, 1934, a part of said issue of Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938 including, among others, said bond of which the claimant is the owner and registered holder.[3] After said date, and on May 24, 1934, the claimant duly presented said bond to the defendant at the Division of Loans and Currency, Treasury Department, Washington D. C., and demanded of the defendant that it redeem said bond by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine.[4] The defendant refused to comply with the claimant's demand and refused to re-

1. This bond is one of the series of 4¼% Gold Bonds of 1933-1938 authorized by an Act of Congress, approved September 24, 1917, as amended, (40 Stat. 288) and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918. The relevant provisions of this bond, of the Act of September 24, 1917, as amended, and of Treasury Department Circular No. 121, are set forth in the Appendix hereto, page vi et seq.

2. Act of Congress approved March 14, 1900, 31 Stat. 45.

3. Treasury Department Circular, No. 501, dated October 12, 1933, Appendix page x, promulgated in accordance with the Act of September 24, 1917, (40 Stat. 292) as amended, and Treasury Department Circular No. 121.

4. In accordance with said Act of September 24, 1917, as amended, and said Treasury Department Circulars Nos. 121 and 501, said bond at the time of presentment, was properly assigned to "The Secretary of Treasury for redemption."

deem said bond in the manner specified therein. The claimant then demanded of the defendant 258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing $15\frac{5}{21}$ grains of gold .9 fine, or 16,931.25 dollars in legal tender currency.[5] The defendant refused to accede to the claimant's demands, or any of them, and refused to redeem said bond except by the payment of $10,000. in legal tender currency. The claimant declined to accept the payment of $10,000. in legal tender currency believing that it was not an adequate and complete performance of the defendant's obligation.

On June 22, 1934, claimant filed his petition with the Clerk of the Court of Claims of the United States alleging the aforesaid facts and requesting that judgment be entered in his favor against the United States for the sum of $16,931.25, with any interest due thereon. The defendant filed a demurrer to claimant's petition with the Clerk of the Court of Claims, on October 30, 1934, which alleged: that the petition did not set forth a cause of action against the United States, and that it did not set forth a cause of action against the United States within the jurisdiction of the Court of Claims.

The questions arising out of these facts and which were certified by the Court of Claims to this Court are as follows:

1. Is the claimant, being the holder and owner of a Fourth Liberty Loan $4\frac{1}{4}\%$ bond of the United States, of the principal amount of $10,000., issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is "payable in United States gold coin of the present standard of value," entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

5. By Presidential Proclamation on January 31, 1934, made pursuant to the Emergency Relief Act of May 12, 1933, as amended, 48 Stat. 31, the weight of the gold dollar was reduced to $15\frac{5}{21}$ grains of gold .9 fine, or slightly more than 59% of its former weight of 25.8 grains of gold .9 fine.

2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?

The first of these questions, in sweeping terms, is plainly directed at the right of the petitioner to recover from the United States and comprehends any cause of action petitioner may have. The second question is somewhat ambiguous, but, in view of the broad scope of the first, will be considered as dealing with the question of the jurisdiction of the Court of Claims. The claimant contends that both of these questions should be answered in the affirmative.

It is well settled that the United States is bound by its contracts as are private persons,[6] and there can be no doubt, were it not for certain statutes enacted by the Seventy-third Congress, that the claimant would be entitled to payment by the defendant in accordance with the terms of his contract and to recover damages upon defendant's failure to so perform.[7] In substance one of these statutes specifically purports to release the defendant from strictly complying with the terms of its obligation by permitting it to satisfy its debt by paying less than the sum contracted for.[8] The sole issue presented by the first question is, therefore, whether Congress may by statute repudiate in part an obligation entered into under the authority of a power delegated to it by the Constitution of the United States of America.

6. The most recent expression of this doctrine is found in *Lynch* v. *United States,* 292 U. S. 571.
7. See Point One, *infra* at page 10.
8. Public Resolution No. 10, 73rd Congress, June 5, 1933, 48 Stat. 113.

Public Resolution No. 10, Seventy-third Congress.

In order to understand the full effect of the Joint Resolution of June 5, 1933 (Public Resolution No. 10, Seventy-third Congress), a short review of the circumstances surrounding its enactment is necessary. Prior to the legislation of March, 1933, the currency system of the United States had been based primarily on a "gold standard", that is to say, the value of the dollar was maintained at home and abroad at par with the value of a certain amount of gold.[9] As a result of presidential proclamations and orders placing an embargo on gold, both coin and bullion, and making it unlawful to possess it, the United States ceased to be "on a gold standard".[10] It is to be noted that none of these statutes, proclamations, or orders purported to make "gold clause" contracts illegal and such provisions would have been enforced according to their full intent and meaning. On June 5, 1933, the date of the enactment of Public Resolution No. 10, for all practical purposes, there was but one kind of currency lawfully in

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9. "Our present unit of weight is a fixed weight, the pound; our unit of length is a fixed length, the foot, and our unit of content is a fixed content, the quart. But for our unit of value, under the gold standard we used not a fixed value, but whatever value happened to attach at the time to a fixed weight of gold, namely, to 23.22 grains of pure gold, which was the gold content of the dollar. In the Spring of 1933 the United States went on a paper money standard". Kemmerer, MONEY, 1934 ed., p. 14.

10. Act of October 6, 1917 (Trading With The Enemy Act), 40 Stat. 411, Presidential Proclamation of March 6, 1933; Act of March 9, 1933, (Emergency Banking Act) 48 Stat. 2; Presidential Proclamation of March 9, 1933; Executive Order of April 5, 1933, Executive Order of April 20, 1933, Regulations of Secretary of Treasury, entitled "Regulations Relating to Licensing the Purchase and Export of Gold," April 29, 1933; Act of May 12, 1933, Title III (Thomas Amendment to the Agricultural Adjustment Act) 48 Stat. 31. The latter statute clothed the President with authority, by proclamation, to reduce the weight of the gold dollar to not less than 50% of its former weight. This power had not been exercised by June 5, 1933, and was not, in fact, used until January 31, 1934, after the enactment of the Act of January 30, 1934 (Gold Reserve Act), 48 Stat. 337, which in effect placed the United States on a gold bullion standard and amended the Act of May 12, 1933, so as to authorize the President to fix the weight of the gold dollar at not more than 60% of its former weight. Pursuant thereto the President by proclamation dated January 31, 1934, reduced the weight of the gold dollar to 15 5/21 grains of gold .9 fine.

circulation (with the exception of token money), namely paper dollars, and at that time, although the dollar was legally stabilized at 25.8 grains of gold .9 fine, there was a disparity between the actual value of the paper dollar and that of the gold dollar.[11]

Under these circumstances the Joint Resolution of June 5, 1933, was adopted. The first paragraph of the Act reads as follows:

> " '*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to 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.
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> '(b) As used in this resolution, the term "obligation" means an obligation (including every obliga-

11. See index of wholesale commodity prices on a gold basis, published in The Annalist Weekly of December 14, 1934, at page 817, and reproduced by permission in Appendix p. xiv.
This situation is not entirely unprecedented in this country. Shortly after the Civil War there was a disparity in the value of paper money made legal tender by the Legal Tender Acts, and in the value of gold coin and bullion. If it is to be considered that the President exceeded his power in promulgating the Executive Order of April 5, 1933, ordering all persons to surrender gold coin, gold bullion, and gold certificates, and for this reason gold, in coin and bullion, was legally available, the situation is practically identical. (See *United States* v. *Campbell,* 5 Fed. Supp. 156; 47 Harv. L. Rev. 479 (1934).)

> tion 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.' "

This statute seems susceptible of only one interpretation. It purports to make ineffectual provisions in contracts, public or private, requiring the payment of gold or a particular kind of coin or currency, or the payment of an amount of other currency measured by the value of gold or a particular kind of coin or currency. Under this Joint Resolution, had the claimant's bond been called for redemption at any date after June 5, 1933, regardless of the provision that the principal and interest thereof is "payable in United States gold coin of the present standard of value", it would have been satisfied by the payment of $10,000. in legal tender currency, a sum less than claimant would receive were the redemption made in accordance with the tenor of the bond.[12]

The claimant contends that Congress has no power directly to lessen its obligation by repudiation; that the purported abrogation of the gold clause in the claimant's Liberty Bond was wholly without legal justification or excuse; and that, in this respect, the Joint Resolution of June 5, 1933, is, therefore, unconstitutional and void.

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12. Some question of the measure of claimant's recovery might have been presented had his bond matured before January 31, 1934. However, on that date by Presidential Proclamation promulgated pursuant to the Act of May 12, 1933, 48 Stat. 31, as amended, the gold dollar was stabilized at 15⅝₂₁ grains of gold .9 fine, constituting thereby an official recognition of the depreciated value of the dollar. A gold dollar of 25.8 grains of gold .9 fine was thereafter worth $1.69 in the new 15⅝₂₁ grain dollars.

SUMMARY OF THE ARGUMENT

I

The claimant as the owner and holder of a Fourth Liberty Loan $4\frac{1}{4}\%$ Bond Issued in 1918 "payable in United States Gold Coin of the present standard of value" is entitled to receive from the United States an amount in legal tender currency in excess of the face amount of said Bond.

POINT ONE

The proper construction of the provision in claimant's bond to the effect that principal and interest thereof are payable in United States gold coin of the standard of value of the date of issuance, is not that it prescribes the method of payment, but that it is a measure of the obligation of the United States.

Prior to the enactment of the Joint Resolution of June 5, 1933, and on April 15, 1934, (the date of redemption of claimant's bond) if said statute is unconstitutional and void, the claimant, according to the terms of his bond, was entitled to recover from the United States an amount in legal tender currency equivalent to the value of 10,000 gold dollars each containing 25.8 grains of gold .9 fine, or equivalent to the value of 258,000 grains of gold .9 fine.

POINT TWO

The Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in claimant's bond, is unconstitutional and void for the following reasons:

A. It is in direct violation of Section four of the Fourteenth Amendment to the Constitution of the United States which is an express limitation upon the powers delegated to Congress by the Constitution.

B. No provision of the Constitution authorizes Congress to enact such legislation.

C. It violates the Fifth Amendment to the Constitution in that it deprives the claimant of his property without due process of law.

POINT THREE

The claimant, in any event, is entitled to recover just compensation for the taking of his property for public use.

II

The Court of Claims has jurisdiction of the claimant's action against the United States.

ARGUMENT

I

POINT ONE

The purpose and effect of the gold clause in the claimant's bond is not to prescribe the method of payment, but to measure the obligation of the United States.

