

Harvard Law School
Briefing Papers on Federal Budget Policy

Briefing Paper No. 54

**The Gold Clause Cases and
Their Implications for Today**

May 8, 2015

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Federal Budget Policy – Spring 2015

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INTRODUCTION

The federal government's promises to fulfill its financial obligations are central to the way in which we think about budgeting and fiscal policy, yet there is little consensus about when the government may repudiate, modify, or otherwise fail to live up to its commitments. Under what circumstances will government default be excused? Does this depend on the type of obligation at issue, the degree of delinquency, or other factors?

History provides little guidance in answering these questions. The legislative and executive branches have largely avoided clarifying the legal bindingness of the government's various financial commitments, whether these concern obligations to repay holders of U.S. treasury securities, duties to fulfill contracts with private parties, or promises to provide retirement, health, and disability benefits to qualified residents and citizens.¹ The legal murkiness surrounding government delinquency is partially the result of constraints on the federal government's ability to incur unfunded obligations,² as well as the fact that entertaining the possibility of default would raise questions about the nation's creditworthiness. Because the federal government has tended to live up to its financial commitments, courts have also had little occasion to weigh in on the legality of government delinquency.

The Gold Clause Cases are an exception to this trend. As part of its efforts to end the Great Depression by taking the U.S. off the gold standard, in 1933 Congress passed a Joint Resolution invalidating contractual provisions requiring reimbursement of obligations in gold or an equivalent amount of dollars (so-called gold clauses), providing instead that such debts could

¹ Some guidance may, however, be found in the procedures that govern federal spending during lapses in appropriations. See Puja Seam and Brad Shron, *Government Shutdowns*, HARVARD LAW SCH. BRIEFING PAPERS ON FEDERAL BUDGET POLICY, PAPER NO. 10, MAY 4, 2005: http://isites.harvard.edu/fs/docs/icb.topic1379255.files/GovernmentsShutdowns_10.pdf.

² Under the Antideficiency Act, federal employees may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C.A. § 1341 (West).

be discharged through payment only in dollars.³ The invalidation of gold clauses in public and private contracts became problematic the following year, when the federal government devalued the dollar against gold. In *Perry v. United States*, 294 U.S. 330 (1935), the most famous of the Gold Clause Cases, the Court considered the legality of the Joint Resolution's invalidation of gold clauses in the context of a privately-held Liberty Bond, a debenture issued by the federal government to finance its activities during World War I. In an opinion by Chief Justice Charles Evans Hughes, the Court held that the Joint Resolution constituted a repudiation of a government debt obligation and that this form of default violated Congress' Article I borrowing power⁴ and the Public Debt Clause of the 14th Amendment.⁵ Nevertheless, by a 5-4 margin the Court ruled for the government on the grounds that the plaintiff had not suffered any damages. The Court based this decision on a finding that the absence of a domestic market for gold and the universality of the dollar in domestic transactions meant that the plaintiff's purchasing power would not be reduced if his bond was redeemed at its post, rather than pre, devaluation amount.⁶

Legal scholars have struggled to make sense of *Perry*,⁷ as well as the three other Gold Clause Cases, which invalidated gold clauses in private as well as government contracts.⁸ Some

³ H.R.J. Res. 192, 73d Congress (1933) (enacted). See Appendix A.

⁴ U.S. CONST. art. I, § 8, cl. 2. ("The Congress shall have Power To ... borrow Money on the credit of the United States.")

⁵ U.S. CONST. amend. XIV, § 4. ("The validity of the public debt of the United States ... shall not be questioned.")

⁶ *Perry v. United States*, 294 U.S. 330, 357-58 (1935) ("Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment.")

⁷ See John Harrison, *New Property, Entrenchment, and the Fiscal Constitution* in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 408 n.23 (Elizabeth Garrett, Elizabeth A. Graddy, and Howell E. Jackson eds., 2008) ("It is difficult to know what to take away from [*Perry*]."); Henry M. Hart, Jr., *The Gold Clauses in United States Bonds*, 48 HARV. L. REV. 1057, 1057 (1935) ("Few more baffling pronouncements, it is fair to say, have ever issued from the Supreme Court.")