The claimant's bond recites: "The United States of America for value received promises to pay to John M. Perry or registered assigns the sum of Ten Thousand Dollars on October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum, from April 15, 1920 on April 15 and October 15 in each year, until the principal hereof shall be payable, ... The principal and interest hereof are payable in United States gold coin of the present standard of value. * * *"

The obligation of this contract is not to pay solely in gold coin or bullion. The language inserted therein by the United States is merely the formal expression of an agreement to protect the bondholder against fluctuations in the medium of payment, and to establish a measure of the debtor's obligation that will carry this intention into effect. The intention of the parties was not, in the words of the Joint Resolution of June 5, 1933, to require payment "in gold or a particular kind of coin or currency", but "in an amount in money of the United States measured thereby".

The Act of March 18, 1869, (16 Stat. 1), reading as follows, was an integral part of the law at the time of the issuance of claimant's Liberty Bond:

> "The faith of the United States is solemnly pledged to the payment in coin or its equivalent * * * of all the interest bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver."

This statute must be considered as entering into and being a part of claimant's Liberty Bond. The gold clause therein, for this reason, must be taken to read: "The principal and interest hereof are payable in United States gold coin of the present standard of value *or its equivalent*". This construction and only this construction confirms the intention of the parties.[13]

The question of the construction of a gold clause contained in an obligation of the Federal Government has never arisen. There are, however, numerous decisions involving similar clauses in private obligations.

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13. A further argument in support of the construction set forth above (and which was stressed by Lord Russell of Killowen in delivering the decision of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité* [1934], A. C. 161) may be found in the fact that the gold contract contained in the bonds of the Fourth Liberty Loan cannot be satisfied in "gold coin of the United States." Pursuant to Treasury Department Circular No. 121 (Appendix, pp. viii, ix) bonds of the Fourth Liberty Loan were issued in denominations of $50, $100, $500, $1000, $5000 and $10,000, and interest thereon was payable semi-annually on April 15th and October 15th. The amount of interest payable semi-annually on bonds of this issue was, in the case of bonds of the denomination of $50, $100, $500, $1000, $5000 and $10,000, respectively, the sum of $1.06 and $1.07, $2.12 and $2.13, $10.62 and $10.63, $21.25, $106.25 and $212.50. At the time of the issuance of the bond there was no single standard gold coin, or combination of standard gold coins that could have been used in making payments of a semi-annual instalment of interest payable on bonds of the denomination of $50, $100, $500, $1000 or $5,000. The "gold coins of the United States" were then the quarter eagle, or $2.50 piece, the half eagle, or $5. piece, the eagle, or $10. piece, and the double eagle or $20. piece, (26 Stat. 485). [The coinage of the quarter-eagle or $2.50 piece was discontinued in 1930 (46 Stat. 154)]. Consequently, at the time of the enactment of the Joint Resolution of June 5, 1933, none of the semi-annual instalments of interest payable on any of the bonds could have been met in standard gold coins.

The language of one these decisions, handed down by this Court at the time of the Legal Tender Acts of 1862 and 1863, appears to support the view that such clauses require the payment of gold coin or bullion. In *Bronson* v. *Rodes,* 7 Wall. 229, at page 250, the Court said:

> "Payment of money is delivery by the debtor to the creditor of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstances, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count."

An examination of subsequent cases in this Court shows, however, that the judgments given in these cases were not for specific performance of an obligation to deliver a commodity, but judgments for the payment of a debt due in a specific form of currency.

In *Trebilcock* v. *Wilson,* 12 Wall. 687, the Court avoided the analogy to commodity or bullion contracts, and said, at page 694:

> "The note of the plaintiff is made payable, as already stated, *in specie.* The use of these terms, *in specie,* does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain. Such contracts are generally made because it is more convenient for the maker to furnish the articles designated than to pay the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles or neglects to do so, the number of dollars specified is the measure of recovery.

But here the terms, *in specie,* are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States.''

The commodity analogy of *Bronson* v. *Rodes* was definitely rejected in *Thompson* v. *Butler,* 95 U. S. 694, where the Court said at page 696:

> ''We are aware that in *Bronson* v. *Rodes,* 7 Wall. 229, it was said that a contract to pay in gold or silver coins 'is, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins,' and that 'it is not distinguishable, . . . in principle, from a contract to deliver an equal weight of bullion of equal fineness;' but, notwithstanding this, it is a contract to pay money, and none the less so because it designates for payment one of the two kinds of money which the law has made a legal tender in discharge of money obligations.''

That this Court has recognized the primary object of the gold clause is clear from the following language of *Butler* v. *Horwitz,* 7 Wall. 258, 260:

> ''*The obvious intent, in contracts for payment or delivery of coin or bullion, to provide against fluctuations in the medium of payment,* warrants the inference that it was the understanding of the parties that such contracts should be satisfied, whether before or after judgment, only by tender of coin, while the absence of any express stipulation, as to description, in contracts for payment in money generally, warrants the opposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money'' (Italics supplied).

The real purpose of the gold clause has been succinctly stated by Post and Willard, *The Power of Congress to*

Nullify Gold Clauses, 46 Harvard Law Review, 1225 at page 1238:

> "The gold clause is inserted in contracts for the benefit of the obligor as well as the obligee, in order to make the instrument attractive by assuring the obligee that, in case of currency depreciation, the obligor will take the loss, and not the obligee. The gold creditor, when he makes the contract, has no intention of committing himself entirely to payment in gold coin, thereby putting it in the power of the debtor, in case of a shortage of gold or an embargo, to raise the defense of impossibility of performance.
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> "In the Case of Brazilian Loans, Publications of the Permanent Court of International Justice, Ser. A, No. 20 (1929), the court said, at page 120: 'The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligation. As for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable.' "

For these reasons, therefore, it would seem clear that the purpose of the gold clause is not to force payment in gold coin, but to measure the obligation of the debtor. This interpretation has been adopted by the English House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité,* (1934) A. C. 161. In that case, Feist, the holder of a bond for £100 containing a clause to pay the principal and interest in gold coin of the United Kingdom "of or equal to the standard of weight and fineness existing on September 1st, 1928" (the date of issue), asked in the alternative for a declaration that he was entitled to the gold coins or their market value. In the Chancery Division, Mr. Justice Farwell held that the obligation could be satisfied by payment in depreciated currency, and his decision was unanimously affirmed by the Court of Appeal. In the House of Lords, however, Lord Russell of Killowen, speaking for the Court, held that the purpose of the gold clause in the bond was not to prescribe the method of payment of the bond but to measure the obligation and that the contract should be enforced in accordance with the intention of the parties.[14] In the *Bronson* case and in the cases following it the creditor asked for a gold judgment which the debtor was able to satisfy, since gold coins were then one of the media of currency. Under these cases, however, it has been held proper to enter a judgment in currency for the dollar equivalent of the gold. In *Gregory* v. *Morris,* 96 U. S. 619, the Supreme Court held that the holder of a gold obligation was entitled, if he chose, to "an amount which would be the equivalent in currency of the specific amount of coin as bullion." See also, *Dutton* v. *Palairet,* 154 U. S. 563.

The claimant does not question the right of the Government to discharge its obligation by payment in legal tender

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14. The relevant portions of Lord Russell's opinion are as follows:

"In my opinion the purpose can be discerned from Clause 4, in which the reference to gold coin of the United Kingdom is clearly not a reference to the mode of payment but to the measure of the Company's obligation. So too, Condition 6, which again is a clause not directed to mode of payment, but to describing and measuring liability, shows that the words are used as such a measure. In just the same way I think that in Clauses 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness not as being the mode in which the Company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained. I would construe Clause 1 not as meaning that £100 is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of £100 if paid in a particular way; in other words, I would construe the clause as though it ran thus (omitting immaterial words): 'pay * * * in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928.' I would similarly construe Clause 2.

"I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some of its provisions. Thus, for instance, the half-yearly payments in accordance with the coupons (which are described in Clause 2 as equal) may in fact not be equal. But I prefer this to the only other alternatives, namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear. * * *"

currency, since that was the only form of money lawfully in circulation at and after the redemption date. The only issue here presented is as to the amount of legal tender currency required to satisfy the claimant's bond. It is clear that the gold clause therein was intended to be and must be construed as a measure for determining the amount both of principal and interest due in such currency.

Prior to the enactment of the Joint Resolution of June 5, 1933, and on April 15, 1934, if said act is unconstitutional and void, the claimant was entitled to recover from the United States the gold value of the face amount of his bond.

The power of the United States to insert gold clauses in its obligations as an inducement to purchasers has never been disputed and the legality of gold clauses has never been questioned in the United States by the decision of a court of last resort. The Government surely does not contend that Congress by the Act of September 24, 1917 (40 Stat. 288), exceeded its powers by providing for the insertion of the gold value clause in the claimant's Liberty Bond. In *Bronson* v. *Rodes,* 7 Wall. 229, this Court sustained the enforceability of gold clauses in the following language:

> "Our conclusion, therefore, upon this part of the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful." (p. 250).

This Court has consistently followed the *Bronson* case,[15] and in *Gregory* v. *Morris*, 96 U. S. 619, a judgment in legal tender currency was granted in an amount measured by the gold value of the contract.

It is elementary that the law is not altered by an unconstitutional act since such a statute is a complete nullity.[16] In the event, therefore, that the Joint Resolution of June 5, 1933, is unconstitutional, the claimant is entitled to recover in legal tender currency the gold-value of the face amount of his bond.

POINT TWO

The Joint Resolution of June 5, 1933, is unconstitutional and void.

A

The Joint Resolution of June 5, 1933, is a direct violation of Section four of the Fourteenth Amendment, expressly limiting the delegated powers of Congress, and making the public debt of the United States inviolable at the hands of Congress.

The first sentence of Section four of the Fourteenth Amendment to the Constitution of the United States reads:

> "The validity of the public debt of the United States, authorized by law, including debts incurred

15. *Butler* v. *Horwitz*, 7 Wall. 258; *Dewing* v. *Sears*, 11 Wall. 379; *Trebilcock* v. *Wilson*, 12 Wall. 687; *The Emily Souder*, 17 Wall. 666; *Thompson* v. *Butler*, 95 U. S. 694. See also *The Case of Brazilian Loans*, Publications of the Permanent Court of International Justice, Ser. A, No. 20, p. 216; *The Case of Serbian Loans*, Publications of the Permanent Court of International Justice Ser. E, No. 5, p. 205; *Feist* v. *Société Intercommunale Belge d'Electricité*, (1934) A. C. 161.

16. *Norton* v. *Shelby County*, 118 U. S. 425, where Mr. Justice Field, writing the opinion for a unanimous Court, stated:

    "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

    See, also, *Ex parte Siebold*, 100 U. S. 371, 376; *Chicago, Ind., & L. Ry. Co.* v. *Hackett*, 228 U. S. 559, 566.

> for payment of pensions and bounties for services in suppressing insurrection and rebellion, shall not be questioned."

Section four was inserted in the Fourteenth Amendment for the express purpose of preventing Congress from attempting to discharge the obligations of the government by payment of their face value in depreciated legal tender currency. A legislative interpretation of this provision was adopted by the first Congress meeting after its ratification in the Act of March 18, 1869 (16 Stat. 1), the first statute enacted by that Congress. By this Act "the faith of the United States is solemnly pledged to the payment in coin or its equivalent * * * of all the interest bearing obligations of the United States, * * *."

It has never been necessary to apply the prohibition of this portion of Section four for the reason that, after the ratification of the Fourteenth Amendment and the passage of the Act of March 18, 1869, and until recently, no attempt had ever been made by Congress to attack the validity of the public debt. The Joint Resolution of June 5, 1933, enacting a complete repudiation by Congress of the gold clause in some 18 billion dollars of existing and outstanding bonds of the United States expressly made payable in gold coin of the then standard of value, or its equivalent, is necessarily unconstitutional and void as a direct violation of this Section four of the Fourteenth Amendment.

The history of the original form of this first sentence of Section four and of its various amendments or attempted amendments and of the statements of its sponsors, shows that it was inserted for the specific purpose of protecting for all time the public debt of the United States intended to be payable in gold coin or its equivalent from being made payable, dollar for dollar, in legal tender currency.[17]

The Fourteenth Amendment, before ratification by the States, was in form of a Joint Resolution. On May 23,

17. The following facts are derived from a scholarly article, "*A Forgotten Section of the Fourteenth Amendment*," by Phanor J. Eder, of the New York bar, in Cornell Law Quarterly, Dec. 1933, pp. 1-19.

1866, Senator Wade introduced the following amendment to this Joint Resolution (Cong. Globe, May 23, 1866, pp. 2768, 2769):

> "Section 3. The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the union, or for payment of bounties or pensions incident to such war, and provided for by law, shall be inviolable."[18]

The language of this provision clearly contemplates the future as well as the existing debt of the United States. However, Senator Wade's amendment apparently did not reach a vote. The majority of senators for the next five days were in secret caucus settling their differences in regard to the terms of the amendment. (*Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction* (1914) pp. 315, 316). On May 29, 1866, Senator Howard of Michigan introduced the amendments decided on in the caucus (Cong. Globe, May 29, 1866, p. 2869). The record reads:

> "Mr. Howard: The following is to come in as Section 4: 'The obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for the payment of bounties or pensions incident thereto, shall remain inviolate.'"

On June 4, 1865, the Senate, as a Committee of the Whole, resumed the consideration of the Joint Resolution and this amendment was agreed to. (Cong. Globe, June

18. In his speech in support of this amendment Senator Wade said:

> "It puts the debt incurred in the Civil War on our part under the guardianship of the Constitution of the United States, so that a congress cannot repudiate it. I believe that to do this will give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a congress to repudiate it and placed under the guardianship of the Constitution than he would feel if it were left at loose ends and subject to the varying majorities which may arise in Congress."

4, 1855, pp. 2938, 2941.) Had the Howard draft of Section four been finally adopted, it might have been claimed that the Amendment applied only to the then existing obligations of the United States. The change from the form of the Howard amendment to the present form is, however, highly significant and was clearly intended to formulate a constitutional principle applicable to all public debt, future as well as present. This is clearly shown by the Minority Report of the Joint Committee on Reconstruction which contains the following paragraph:

> "The repudiation of the rebel debt and all obligation to compensate for slave property and the inviolability of the debt of the government, *no matter how contracted,* provided for by some sections of the amendment, we repeat, we believe would meet the approval of many of the Southern States" (Dunning, *Political History of the U. S. During Reconstruction* (1880), pp. 93, 99). (Italics supplied.)

On June 6, 1866, the date of its final passage in the Senate, the fourth section, *in its present form,* was presented as an amendment, the amendment was concurred in, and the entire Joint Resolution was passed. (Cong. Globe, June 8, 1866, p. 3042). An amendment in the same form as Mr. Howard's (*supra,* p. 19), limiting its application to the debts incurred in the Civil War, *was rejected* (Cong. Globe, June 8, 1866, p. 3040).

The Joint Resolution, as amended by the Senate, was passed by the House of Representatives on June 13, 1866 (Cong. Globe, June 13, 1866, p. 3149).

The record thus discloses that the purpose of the fourth section of the Fourteenth Amendment was definitely to prevent any attempt either to repudiate or to scale down the principal of or interest on the public debt, no matter how or when contracted, by insuring that it should always be paid according to its tenor in gold coin of specific weight and fineness or in legal tender currency equivalent in worth to such gold coin.

No other construction can possibly be attached to Section four of the Fourteenth Amendment if the general rules of constitutional interpretation are applied. "Constitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question" (*Shreveport* v. *Cole,* 129 U. S. 36). The language of Section four surely does not look to the past alone. The phrases "public debt" "authorized by law", and "debts incurred" are general in terms and there is no limiting language in the text. Under the rule of *Shreveport* v. *Cole, supra,* it must, therefore, be construed to operate prospectively. It cannot be considered to be controlled by the particular occasion out of which it arose. The occasion may no longer exist, but the Constitution and its amendments remain effective to regulate analogous cases (W. D. Guthrie, *The Fourteenth Amendment* (1898), pp. 37, 38).

The clear purpose of Section four of the Fourteenth Amendment was to lay down a constitutional canon for all time, in order to maintain the national honor and to strengthen the national credit.

B

No provision of the Federal Constitution authorizes Congress to enact that portion of the Joint Resolution of June 5, 1933 which purports to abrogate the gold clause in the claimant's Liberty bond.

Every federal power must be express or implied from some power or group of powers, and any attempted exercise of power not delegated violates the Tenth Amendment to the Constitution.[19] The doctrine of inherent sovereignty does not apply to the federal government.[20] Nor does the Constitution specifically authorize the federal

19. This Court has never deviated from the doctrine expressed by Mr. Justice Story in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326, to the effect that, "The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication."

20. *Kansas* v. *Colorado,* 206 U. S. 46.

government to alleviate national emergencies.[21] While a general scaling down of public indebtedness by making "gold clauses" inoperative and allowing the United States to pay in inflated currency might be a means of relieving the financial burden of the Government, neither the appropriateness of, nor the necessity for Federal action can create a Federal power.[22] Furthermore, it is constitutional heresy to claim that an act unconstitutional in normal times becomes constitutional because Congress deems that an emergency exists. The reverse of this doctrine has been firmly established ever since the Civil War.[23]

No provision in the Constitution authorizes Congress to provide for the general relief of debtors.

The power to establish "uniform laws on the subject of Bankruptcies" cannot be said to authorize all measures for the relief of debtors. "Bankruptcy" had a well-defined meaning long before the adoption of the Constitution and it is obvious that the application of this power is limited to laws "for the benefit and relief of creditors and their debtors, in cases in which the latter are unwilling or unable to pay their debts."[24] It cannot seriously be contended that the Joint Resolution of June 5, 1933, is such a law. In any event, in so far as this Resolution applies to obligations of

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21. The "general welfare" clause of the preamble of the Constitution does not confer any power at all (*Jacobson* v. *Massachusetts,* 197 U. S. 11), while the "general welfare" clause of Art. I, sec. 8 (1), is a limitation on the taxing power and not a grant of power. (*Ward* v. *Maryland,* 12 Wall. 418; *The Federalist,* No. 41).

22. *Kansas* v. *Colorado,* 206 U. S. 46; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Ward* v. *Maryland,* 12 Wall. 418; *Keller* v. *United States,* 213 U. S. 138; *Linder* v. *United States,* 268 U. S. 5; *Lynch* v. *United States,* 292 U. S. 571.

23. *Ex parte Milligan,* 4 Wall. 2; *Home Building and Loan Ass'n* v. *Blaisdell,* 290 U. S. 398; *Lynch* v. *United States,* 292 U. S. 571.

24. Story, *Commentaries on the Constitution,* section 1102 *et seq.; United States* v. *Fox,* 95 U. S. 670; *United States* v. *Pusey,* Fed. Cas. No. 16098; *In re Reiman,* Fed. Cas. No. 11673.

the United States, it is obvious that it may not be justified as a bankruptcy law since such authority may never be invoked by the sovereign to repudiate its own obligations.

Had it been intended that Congress should be empowered to legislate generally for the direct relief of all debtors, such power would have been expressly granted. The absence of such a general grant, and the presence of authority for the relief of insolvent debtors only, is conclusive proof that the power of Congress to relieve debtors is accordingly limited.[25] This doctrine, applied to the situation where the authority of Congress to abrogate the obligations of the United States was in question, was expressed in the *Sinking Fund Cases,* 99 U. S. 700, and was affirmed in *Lynch* v. *United States,* 292 U. S. 571.

Mr. Justice Strong, dissenting in the *Sinking Fund Cases,* where the issue upon which the dissent was based was the effect of a Congressional reservation of the right to amend a railroad charter, stated the general limitation upon the power of Congress to alter the provisions of a contract where the United States itself is a party, at page 737:

> "I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the government, or any grant of power to destroy vested rights. No power has been given to Congress to *lessen* the obligations of a contract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy. . . . I admit that in the exercise of some of the powers granted, Congress may enact laws that indirectly affect existing contracts and lessen their obligation, but I deny that it can by any direct action, otherwise than by a bankrupt law, *even relieve* a debtor to a private party from any duty he

25. It is not denied, of course, that the lawful exercise of an express power may also relieve debtors. In such instances, however, the relief provided is and must be merely incidental. [See: *Knox* v. *Lee* (12 Wall. 457) and *Juilliard* v. *Greenman,* (110 U. S. 421); and see particularly the quoted statement of Mr. Justice Bradley, *infra* at p. 41.]

> has assumed by his contract. . . . Such an exercise of power would be making a contract for parties to which they never assented." (Italics supplied.)

In *Lynch* v. *United States*, 292 U. S. 571, where the question was whether that provision of the Economy Act of March 20, 1933, which purported to repeal all laws granting or pertaining to yearly renewable term insurance (War Risk), was constitutional, Mr. Justice Brandeis said, at page 580:

> "Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States.' Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts in the attempt to lessen government expenditures, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' The Sinking Fund Cases, 99 U. S. 700, 719, 25 L. Ed. 496."

The Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in the claimant's Liberty Bond, is not an exercise of the power "To borrow Money on the Credit of the United States."

It is inconceivable that anyone could consider the abrogation of gold clauses in existing governmental obligations an exercise of the borrowing power.[26] Here, if nowhere else, lies a fundamental distinction between the present statute and the Legal Tender Acts of 1862 and 1863.[27] If this Joint Resolution had not destroyed the gold

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26. It is not, of course, denied that in the exercise of the borrowing power Congress may refuse to assume the risk of depreciation in the value of legal tender currency by omitting gold-clause provisions from the future obligations of the Government. An attempt to evade that risk already assumed, by shifting it to its creditor, particularly when the possibility of loss is imminent and is the result of the very act of the Federal Government, is quite another thing. Nevertheless, Mr. Steagall, in sponsoring the Resolution, attempted to support this practise as an exercise of the borrowing power by the following (77 Cong. Rec. (House) May 29, 1933, p. 4583):

    "Surely it is not desirable to have outstanding two classes of obligations incurred by the Government—one to be discharged by the payment of gold, and the other by a different kind of money" * * * "So far as the future is concerned, the power to borrow both of the Government and of private interests, will be seriously impaired unless outstanding obligations and future obligations are placed upon the same footing *in respect of the medium of payment.*"

    To the same argument of lesser marketability of new issues of bonds not containing a gold clause by Senator Fletcher Chairman of the Senate Committee on Banking and Currency and the sponsor of the resolution, Senator Fess replied (77 Cong. Rec. June 3, 1933, p. 4915):

    "Then, if we do not write in the gold clause, our bonds will not be marketable, as is admitted by the proponents of the measure. They want to make them marketable and the only way they can do it is to drag down to the level of the issue they must make, all existing Government bonds that now have the gold clause. * * * To me, it is the most amazing thing that has ever been promulgated in finance so far as I know."

    It is significant that no reference was made to the gold-value provisions of the Resolution either in the majority Report of the House Committee on Banking and Currency nor by Mr. Steagall in sponsoring it. Obviously the claimant's Liberty Bond, payable in currency, is "upon the same footing in respect of the medium of payment" as other currency obligations of the government, and Mr. Steagall's alleged justification for the discrimination contained in the Joint Resolution is irrelevant.

27. These Acts were finally sustained as an exercise of the borrowing and currency powers on the theory that the Government was borrowing on the legal tender currency authorized thereby. At the same time a medium of exchange was provided. These powers were, therefore, used in direct support of each other. See, *Knox* v. *Lee,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421.

clause in the obligations of the United States, but had only invalidated those contained in the obligations of private persons, corporations, states, and municipalities, it might have been argued that Congress was exercising authority necessarily incident to the borrowing power in that it was destroying obligations which affected or interfered with that power.[28] Even this argument is necessarily refuted by the fact that Congress has included in the Joint Resolution "obligations of the United States". Our conclusion cannot be more aptly stated than in the words of Mr. Justice Brandeis:

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."[29]

The Joint Resolution of June 5, 1933, in so far as it purports to abrogate the gold clause in claimant's Liberty Bond, does not come within the scope, express or implied, of the power "To coin Money, regulate the Value thereof, and of foreign coin, and fix the Standard of Weights and Measures".

The coinage power does not expressly authorize Congress to render unenforcible gold or gold-value obligations of the United States. The claimant contends that the authority to enact a law purporting to emasculate

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28. See *Veazie Bank* v. *Fenno,* 8 Wall. 533.

29. *Lynch* v. *United States,* 292 U. S. 571. Manifestly the abrogation of gold clauses in obligations of the United States Government is a repudiation of these obligations, tending to destroy the credit of the Federal Government. To hold the Joint Resolution of June 5, 1933, constitutional, would necessarily be to hold that the borrowing power is limited by the currency power, and that the borrowing power could thereby be wholly destroyed. That no such limitation was intended is obvious; it cannot be found in the Constitution itself or in the decisions of the Supreme Court construing it.

every obligation containing a gold-clause may not be implied from these powers.[30]

The three cases which have in some measure defined the extent of the coinage power hold in general that it authorizes the establishment of a sound and uniform national currency.

> *Veazie Bank* v. *Fenno,* 8 Wall. 533;
> *Knox* v. *Lee,* 12 Wall. 457;
> *Juilliard* v. *Greenman,* 110 U. S. 421.[31]

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30. Subsection (18) of Article I, Section 8, authorizes Congress "To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It has been held, however, that this subsection is neither a limitation nor an expansion of powers already granted, but that it merely reiterates what would have been implied had the Constitution contained no such provision. Consequently, the constitutionality of a particular statute depends entirely upon whether or not the right to exercise the authority thereby asserted may reasonably be implied from the express grant of a certain power or powers. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Ex parte Merryman,* 17 Fed. Cas. 144, 148; *U. S.* v. *Rhodes,* 27 Fed. Cas. 785, 792; *The Federalist,* No. 33.

31. In the first of these cases, *Veazie Bank* v. *Fenno,* the Supreme Court upheld the constitutionality of a tax on state bank notes used for circulation, even though it was apparent that no revenue could be obtained and that state banks necessarily would have to cease issuing such notes. The Court held that Congress, apart from taxing powers, could destroy state bank notes which undermine national currency, since the power to "coin Money, (and) regulate the Value thereof" authorized the establishment of "a currency, uniform in value and description, and convenient and useful for circulation."

    Knox v. *Lee,* following shortly thereafter, upheld the constitutionality of the issue of irredeemable "greenbacks" as legal tender under several express powers, referring specifically to the war power, the power to borrow money, and the power to coin money. Justice Strong, writing the opinion for the majority, stated that the Constitution "was designed to provide the same currency, having a uniform legal value in all the States."

    In *Juilliard* v. *Greenman,* after the fiat money had been redeemed and reissued, the Supreme Court upheld the legal tender acts under the coinage and borrowing powers alone.

These cases, however, do not decide that Congress may control obligations which are not currency, such as the claimant's Liberty Bond. The particular legislation in the *Veazie Bank* and *Legal Tender* cases (*Knox* v. *Lee* and *Juilliard* v. *Greenman*) applied directly to the control of the current media of exchange. In the former case the tax statute in effect destroyed state bank notes which circulated as money. The *Legal Tender* cases merely sustained the issuance as legal tender of irredeemable ''greenbacks'', a form of currency.

Nor has it ever been decided that Congress may control obligations not currency on the theory that such obligations affect the value of money.[32] The power of Congress was intended to be and is limited to the issuance and the direct regulation of the kind, amount and value of currency. Congress has no general power, to regulate and control the kind, quality, amount, production or prices of all property.[33] Contract obligations, including obligations to pay money, have always been recognized to be property within the meaning of this rule.[34] It has never even been sug-

32. It may, of course, be argued that the *Veazie Bank* case establishes the rule that Congress may regulate or destroy anything which interferes with the issuance or value of the national currency, but actually nothing more was decided than that Congress had the power to extinguish all obligations circulating as money. The absurdity of such extension of the delegated powers is plainly shown by an illustration of the possible exercise of the borrowing power over things which "interfere" with its exercise by Congress. On such a theory, Congress could prohibit the borrowing of money by individuals, corporations, municipalities and states, since the market for Government securities is limited by such borrowing.

33. It should be noted that, where price regulation has been justified under the commerce power, it has involved businesses "affected with public interest". *Bluefield Co.* v. *Public Service Comm.*, 262 U. S. 679. In other words, the doctrine of *Munn* v. *Illinois*, 94 U. S. 113, applies as well to Federal as to State regulation of industry. In the exercise of the war power this rule is necessarily somewhat relaxed. See, *Highland* v. *Russell Car Co.*, 279 U. S. 253.

34. "Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch* v. *United States*, 292 U. S. 571.

gested that the currency power gives Congress authority to fix the value of any obligation that does not circulate as money, on the theory that the value of money is regulated thereby.[35]

The fact that the currency power must be held to be limited to the direct regulation of the media of exchange becomes more apparent when Section 10 of Article I is considered. It is there provided, as far as is relevant, that "No State shall . . . coin Money; (or) emit Bills of Credit; . . ." This clause has been held merely to prevent the States from issuing currency and not to prevent the issuance of "Bills of Credit" which do not circulate as media of exchange.[36] Its purpose has uniformly been said to be

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35. It should also be noted that Clause 5 of Article 1, Section in addition to the grant of the currency power, authorizes Congress to "fix the Standard of Weights and Measures". The States, within their police powers, have similar authority. *Dwight, etc. Sintering Co.* v. *American Ore Reclamation Co.,* (C. C. A. N. Y.) 263 Fed. 315 (cert. denied 252 U. S. 582). The extent of such regulation, however, has been specifically limited. Thus, in the case of *The Miantinomi* (C. C. Pa.) 17 Fed. Cas. No. 9,521, while expressing doubt of the power of a State to enact the statute in question, stated, at page 256:

> "Men may contract either with or without its sanction to make the pound their unit, and to sell at so much per 100 lbs.—or so much for 2,000 lbs., and they may call it, or any other multiple of a pound, a ton, if the parties to the contract agree to do so. But this act, if it have any efficacy whatever, (which, as I have intimated, is doubtful,) cannot be invoked to change the terms of a contract contrary to the consent of one of the parties, or to authorize vendors who buy coal at one standard or weight to sell it an another, and thus extort from purchasers an increased price for a diminished quantity."

36. The issue of legal tender currency by the United States was justified, although no specific power was given Congress to "emit Bills of Credit" and in spite of the fact that the intent of the framers of the Constitution had apparently been that Congress should have no such power. For this reason the power "To coin Money, (and) regulate the Value thereof" alone was not considered to authorize the legal tender acts. A cursory reading of the *Legal Tender Cases* will illustrate the great reliance placed on the "borrowing power". It has been shown, however, that the Joint Resolution of June 5, 1933, cannot be considered to be an exercise of that power.

that of making effective the affirmative power over currency granted to Congress.[37]

While it is true that this Section purports to curtail State powers alone, it should also be considered as a Constitutional definition of the powers granted to Congress. Since the intent was to make effective the affirmative authority granted, the limitation on the power of the States to deal with the same subject matter clearly should be as broad as that grant. To the extent that the Constitution prohibits the States from exercising the currency power granted to Congress, it impliedly forbids Congress the right to extend those powers beyond the restraint placed on the States. For this reason the cases defining the scope of the limitation upon the States, must likewise be considered as prescribing the extent of Congressional power.

It may thus be said that Congress has the authority to establish a sound and uniform national currency, and to that end may regulate and control all things which circulate as money. Congress may not, however, exercise police power over private obligations on the theory that they affect the value of money.