⁸ *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240 (1935) (concerning the validity of a gold clause in a contract between private parties); *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935) (same); *Nortz v. United States*, 294 U.S. 317 (1935) (U.S. Treasury gold certificates).

have viewed the Cases as standing for the proposition that the government may never legally repudiate its debt obligations.⁹ Thus, they have argued that statutes which restrict the government's ability to repay its creditors, such as the debt ceiling, are unconstitutional.¹⁰ Others have considered the Gold Clause Cases an example of the ways economic and political exigencies sometimes override constitutional limitations.¹¹ In this telling, the Court ultimately sided with the government in order to avoid a showdown with the executive, much as it had done in *Marbury v. Madison*¹² a hundred and thirty-two years earlier.¹³

The dearth of detailed analyses of the Gold Clause Cases partially explains this confusion. Despite their high stakes—contemporary observers considered the Cases among the most important ever heard by the Supreme Court¹⁴ and archival records indicate that President Roosevelt was prepared to refuse to comply with an adverse ruling on the grounds that doing so would result in economic disaster¹⁵—the Gold Clause Cases have failed to attract significant scholarly attention.¹⁶

This paper helps rectify this deficiency by providing a brief history of the Gold Clause Cases and examining their implications for today. Specifically, the paper uses the Gold Clause Cases as a lens through which to analyze the legal aspects of federal government delinquency. Although the federal government has generally lived up to its financial commitments, this has

⁹ See Josh Hazan, *Unconstitutional Debt Ceilings*, 103 GEO. L.J. ONLINE 29 (2014).

¹⁰ See Zachary K. Ostro, *In the Debt We Trust: The Unconstitutionality of Defaulting on American Financial Obligations, and the Political Implications of Their Perpetual Validity*, 51 HARV. J. ON LEGIS. 241, 258-59 (2014) (“The spirit of *Perry* is that the nation’s debt obligations are sacrosanct, and any action cannot alter existing obligations. Therefore, the nation cannot go into default if the debt ceiling is lower than the nation’s debt obligations.”).

¹¹ See Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLORIDA L. REV. 1243 (2012).

¹² 5 U.S. 137 (1803).

¹³ See Magliocca, *The Gold Clause Cases*.

¹⁴ See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 102 (1941) (“So intense was the excitement caused by the delay that on successive week ends the Court ordered its Clerk to announce that no decision in the cases would be forthcoming on the following Monday—announcements apparently without precedent in the history of the Court.”).

¹⁵ See Magliocca, *The Gold Clause Cases* at 1247.

¹⁶ See *id.* at 1246, n.12 (noting the lack of scholarship on the Gold Clause Cases).

not always been the case. Instead, history shows that the government's legal ability to default on its debts or otherwise fail to fulfill its financial obligations varies depending on the nature of the obligation and the manner of nonperformance. Generally speaking, the government has greater latitude to curtail statutorily-created benefits funded through taxation, "new property,"¹⁷ than it does to abrogate financial commitments imposed by contract, including but not limited to debt agreements.

In addition to considering the legality of government delinquency, the paper examines judicial doctrines that restrict the ability of creditors to bring suit and recover against the government. Sovereign immunity, standing, and the political question doctrine significantly limit the federal government's liability for financial nonperformance. The paper considers these issues in turn and concludes by speculating on some of the nonlegal mechanisms that constrain government delinquency. Although gold clauses are a relic of the past, the prospect that the federal government may fail to live up to its financial commitments renders the issues raised by the Cases of continuing importance, and a better understanding of their legacy is needed if we are to make sense of the potential implications of government default.¹⁸

I. THE GOLD CLAUSE CASES

A. Origins

1. Gold clauses

For many years, parties included provisions in contracts that allowed a creditor to obtain payment in a specific commodity, such as gold, rather than in currency. These provisions were designed to protect creditors against inflation, which reduces the real value of debt. Provisions providing that a creditor paid in a commodity like gold whose value is more likely to remain

¹⁷ See Harrison, *New Property*, 401.