The claimant's Liberty Bond cannot be classified as currency; it does not and could not circulate as money. As has been shown, this bond is not an obligation to pay gold, but merely to pay gold-value (Point One, *supra*) and cannot be said to be any different from any other obligation to pay money which does not circulate as a medium of exchange. It is not, consequently, subject to the regulation of Congress in the exercise of its coinage power and, in so far as the Joint Resolution of June 5, 1933, purports to invalidate the gold value provisions of this bond, Federal powers are exceeded and this Resolution is unconstitutional and void.

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37. *Ogden* v. *Saunders,* 12 Wheat. 213; *Craig* v. *Missouri,* 4 Pet. 410; *Briscoe* v. *Kentucky Bank,* 11 Pet. 257; *Darrington* v. *Branch of Alabama Bank,* 13 How. 12; *Poindexter* v. *Greenhow,* 114 U. S. 270; *Houston etc., R. Co.* v. *Texas,* 177 U. S. 66.

C

The Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold-clause in the claimant's Liberty Bond, violates the Fifth Amendment to the Constitution in that it deprives the claimant of his property without due process of law.

It is well settled that for a statute to be constitutional it cannot be arbitrary or capricious, but must be reasonably related to an object entrusted to the Federal Government.[38] The claimant contends that that part of the Joint Resolution of June 5, 1933, which purports to invalidate the gold-value clause in claimant's Liberty Bond is unreasonable, arbitrary, and capricious; it is not reasonably appropriate to any legitimate legislative end; the purpose of its enactment is not comprehended within the objectives of the powers delegated to Congress; and it is, therefore, unconstitutional and void as a violation of the Fifth Amendment to the Constitution.

Manifestly, if this statute may be justified at all, it must be as an exercise of the currency power. It has been shown

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38. The most recent expression relating to the limitation of the Fifth and Fourteenth Amendments is found in *Nebbia* v. *People of the State of New York,* 291 U. S. 502, wherein it was stated:

"* * * the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In 1819, Chief Justice Marshall, writing the opinion for this Court in *McCulloch* v. *Maryland,* 4 Wheat. 316, pointed out that the end must be legitimately within the scope of the Constitution and said:

"Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

See also, *Lochner* v. *New York,* 198 U. S. 45; *Adair* v. *United States,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20.

that the other Congressional powers do not authorize any such legislation (Point Two, B, *supra*) and Congress itself has left no doubt that the enactment was intended as an exercise of the currency power. Thus, the preamble of the Joint Resolution of June 5, 1933, reads:

> "To assure uniform value to the coins and currencies of the United States.
> "Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and
> "Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of 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."

This preamble must be considered as an official statement of the facts upon which the specific exercise of power is predicated and as a declaration of the objects sought to be attained thereby. With regard to that part of the Joint Resolution which purports to invalidate the gold clause in the claimant's bond, even a cursory examination of the preamble will show both that these asserted justifications are spurious and that that part of the Joint Resolution cannot accomplish those ends.

The preamble states that the object of the Joint Resolution is "To assure uniform value to the coins and currencies of the United States" and that gold coin and gold-value clauses "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, * * *". This is an obvious attempt to bring the operation of the Resolution within the scope of Article I, Section 8 (5) of the Constitution authorizing Congress "To coin Money, (and) regulate the Value thereof * * *". At the time of the enactment of this statute there was, however, but one form of currency (other than token money) in circulation, irredeemable paper money. All of this currency was necessarily based on the same standard and each dollar of this currency was equal in value to every other dollar.

The claimant's bond was merely an obligation to pay an adjustable value in such legal tender currency, and was not an obligation to pay in a particular kind of money. The purpose of the gold clause therein was to provide a measure of the obligation and its only possible effect is to fix the amount of legal tender currency payable in satisfaction thereof. How such provisions "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" and how their abrogation will "assure a uniform value to the coins and currencies of the United States", is difficult to comprehend.[39] There was not then, nor can there be under existing circumstances, any disparity between the value of the kinds of currency lawfully in circulation and Congress was untrammeled in its power to issue other forms of currency, to increase or decrease the amount of money in circulation, to change the standard, to declare what is and what shall be legal tender, to prohibit the circulation of unauthorized forms of currency, or otherwise to regulate the value of money.

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39. This purpose is carried out, however, in Section 2 of the Joint Resolution of June 5, 1933, which amends Section 43 of the Act of May 12, 1933, to read as follows:

> "All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

This Section 2 obviously has no necessary relation to the first paragraph of the Joint Resolution which purports to abrogate the gold-clause in the claimant's bond.

Furthermore, the second paragraph of the preamble of the Joint Resolution of June 5, 1933, is misleading. It is there inferred that this statute is a regulation of the ''holding of or dealing in gold'', which, it is stated, ''affect the public interest and are therefore subject to proper regulation and restriction; * * *.'' It is not denied that the ''holding of or dealing in gold'' may ''affect the public interest'' and for that reason be ''subject to proper regulation and restriction''.[40] However, the ''holding of or dealing in gold'' had already been prohibited.[41] A further regulation, not abrogating or in some measure altering the former prohibitions, could be of no effect and could only have been intended to disguise the real purpose of the Joint Resolution.

It is thus clear that, if the purposes of the enactment of the Joint Resolution of June 5, 1933, are those expressed in the preamble, the actual operation and effect of that statute can have no real and substantial relation to those purposes. Unless, therefore, it may be said that the statute will accomplish some other legitimate purpose, it is unconstitutional and void.[42]

The claimant contends that the Joint Resolution of June 5, 1933, in so far as it purports to abrogate the gold clause in the Claimant's bond, cannot be considered to be a regulation of the value of money.

The ordinary means by which the value of the currency may be and has been regulated is by changing the base at

40. See *Ling Su Fan* v. *United States,* 218 U. S. 302.

41. Trading with The Enemy Act, 40 Stat. 411 (1917); Act of March 9, 1933, 48 Stat. 2; Presidential Proclamation of March 6, 1933; Executive Orders of April 5, 1933, and August 28, 1933. See also 33 Columbia Law Review 617 (1933).

42. It is clear that this Court is not bound by recitals contained in a preamble to a statute as to its alleged purpose, but will look to its actual operation and effect, and, if there is thereby an attempt to exert authority not vested in the legislative body enacting the statute, will declare it unconstitutional and void. *Coppage* v. *Kansas,* 236 U. S. 1, 14, 16; *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 536.

which it had previously been stabilized,[43] or by issuing more currency, thus creating a greater supply. Congress has also issued a new form of currency stabilized at a new base, different from pre-existing standards.[44]

The present statute does not and did not, at the time of its enactment, do any of these things. Gold payments were then, and have since remained suspended.[45] The outstanding currencies, thus, if stabilized at all at that time, must be considered to have been stabilized in terms of one dollar obligations and these currencies were and are legal tender, dollar for dollar, in the payment of dollar obligations. The Joint Resolution of June 5, 1933, stated, in effect, that both gold and gold-value obligations were payable, dollar for dollar, in this same currency. This Resolution, therefore, purported simultaneously to standardize the unit of currency in terms of dollar, gold dollar, and gold-value obligations. That this is unreasonable, arbitrary, and capricious and cannot be considered to be a regulation of the value of currency may easily be shown.

It is not denied that Congress may issue currency and designate its worth in terms of property; it may fix its value at the equivalent of a certain number of grains of gold of a specified weight and fineness, or of a certain amount of any commodity or group of commodities.[46] However, to issue money without intrinsic worth (i. e., irredeemable paper) and not designate its value in property would be absurd. (The Legal Tender Act of 1862

43. See: 4 Stat. 699 (1834); 10 Stat. 160 (1853); 17 Stat. 426 (1873); Act of May 12, 1933, 48 Stat. 31; Act of January 30, 1934, 48 Stat. 337.

44. Legal Tender Acts, 12 Stat. 345 (1862), 12 Stat. 532 (1862), 12 Stat. 709 (1863), making one dollar obligations the standard.

45. Trading with the Enemy Act, 40 Stat. 411 (1917), Presidential Proclamation of March 6, 1933; Emergency Banking Act of March 9, 1933 (48 Stat. 2), Executive Orders of April 5, 1933, and August 28, 1933; Act of May 12, 1933, (48 Stat. 31); Gold Regulations of the Secretary of the Treasury, September 12, 1933; Orders of the Secretary of the Treasury, December 28, 1933, and January 15, 1934; Gold Reserve Act of January 30, 1934 (48 Stat. 337); Presidential Proclamation of January 31, 1934 and Provisional Regulations of the Secretary of the Treasury issued under the Gold Reserve Act of 1934, January 31, 1934. The Presidential Proclamation of January 31, 1934, stating that thereafter the weight of the gold dollar should be 15$\frac{5}{21}$ grains of gold .9 fine did not change this situation since, for all practical purposes, all money in circulation was irredeemable.

46. See Sedgwick on *Damages,* 9th ed, sec. 266.

providing for the issue of "greenbacks", since no means of redemption was specified, in effect stabilized this unit of money in terms of one dollar obligations.) Value, as distinguished from utility, is never absolute, but always implies a ratio—a relation to another property or properties. Such a relation necessarily imports specific quantities and qualities.[47] To state that the same unit of currency is at the same time equal in value to a certain amount of property of a given quality and to a different amount of the same property is to state an impossibility.[48] Granting that the unit of currency may be stabilized in terms of dollar obligations, a statute purporting to make the standard both a one dollar obligation and an obligation of one dollar and one cent would be a regulation of the value of obligations and not of currency, and would, therefore, be unreasonable, arbitrary, and capricious.[49] The Joint Resolution of June 5, 1933, purporting to invalidate gold clauses, if it could in any way be said to be an attempt to regulate the value of money, similarly purports to standardize the unit of currency at obligations of different values.

The claimant's bond by its tenor may be satisfied by the payment of legal tender money in a sum equal to the gold-value of its face amount. Ordinarily the gold-value in legal tender currency is no greater than the face amount of the instrument. When, however, gold payments have been suspended, gold-value obligations, although they may still be satisfied by payment in legal tender currency, remain at par with gold, but, ordinarily, are at a premium

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47. Thus the dollar recently was valued at 25.8 grains of gold .9 fine.

48. For example, Congress could not stabilize the dollar at 25.8 grains of gold .9 fine and contemporaneously stabilize it at 15 5/21 grains of gold .9 fine. Whatever it may be called, this would not be a regulation of the value of money.