¹⁸ See Howell E. Jackson, *Counting the Ways: The Structure of Federal Spending*, in FISCAL CHALLENGES, 197-211 (discussing the federal government's various financial commitments and the ways many of these are not reflected in popular budgetary measures).

stable over time ensure that creditors are not punished when inflation reduces the real value of outstanding obligations. Although gold clauses rarely exist today, modern contracts are sometimes structured to achieve similar ends. For instance, the U.S. government issues treasury inflation-protected securities (TIPS) in which loan principal is adjusted upwards with inflation and downwards with deflation. These securities are protected against inflation because the amount the creditor is repaid upon maturity is equivalent to the greater of the adjusted or original principal.¹⁹

In the United States, anti-inflationary provisions became widely used in the years after the Civil War. The introduction of paper currency unbacked by gold (greenbacks) by the Union as part of its effort to finance the conflict produced significant inflation in the postbellum era.²⁰ As a result, most long-term financial contracts of the period included gold clauses.²¹

Prior to 1935, courts upheld the legality of these provisions. The Supreme Court first considered gold clauses in *Bronson v. Rodes*, 74 U.S. 229 (1868). At issue in the case was whether a bond between private parties that provided for repayment in gold and silver dollar coins could be discharged through payment in the equivalent amount of paper currency.²² The Court held that the Congressional recognition of greenbacks as valid legal tender did not abrogate the terms of the contract and, as such, payment must be rendered in the medium of exchange specified in the contract.²³ Three years later, the Court in *Trebilcock v. Wilson* affirmed

¹⁹ See *Treasury Inflation-Protected Securities (TIPS)*, TREASURY DIRECT, https://www.treasurydirect.gov/indiv/products/prod_tips_glance.htm. See also Appendix C: TIPS-Rates & Terms.

²⁰ See Stephen J. DeCanio and Joel Mokyr, *Inflation and the Wage Lag during the American Civil War*, 14 EXPLORATIONS IN ECONOMIC HISTORY 311 (1977).

²¹ See Kroszner, *Is It Better to Forgive than Receive?*, 1.

²² Technically, the question was whether repayment in U.S. government demand notes would be an acceptable alternative. At the time, dollars included both gold and silver coins as well as demand notes of the U.S. government.

²³ See *Bronson v. Rodes*, 74 U.S. 229, 250 (1868) (“[T]he 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 validity of gold clauses by holding that a promissory note requiring that payment be made “in specie” could not be discharged through payment in the equivalent amount of paper currency.²⁴

2. *The Great Depression*

Questions regarding the legitimacy of gold clauses reemerged in the 1930s as a result of the federal government’s decision to take the U.S. dollar off the gold standard.²⁵ In order to reduce inflationary pressures while promoting wider use of paper currency, in 1879 the U.S. government declared that dollars would be convertible in gold.²⁶ This decision ensured that greenbacks were no longer backed simply by faith in the government, as they had been in the postbellum era. Instead, the adoption of the gold standard guaranteed that the federal government’s creditors would have their debts discharged through payment in a stable medium of exchange.²⁷ Vigorous debates followed about whether the government should allow the dollar convertibility of silver as well as gold—or even adopt a fiat paper currency unbacked by either precious metal. Doing so would increase inflation and thereby assist borrowers repay their debts. By the late 19th century, “bimetallism” had become a central part of the agenda of the Populist movement.²⁸ As the historian Charles Postel has written, “[e]ither by silver or paper, or a combination of both, farmers hoped that an inflated money supply would help raise farm prices

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.”)

²⁴ 79 U.S. 687, 695 (1871) (“[T]he 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. They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms, *in currency*, which are used when it is desired to make a note payable in paper money. These latter terms, *in currency*, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars.”).

²⁵ A gold standard is a monetary system in which a set unit of account or currency is based on a fixed quantity of gold. On the history of the gold standard in the United States, see Craig K. Elwell, *Brief History of the Gold Standard in the United States*, CONGRESSIONAL RESEARCH SERVICE (June 23, 2011): <https://fas.org/sgp/crs/misc/R41887.pdf>.

²⁶ See *id.* at 6.

²⁷ See *id.* at 6-8.