49. It has uniformly been held that the power to determine the amount or value of contract obligations is a judicial and not a legislative function. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327-8; *United States* v. *Lynah,* 188 U. S. 445, 471-2.

in terms of irredeemable currency.[50] This was the situation when the Joint Resolution of June 5, 1933, was enacted[51] and, if this statute is given effect, an ordinary one dollar obligation and a similar gold-value obligation could both be satisfied by the payment of the same unit of currency. This Joint Resolution was, therefore, an attempt simultaneously to stabilize the unit of currency at two obligations for the payment of money, which obligations were definitely different in value. Manifestly this cannot be considered to be a regulation of the value of money within the currency power.[52]

50. Such disparity has been recognized by the courts on numerous occasions. See *Bronson* v. *Rodes,* 7 Wall. 229; *Butler* v. *Horwitz,* 7 Wall. 258; *Thompson* v. *Butler,* 95 U. S. 694.

51. See index of wholesale commodity prices on a gold basis, contained in The Annalist Weekly of December 14, 1934, at page 817, and reproduced by permission in Appendix p. xiv.

52. In the debate in the Senate on the Joint Resolution on June 3, 1933 (77 Cong. Rec. pp. 4901-2) Senator Glass of Virginia, the recognized Democratic authority on matters of banking and currency, refusing to be stampeded by the Government, riddled the claim put forward by the sponsors of the Resolution that its abrogation of the gold clause in existing contracts was a valid exercise of the power "to regulate the Value" of money, and stigmatized it as pure repudiation.

"Mr. Borah. The National Government, in the exercise of its sovereign power, such as the coinage of money and regulating the value thereof, cannot be restrained by contractual relations. It would not be contended for a moment, I presume, that by reason of contracts, either of the Government under the authority of Congress or between private parties, there could be impaired, embarrassed, circumscribed, or limited the sovereign power of the Government to coin money and regulate the value thereof.

Mr. Glass. Mr. President, does the Senator contend that it is competent for the Congress to declare that 12.9 grains of gold constitute 25.8 grains of gold?

Mr. Borah. No; I do not contend that, but I contend that Congress may declare that a dollar with 12.9 grains must be accepted in payment of a dollar of 25.8 grains. It may fix the value of the dollar, the value of money.

Mr. Glass. Is not that the contention, in the last analysis? When a contract requires the Government to pay the holder of its obligation 25.8 grains, is it competent for Congress to say that the Government shall pay him 12.9 grains?

Mr. Borah. I contend when an individual takes an obligation payable in gold, specified as suggested by the Senator, that he takes it with the

Nor may it be said that gold-value obligations affect the value of money in any manner justifying Congressional regulation. Gold-value contracts do not affect the value of money in any greater measure than do other money obligations or commodity contracts.[53] Any regulation increasing

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full understanding that the Government may change its monetary policy at any time and that he must accept whatever the Congress says at a particular time shall constitute money. I am not discussing now a commodity contract; I am discussing a contract to pay dollars.

Mr. Glass. I submit that it does not relate to that monetary policy of the Government at all. The contract does not say that the Government shall pay so many dollars. It says the Government shall pay so many grains of gold, to wit, 25.8 grains. Is it competent for Congress to say that contract is fairly met if the Government says it will pay only 12.9 grains? The contracts provide that the Government shall pay so much money of a certain weight and fineness.

Mr. Borah. Yes; but it is money. It is dollars to be paid, although the dollars are supposed to be so much gold, but it is dollars.

Mr. Glass. Yes; but it is money of a certain weight and fineness.

Mr. Borah. Exactly; but if the Government sees fit to change the weight and fineness and still make it money, the individual must accept the money of the weight and fineness fixed.

Mr. Glass. In other words, the Senator contends that the Government can legitimately declare that 2 ounces make a pound?

Mr. Borah. No; I do not declare anything of that kind. I contend the Congress may fix the value of the dollar as to its gold content. I declare that when the Government says it will pay a certain number of dollars, and designates those dollars of a certain weight and fineness, it may thereafter exercise the power to name what the dollar shall be and to say that the dollar shall be of a different weight and fineness, and the individual must accept that dollar. * * *

* * * * * * * *

Mr. Glass. As I said to the Senator, I am not contesting the point that the Senate can exercise its constitutional right to coin and fix the value of money. I do not think that is involved. I think what is involved is that the Government has agreed with the holders of the bonds to pay them 28.8 (sic) grains of gold of existing fineness, and if it pay them any less than that it is repudiation."

53. The only possible effect that gold-value contracts may have on the value of money is by affecting the demand for money. It is undoubtedly true that if the supply of currency and the rate of circulation were constant, then the value of money would fluctuate directly as the demand. The effect upon that demand of the payment in gold-value of Federal obligations upon the retirement of such obligations, spread over the years of their respective maturities, would, however, be negligible.

or decreasing the amount that obligees may recover from the obligors of gold-value contracts, has no more effect on the value of the medium of exchange than would a regulation increasing or decreasing the rights of obligees of any other class or classes of contracts to pay money, or for that matter, the rights of promisees of agreements for the delivery of commodities.[54] No one would contend that Congress has the power to lessen the obligation of all contracts on the theory that it is thereby regulating the value of money.[55]

The claimant further contends that the Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in the claimant's Liberty Bond, will not accomplish, or have a reasonable relation to, any proper legislative object.

The only purpose of the Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in the obligations of the United States, was to secure the release of a portion of the Government's obligations by the re-

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54. In every contract to be performed in the future one or the other of the parties thereto must bear the risk of loss due to fluctuation in value of the subject of the contract. In the ordinary contract for the payment of money, the risk of loss arising from an increase in the value of money rests upon the debtor; that resulting from its decrease upon the creditor. Yet it is not to be contended that Congress has power to shift these risks on the theory that it is regulating the value of money. The logical extension of this doctrine would be to hold that Congress could forbid persons from protecting themselves against risk of loss in any situation, an obvious impossibility; and further, since this risk must fall on someone, that Congress could, *ex post facto,* choose the person upon whom it shall fall. The Federal Government, by its own insertion of the gold-clause in claimant's Liberty Bond, has voluntarily assumed the risk ordinarily borne by the creditor. It now seeks to transfer to its creditor the loss caused by its own act of devaluation, the very contingency which it itself contemplated when it issued claimant's bond.

55. In *Hepburn* v. *Griswold,* 8 Wall. 603, at page 625, Chief Justice Chase, speaking for the Court, said:

> "No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary deprivation of property."

pudiation of a material term in its contracts.[56] The purpose of the Joint Resolution of June 5, 1933, in this respect, was not to execute or make effective any of the powers granted to Congress, but, under the guise of an exercise of the currency power, to commit an act of repudiation. This practice was first condemned by the Court in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423, where Chief Justice Marshall stated:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

With specific application to contractual obligations of the Federal Government, Mr. Justice Strong, who wrote the opinion of the Court in the *Legal Tender Cases,* expressed the doctrine in his dissenting opinion in the *Sinking Fund Cases,* 99 U. S. 700, at page 739, as follows:[57]

> "* * * I deny that an acknowledged power can be exerted solely for the purpose of effecting indirectly an unconstitutional end which the Legislature cannot directly attempt to reach. If the purpose were de-

56. The abrogation of gold clause provisions in Federal obligations can no more be considered an exercise of the currency power than was the repudiation by the Government of renewable War Risk insurance policies. The Government did not even attempt to justify that repudiation under the currency power in *Lynch* v. *United States,* 292 U. S. 571-579. The relief afforded the United States is approximately the same in each instance. The only effect on the value of money produced in either case would be indirectly by a slight reduction in the demand for currency. A slight diminution in general business would have the same effect.

57. The majority of the Court found that Congress had reserved the right to change the contracts in question. Justices Field, Strong and Bradley dissented on the ground that the reservation made did not permit the particular modification. Based on this premise the conclusions reached in their dissenting opinions was inescapable and were the necessary result of *The Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518.

> clared in the act, I think no court would hesitate to pronounce the act void. * * *''
>
> ''It is unnecessary, however, to enlarge upon this, for the effect wrought upon the contracts of these two companies is a direct effect,—a direct alteration of the obligation assumed by the debtors, and not an incidental result of legislation upon some other subject over which Congress has a right to legislate.''

Even if that part of the Joint Resolution of June 5, 1933, which purports to abrogate existing gold clause obligations might in any way be considered to be an exercise of the power "To coin Money, (and) regulate the Value thereof", it must, to the extent that the gold clause in the claimant's Liberty Bond is affected, deprive the claimant of his property without due process of law and be a violation of the Fifth Amendment to the Constitution.

When Congress, by the Act of September 24, 1917, as amended, authorized the issuance of the claimant's Liberty Bond and provided that it should be payable ''in United States gold coin of the present standard of value'', it thereby exercised its power ''to regulate the Value'' of money in respect of this obligation; and when the claimant, in reliance thereon and on the faith thereof, parted with his property for the benefit of the United States, he acquired a vested right which cannot be taken or destroyed by any subsequent act of Congress and any attempt so to do without payment of just compensation is a denial of due process and a violation of the Fifth Amendment to the Constitution. *Lynch* v. *United States,* 292 U. S. 571, 579; *Choate* v. *Trapp,* 224 U. S. 665, 678.

Mr. Justice Bradley, who wrote a concurring opinion in the *Legal Tender Cases* stated in his dissenting opinion in the *Sinking Fund Cases, supra,* at page 747, as follows:

> ''The legal-tender laws may have indirectly affected contracts, but did not abrogate them. The

> case before us is totally different. It is a direct abrogation of a contract, and that, too, of a contract of the government itself,—a repudiation of its own contract.''

It has been shown that the purpose of the Joint Resolution of June 5, 1933, was not to accomplish any of the legitimate objects entrusted to the Federal Government; that the law has no real and substantial relation to any Congressional power; that its real purpose and actual effect is to reach ends not subject to Federal control; and that it operates to take the property of the claimant without compensation, for the benefit of the United States; that the Joint Resolution of June 5, 1933, deprives the claimant of his property without due process of law and thereby violates the Fifth Amendment to the Constitution.

POINT THREE

The claimant in any event is entitled to recover just compensation for the taking of his property for public use.

Contract rights have always been held by this Court to be property protected by the Fifth Amendment for the taking or appropriation of which, for public use, even under a paramount power, just compensation must be paid to the owner.[58] Even if the Joint Resolution of June 5, 1933, in so far as it required generally the discharge of gold or gold-value obligations in legal tender currency, should be held to be a valid exercise of delegated power, the *direct* repudiation by it therein of claimant's existing contract with defendant constitutes a 'taking' of claimant's property thereunder, which, even under the exercise of a para-

58. *Lynch* v. *United States,* 292 U. S. 571, 579; *Sinking Fund Cases,* 99 U. S. 700, 719, 744-5, 746, 746-7; *Phelps* v. *United States,* 274 U. S. 341; *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106.

mount power, implies an agreement in fact to pay just compensation therefor, protected by the Fifth Amendment.[59]

In the *Sinking Fund Cases,* 99 U. S., 700, Mr. Justice Bradley said at pp. 744-5, 746, 746-7:

> "It will not do to say that the violation of the contract by the law in question is not a taking of property. In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled."
>
> "But if it were not, as it is, an actual or physical taking of property,—*if it were merely the subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law."* (Italics supplied.)

Even were the portion of the Joint Resolution authorizing payment in legal tender upheld, that part of the Resolution which attempts to *fix the just compensation* for such taking at *"dollar for dollar"* in legal tender would in any event, be utterly void, as an attempted exercise of judicial power by the legislature.[60] The judicial measure of that just compensation is the value of the property as of the date of taking.[61]

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59. This doctrine has been affirmed without question in the following cases: *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 336-7; *Sinking Fund Cases,* 99 U. S. 700, 718-9, 744-5, 746, 746-7; *United States* v. *Lynah,* 188 U. S. 445; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306; *Lynch* v. *United States,* 292 U. S. 571, 579; *Liggett & Meyers Tobacco Co.* v. *United States,* 274 U. S. 215; *Jacobs* v. *United States,* 290 U. S. 13, 17; *Phelps* v. *United States,* 274 U. S. 341, 343; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 119-20, 123; *Philippine Sugar Estates Dev. Co.,* v. *United States,* 40 Ct. Cl. 33.

60. *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 306; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327-8; *United States* v. *Lynah,* 188 U. S. 445, 465; *Sinking Fund Cases,* 99 U. S. 700, dissenting opinion of Justice Field at pages 759-60, 761.

61. *Olson* v. *United States,* 292 U. S. 246; *Seaboard Air Line Ry. Co.* v. *United States, supra.*

The value of the property on the date of taking is the same as the damages claimed for the breach of the express contract, for the date of breach of contract and the date of taking is the same. In any case, neither the breach of the express contract nor the taking and appropriation by defendant of claimant's property were complete until the claimant's bond had been called for redemption and defendant had refused to pay according to the tenor of the bond. Both of these events happened on May 24, 1934, when the bond was presented to the Treasury Department for payment. The just compensation is, therefore, equal in amount to the relief asked for in the petition.

II

The Court of Claims has jurisdiction to entertain the claimant's action against the United States.

The petition herein states at least two good causes of action against the United States within the jurisdiction of the Court of Claims: (1) for breach of an express contract with the United States set out in the claimant's Liberty Bond, and (2) a cause of action founded upon the Constitution of the United States for breach of a contract implied in fact to pay just compensation for the taking of the claimant's property. Both of these causes of action fall within the jurisdiction of the Court of Claims.

Section 145 of the Judicial Code gives to the Court of Claims jurisdiction to hear and determine "all claims (except for pensions) founded upon the Constitution of the United States or * * * upon any contracts, express or implied with the Government of the United States * * *".

Phelps v. *United States,* (274 U. S. 341) held that a claim for just compensation for the use of property taken by the Government is "founded upon the Constitution" and is based on a contract implied in fact within the meaning of Section 145 of the Judicial Code and that a claim for just compensation for property taken for public use by officers or agents of the United States pursuant to an Act of Congress, is a claim founded upon such an implied contract.

CONCLUSION.

For all the reasons above set forth the claimant submits that both questions certified to this Court by the Court of Claims should be answered in the affirmative.

Respectfully submitted,

JOHN M. PERRY,
Claimant.

Of Counsel:

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
CHARLES D. PEET.

APPENDIX.

Statement of Facts and Certificate

Messrs. Larkin, Rathbone & Perry appeared for the plaintiff.

Messrs. George C. Sweeney, William W. Scott, and Harry LeRoy Jones appeared for the defendant.

Before Chief Justice Booth, Judge Green, Judge Littleton, Judge Williams, and Judge Whaley

Statement of Facts

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following facts, stated in plaintiff's petition filed June 22, 1934:

1. That ever since January 1, 1933, and for a number of years prior thereto, petitioner has been the owner and registered holder of an obligation of the United States of America, in principal amount of $10,000, known as Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, Serial Number 19831 (a copy of which is annexed in Schedule A), which is one of a series of four and one-quarter per cent, gold bonds of 1933-1938 authorized by an Act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918 (a copy of the relevant provisions of [fol. 2] which is annexed in Schedule B), wherein and whereby the defendant, as authorized by said Act and amendments thereto, promised to pay to your petitioner, or his registered assigns, on October 15, 1938, or at any time after October 15, 1933, at the pleasure of the defendant, said principal sum in United States gold coin of the standard of value on the date of issuance, and to pay in-

terest in like gold coin on said principal sum at the rate of four and one-quarter per cent per annum, from April 15, 1920, on April 15 and October 15 in each year, until the principal thereof should be payable.

2. That under and pursuant to the Laws of the United States, namely, an Act approved March 14, 1900, (31 Stat. 45,) which was in force on September 24, 1917, at the time of the issuance of said bond, and at the time of the acquisition of the same by your petitioner, a dollar in gold consisted of 25.8 grains of gold .9 fine.

3. That by virtue of the agreement between your petitioner, as the owner and registered holder of said bond, and the defendant, pursuant to whose authority said bond had been issued, and said Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121, your petitioner was entitled to receive from the defendant at the time of the maturity of said bond, whether by redemption or otherwise, 10,000 gold dollars each containing 25.8 grains of gold .9 fine.

4. That on October 12, 1933, the defendant, through and by the Secretary of the Treasury, in Treasury Department Circular No. 501, dated October 12, 1933, (a copy of the relevant provisions of which is annexed in Schedule C,) and pursuant to said Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121, called for redemption on April 15, 1934, a part of said [fol. 3] issue of Fourth Liberty Loan 4¼% Gold bonds of 1933-1938, namely, among others, all outstanding registered bonds bearing serial numbers the final digit of which was 1.

5. That the final digit of the Serial Number of said bond of which your petitioner is the owner and registered holder is 1, the Serial Number being 19831, and said bond is one of those called for redemption on April 15, 1934, as aforesaid.

6. That after April 15, 1934, and on May 24, 1934, your petitioner duly presented said bond to the defendant at the Division of Loans and Currency, Treasury Department, Washington, D. C., in accordance with said Act of September 24, 1917, as amended, said Treasury Department Circular No. 121, and said Treasury Department Circular No. 501, and demanded of said defendant that it redeem said

bond by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine.

7. That said bond when presented was properly assigned to "The Secretary of Treasury for redemption", as provided in said Treasury Department Circular No. 501.

8. That the defendant refused to comply with your petitioner's demand and refused to redeem said bond in the manner specified therein and as prescribed by the Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121.

9. That your petitioner then demanded of said defendant 258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing $15\frac{5}{21}$ grains of gold .9 fine, or 16,931.25 dollars in legal tender currency.

[fol. 4] 10. That the defendant refused to accede to your petitioner's demands, or any one of them, and refused to redeem said bond except by the payment of 10,000 dollars in legal tender currency.

11. That the payment of 10,000 dollars in legal tender currency is not adequate and complete performance of the defendant's obligation.

12. That defendant's said refusals were, as your petitioner is informed and verily believes, on the ground that the Joint Resolution of June 5, 1933, (48 Stat. 113), excused full performance of defendant's obligation.

13. That the Congress of the United States had no power to enact said Joint Resolution.

14. That the operation and effect of said Joint Resolution is to deprive your petitioner of his property without due process of law.

15. That said Joint Resolution is, therefore, unconstitutional and void.

16. That said Joint Resolution was repealed by the Gold Reserve Act of 1934, approved January 30, 1934.

17. That by reason of the circumstances aforesaid, your petitioner was damaged in the sum of $16,931.25, the value of defendant's obligation to petitioner, which sum is now due and owing by the United States to your petitioner, and no part of which has been paid.

18. That your petitioner is the sole owner of the claim herein made and the only person interested therein, and that there has been no assignment or transfer of this claim [fol. 5] or any interest therein, and your petitioner is justly entitled to recover the amount herein claimed from the Government of the United States after allowing all just credits and offsets.

19. That no action upon your petitioner's claim has been had by or before Congress or, except as aforesaid, any Executive Department of the Government.

20. That your petitioner is and at all times herein mentioned was a citizen of the United States; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

21. That the address of your petitioner is No. 70 Broadway, in the Borough of Manhattan, City, County and State of New York; that the address of the attorneys for your petitioner, Larkin, Rathbone & Perry, Esqs., is No. 70 Broadway, Borough of Manhattan, City, County and State of New York.

22. That the facts stated in this petition are true.

Wherefore, your petitioner asks that judgment may be entered in his favor against the United States for the sum of $16,931.25, with any interest due thereon.

To this petition the defendant has filed a demurrer, on the ground that the petition does not state a cause of action against the defendant.

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the record before it the court finds it necessary for a proper disposition of the case that certain questions of law should be determined. They are as follows:

[fol. 6] QUESTIONS CERTIFIED

1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of$10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is "payable in United States gold coin of the present standard of value," entitled

to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above questions and certify and transmit and refer the same to the Court of Claims of the United States for its guidance in the further progress of the case.

Fenton W. Booth, Chief Justice. Wm. R. Green, [fol. 7] Judge. Benjamin H. Littleton, Judge. T. S. Williams, Judge. Richard J. Whaley, Judge.

[fol. 8] I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of John M. Perry v. The United States, No. 42676, was duly filed and entered *or* (sic) record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 15th day of November, A. D. 1934.

Willard L. Hart, Chief Clerk, Court of Claims of the United States. (Seal Court of Claims.)

[fol. 9] [Endorsed:] Court of Claims. No. 42676. John M. Perry v. The United States. Questions to be certified to the Supreme Court.

Endorsed on Cover: File No. 39,160. Court of Claims. Term No. 532. John M. Perry vs. The United States. Certificate. Filed November 16, 1934. File No. 532, O. T., 1934.