²⁸ See CHARLES POSTEL, *THE POPULIST VISION* 152 (2009).

and make farm credits more available and easier to repay.”²⁹ Nevertheless, after the Populists were defeated at the polls, in 1900 Congress passed the Gold Standard Act affirming gold as the only metal capable of convertibility with the dollar.³⁰

Although adoption of the gold standard provided currency stability, it severely restricted the federal government’s monetary powers. The gold standard’s shortcomings became evident during the banking failures of the late 1920s and early 1930s. During this time, public hoarding of gold created a significant deflationary effect on the economy, which deepened the ongoing slowdown.³¹ Gold-dollar convertibility also meant that the federal government could not easily increase the money supply as a means to counteract economic contraction.³²

The United States was not alone in being constrained by these “golden fetters.”³³ Other countries which operated on a gold standard experienced similar difficulties. For instance, in the early 1930s there was a run on gold in British banks, which depleted the government’s gold stock and left the pound open to speculative attack.³⁴ As a result, in 1931, the United Kingdom became the first major industrialized country to abandon the gold standard.³⁵ The U.K.’s decision put significant pressure on other countries to follow suit. Unpegging the pound from gold allowed the U.K. government to engage in expansionary policies that helped soften the impact of

²⁹ See *id.* at 152.

³⁰ 301 Stat. 45, March 1900.

³¹ See BARRY EICHENGREEN, *GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919-1939* (1996).

³² See Elwell, *Brief History* at 8-9.

³³ See EICHENGREEN, *GOLDEN FETTERS*.

³⁴ See Ben Bernanke and Harold James, *The Gold Standard, Deflation, and Financial Crisis in the Great Depression: An International Comparison*, in R. GLENN HUBBARD, ED., *FINANCIAL MARKETS AND FINANCIAL CRISES* 33-68 (1991).

³⁵ See EICHENGREEN, *GOLDEN FETTERS* at 21.

the Depression.³⁶ At the same time, the devaluation of the pound placed other countries in an adverse position in terms of the international competitiveness of their export sectors.³⁷

Abandoning the gold standard was a key part of President Franklin Roosevelt's early agenda. Upon taking office in March 1933, FDR declared a bank holiday that, among other things, suspended banks' ability to pay out gold to their depositors and creditors.³⁸ The following month, the President signed Executive Order 6102 criminalizing the possession of gold used for trade or exchange.³⁹ Then in June, Congress enacted a Joint Resolution that invalidated as against public policy gold clauses in public and private contracts.⁴⁰ The Joint Resolution was followed in 1934 with passage of the Gold Reserve Act.⁴¹ The Act outlawed most private possession of gold and required U.S. residents to turn over gold holdings to the Treasury for payment in dollars at a rate of \$35/ounce, which represented a 41% devaluation of the dollar compared to the previous nominal price of gold of \$20.67/ounce.⁴²

B. The Cases

1. The disputes

Although the abandonment of the gold standard allowed the federal government greater flexibility to respond to the Great Depression, many people took issue with these steps. Soon

³⁶ *See id.* at 21-26.

³⁷ *See id.*

³⁸ *See* William L. Silber, *Why Did FDR's Bank Holiday Succeed?*, FEDERAL RESERVE BANK OF NEW YORK ECONOMIC POLICY REVIEW 19 (2009).

³⁹ Exec. Order No. 6102 (Apr. 5, 1933).

⁴⁰ Ch. 48, 48 Stat. 112 (1933) ("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 in an amount of money of the United States measured thereby, is declared to be against public policy. . . . [e]very obligation heretofore or hereafter incurred . . . 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.").

⁴¹ Pub. L. No. 73-87, 48 Stat. 337 (1934).

⁴² *See* Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504 (1983).

after the Joint Resolution’s passage, displeased creditors filed suit in the U.S. Court of Claims.⁴³ The challengers included parties holding certain types of U.S. government debt obligations, as well as those who were party to private contracts that included gold clauses.⁴⁴ They alleged that the Joint Resolution violated the Due Process and Takings Clauses and also argued that the power to abrogate contracts was not within Congress’ enumerated, delegated powers.⁴⁵ The government and private debtors responded that congressional authority to “regulate the value of money, borrow money, or regulate foreign and interstate commerce” took precedence over provisions in contracts with or between private parties.⁴⁶

The liberal justices of the Supreme Court were among those concerned about the government’s actions. Justice Louis Brandeis, no friend of creditors,⁴⁷ informed then-Professor Felix Frankfurter that “[t]he action on the gold clause is terrifying in its implications”⁴⁸ and that “[i]f the Government wished to extricate itself from the assumed emergency, taxation would have afforded an honorable way out.”⁴⁹ Perhaps drawing on his background as a common law judge, Justice Benjamin Cardozo sought to assure an uneasy observer by noting that “[t]here is room for a lot of immorality within the confines of the Constitution and of constitutional law.”⁵⁰

⁴³ See *Perry v. United States*, 294 U.S. 330, 347 (1935) (stating the plaintiff’s claim that —this enactment was unconstitutional as it operated to deprive plaintiff of his property without due process of law); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 246 (1935) (giving the creditors’ argument that —[t]he Joint Resolution deprives petitioner of his property without due process of law and without just compensation).”