The face of claimant's Liberty Bond provides as follows:

$4\frac{1}{4}\%$	**Fourth Liberty Loan**
Gold Bond of 1933-1938	19831
$10,000	$10,000

THE UNITED STATES OF AMERICA

for value received promises to pay to

JOHN M. PERRY

or registered assigns the sum of

TEN THOUSAND
DOLLARS

On October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum, from April 15, 1920 on April 15 and October 15 in each year, until the principal hereof shall be payable, at the Treasury Department, Washington, or, at the holder's option, at any agency or agencies in the United States which the Secretary of the Treasury may from time to time designate for the purpose. The principal and interest hereof are payable in United States gold coin of the present standard of value. This bond is one of a series of four and one-quarter per cent gold bonds of 1933-1938 authorized by an act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department circular No. 121, dated September 28, 1918, to which reference is hereby made for a statement of the further rights of the holders of bonds of said series as fully and with the same effect as if herein set forth. All or any of the bonds of said series may be redeemed, at the pleasure of the United States on and after October 15, 1933, at par and accrued

interest, as in said circular provided. This bond does not bear the circulation privilege.
Washington, October 24, 1918.

Recorded: .... Examined ....

WM. G. MCADOO,
Secretary of the Treasury.

(SEAL)

HOUSTON B. TEEHEE,
Register of the Treasury.

Transferable on the Books of the United States Treasury Department.

Treasury Department Circular No. 121, insofar as it is relevant, provides:

"1918
Department Circular No. 121 — TREASURY DEPARTMENT,
Office of the Secretary,
Loans and Currency — *Washington, September 28, 1918.*

The Secretary of the Treasury invites subscriptions, at par and accrued interest, from the people of the United States for $6,000,000,000 of United States of America Four and One-Quarter Per Cent Gold Bonds of 1933-38, of an issue authorized by an act of Congress approved September 24, 1917, as amended by the acts of Congress approved April 4, 1918, and July 9, 1918, and supplemented by an act of Congress approved September 24, 1918, the right being reserved to allot additional bonds up to the full amount of any oversubscription.

Description of Bonds.

DENOMINATIONS.

Bearer bonds with interest coupons attached will be issued in denominations of $50, $100, $500, $1,000, $5,000, and $10,000 Bonds registered as to principal and interest will be issued in denominations of $50, $100, $500, $1,000, $5,000, $10,000, $50,000, and $100,000. Provision will be made for the interchange of bonds of different denominations and of coupon and registered bonds and for the transfer of registered bonds, without charge by the United States, and under rules and regulations prescribed by the Secretary of the Treasury.

RATE OF INTEREST, DATE OF BONDS, MATURITY, AND REDEMPTION.

The bonds will be dated October 24, 1918, and will bear interest from that date at the rate of four and one-quarter per cent per annum, payable on April 15 and October 15 in each year. The interest payable on April 15, 1919, will be for 173 days. The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease. The principal and interest of the bonds are payable in United States gold coin of the present standard of value.

* * * *"

Treasury Department Circular No. 501, insofar as it is relevant, provides:

"PARTIAL REDEMPTION OF FOURTH LIBERTY LOAN BONDS BEFORE MATURITY

1933
Department Circular No. 501
Public Debt Service

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, October 12, 1933.

To Holders of Fourth Liberty Loan 4¼ percent Bonds of 1933-38, and Others Concerned:

I. NOTICE OF CALL FOR PARTIAL REDEMPTION OF FOURTH LIBERTY LOAN 4¼ PERCENT BONDS OF 1933-38 (FOURTH 4¼'S) BEFORE MATURITY

1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ percent bonds of 1933-38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows:

* * * *

All outstanding registered bonds bearing serial numbers the final digit of which is 9, 0, or 1.

2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934.

3. Fourth 4¼'s bearing serial numbers (and prefix letters) other than those designated are not included in or affected by this call for partial redemption.

* * * *

IV. RULES AND REGULATIONS GOVERNING REDEMPTION

Pursuant to the call for partial redemption, as set forth in Section I of this Circular, the following rules and regulations are hereby prescribed to govern the surrender of Fourth $4\frac{1}{4}$'s called for redemption on April 15, 1934:

*   *   *   *

5. *Presentation and surrender of registered bonds.*—Any Fourth $4\frac{1}{4}$'s in registered form, which are included in the call for partial redemption, must be assigned by the registered payees or assigns thereof, or by their duly constituted representatives, to 'The Secretary of the Treasury for redemption' in accordance with the general regulations of the Treasury Department governing assignments, and should thereafter be presented and surrendered to any Federal Reserve Bank or Branch, or to the Division of Loans and Currency, Treasury Department, Washington, D. C., for redemption on April 15, 1934. (NOTE.—IF TO BE PRESENTED FOR EXCHANGE UNDER TREASURY DEPARTMENT CIRCULAR NO. 502, FOLLOW INSTRUCTIONS GIVEN IN THAT CIRCULAR.) The bonds must be delivered at the expense and risk of holders, and should be accompanied by appropriate written advice (see Form P.D. 1364 attached hereto).

*   *   *   *"

Act of September 24, 1917

(40 Stat. 288, amended, April 4, 1918, 40 Stat. 502; and July 9, 1918, 40 Stat. 844):

An Act To authorize an additional issue of bonds to meet expenditure for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend additional credit to foreign Governments, and for other purposes.

Sec. 1. The Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purpose of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law, not exceeding in the aggregate $20,000,000,000, and to issue therefor bonds of the United States, in addition to the $2,000,000,000 bonds already issued or offered for subscription under authority of the Act approved April twenty-fourth, nineteen hundred and seventeen, entitled "An Act to authorize an issue of bonds to meet expenditures, for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes": Provided, That of this sum $3,063,945,460 shall be in lieu of that amount of the unissued bonds authorized by sections one and four of the Act approved April twenty-fourth, nineteen hundred and seventeen, $225,000,000 shall be in lieu of that amount of the unissued bonds authorized by section thirty-nine of the Act approved August fifth, nineteen hundred and nine, $150,000,000 shall be in lieu of the unissued bonds authorized by the joint resolution approved March fourth, nineteen hundred and seventeen, and $100,000,000 shall be in lieu of the unissued bonds authorized by section four hundred of the Act approved March third, nineteen hundred and seventeen.

The bonds herein authorized shall be in such form or forms and denomination or denominations and subject to such terms and conditions of issue, conversion, redemption, maturities, payment and rate or rates of interest, not exceeding four and one-quarter per centum per annum, and time or times of payment of interest as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe. The principal and interest thereof shall be payable in United States gold coin of the present standard of value.

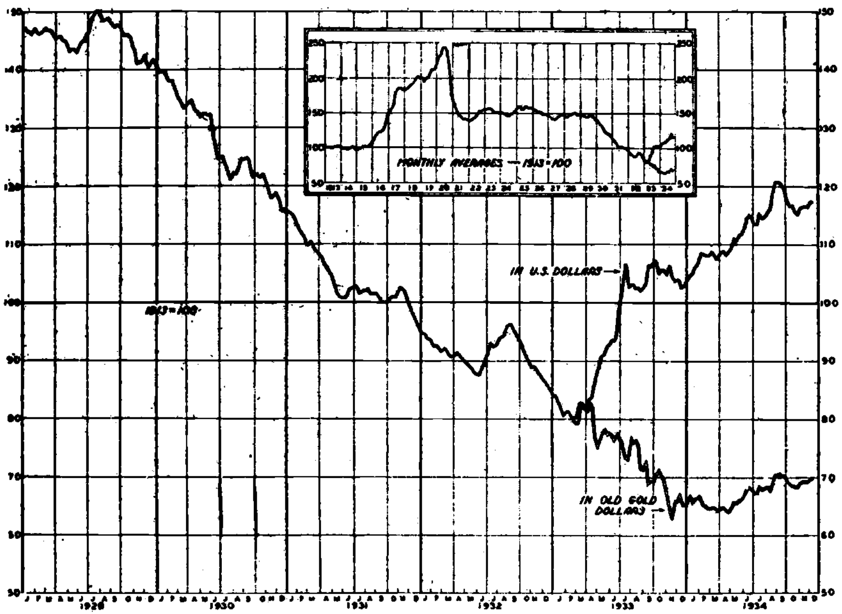
The bonds herein authorized shall from time to time first be offered at not less than par as a popular loan, under such regulations, prescribed by the Secretary of the Treasury from time to time, as will in his opinion give the people of the United States as nearly as may be an equal opportunity to participate therein, but he may make allotment in full upon application for smaller amounts of bonds in advance of any date which he may set for the closing of subscriptions and may reject or reduce allotments upon later applications and applications for larger amounts, and may reject or reduce allotments upon applications from incorporated banks and trust companies for their own account and make allotment in full or larger allotments to others, and may establish a graduated scale of allotments, and may from time to time adopt any or all of said methods, should any such action be deemed by him to be in the public interest: Provided, That such reduction or increase of allotments of such bonds shall be made under general rules to be prescribed by said Secretary and shall apply to all subscribers similarly situated. And any portion of the bonds so offered and not taken may be otherwise disposed of by the Secretary of the Treasury in such manner and at such price or prices, not less than par, as he may determine. The Secretary may make special arrangements for subscriptions at not less than par from persons in the military or naval forces of the United States, but any bonds issued to such persons shall be in all respects the same as other bonds of the same issue.

NOTE: This section was first amended by increasing the aggregate amount of the bond issue from $7,538,945,406, which was originally authorized, to $12,000,000,000, changing the interest rate from four per cent per annum to four and one-quarter per cent per annum, and adding the last sentence of the section relating to subscriptions from persons in the military or naval service, by the Third Liberty Bond Act of April 4, 1918, ch. 44, § 1.

As so amended it was again amended by striking out the figures "$12,000,000,000" and inserting in lieu thereof the figures $20,000,000,000 as given in the text, by the Fourth Liberty Bond Act of July 9, 1918, ch. 142, § 1.

THE ANNALIST WEEKLY INDEX OF WHOLESALE COMMODITY PRICES (1913=100)

(Unadjusted for Seasonal Variation)



1934.	In Terms of Current U. S. Dollars — 1. Farm Products.	2. Food Products.	3. Textile Products	4. Fuels.	5. Metals.	6. Building Materials.	7. Chemicals.	8. Miscellaneous.	All Commodities.	All Comm. ¶In Old Dollar.
Dec. 11...	109.1	118.7	*107.6	161.2	109.6	112.1	99.0	77.5	117.4	69.9
Dec. 4..	†108.8	118.3	†117.5	162.6	109.6	112.2	99.0	77.6	117.4	69.7
Nov. 27...	107.6	117.0	106.5	162.6	109.6	112.4	99.0	77.8	116.5	69.3
Dec. 12,'33	85.0	101.8	117.8	157.0	105.2	111.8	98.5	84.8	103.8	67.2

*Preliminary. †Revised. ¶Based on exchange quotations for France, Switzerland, Holland and Belgium. Back figures: For weekly figures from April 26, 1927, to Sept. 4, 1934, see THE ANNALIST of June 22, 1934, page 963, and Sept. 7, 1934, page 351.