⁴⁴ See Brief of Claimant at 2, *Perry v. U.S.*, 294 U.S. 330 (1935), 1934 WL 31880 (U.S.) (U.S., 2006).

⁴⁵ See *id.* at 247 (stating the petitioner’s argument that “[t]he Federal Government is one of enumerated delegated powers’ and therefore ‘[i]f no power to impair contracts is granted, it is difficult to see how the power can be derived’”).”

⁴⁶ See *Perry*, 294 U.S. at 350 (quoting the government’s position); see also *Norman*, 294 U.S. at 250 (“stating respondent’s submission that “[p]rivate individuals may not “by prophetic discernment,” through contracts previously entered into, any more than by contracts subsequently made, withdraw from the control of Congress any part of its legislative field or limit or obstruct the exercise of its powers”).

⁴⁷ See LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* (1914).

⁴⁸ See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 93-94* (2010), cited in Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 1253.

⁴⁹ See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS*, 697 (2009), cited in Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 1253.

⁵⁰ See SHESOL, *supra* note 47, at 94, cited in Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 1253.

And Justice Harlan Fiske Stone, who along with Brandeis and Cardozo constituted the Court's staunchest defenders of President Roosevelt's agenda, "vowed that he would never buy another federal bond."⁵¹

The Court of Claims certified questions relating to the legality of the Joint Resolution to the Supreme Court in November 1934,⁵² and the Court heard the cases the following January. During oral argument, the government, represented by Attorney General Homer Cummings, stressed the fallout from a decision to strike down the Joint Resolution. According to Cummings, "stupendous catastrophe" would ensue if the Court determined that gold clauses were enforceable, since this would conflict with the Executive Order criminalizing the use of gold in business transactions and create a two-tiered monetary system.⁵³ The Justices did not appear receptive to these claims. Justice Willis Van Devanter, a dogged opponent of the Roosevelt administration, rejected the government's contention that devaluation was a sovereign prerogative by declaring that "[w]hat England can do, what Germany or any other nation can do has no controlling influence here."⁵⁴ More concerning to the government were questions from the Court's liberal wing. Chief Justice Hughes, a swing voter in many New Deal cases,⁵⁵ inquired as to whether the ability "to bind a sovereign State in a contract to borrow money" was "not the very essence of sovereignty?"⁵⁶ Justice Stone submitted that government bonds constituted a pledge by the government of the credit of the United States whose terms could not

⁵¹ Quoted in Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 1253.

⁵² See Brief of Claimant at 1, *Perry v. U.S.*, 294 U.S. 330 (1935), 1934 WL 31880 (U.S.), 1 (U.S., 2006).

⁵³ See *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 256 (1935) (summarizing the government's oral argument).

⁵⁴ See *Hughes Asks Where Power Was Found to Alter U.S. Bond*, N.Y. TIMES, Jan. 11, 1935 at 1, cited in Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 1257.

⁵⁵ See James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. (2006).

⁵⁶ See *Gravity of Issue in Gold Decision Urged on Court*, N.Y. TIMES, Jan. 12, 1935 at 2, cited in Magliocca, *The Gold Clause Cases and Constitutional Necessity* at 1257.

be modified by subsequent congresses.⁵⁷ And Justice Brandeis, who might have been expected to come to the government's defense, decided to remain silent given what he later confided were "his own reservations about the case."⁵⁸

The Gold Clause Cases were some of the most closely-watched in the Court's history. Although they concerned technical provisions in obscure contracts, the stakes were monumental. By 1935, the positive effects of the abandonment of the gold standard were already being felt,⁵⁹ and a ruling against the government threatened to unravel much of this progress. Put simply, if the Court struck down the Joint Resolution, the government's efforts to suspend gold-dollar convertibility, and thereby lift the country out of the Depression, would be jeopardized.⁶⁰

Yet the Justices' questions, as well as the Court's ruling three days earlier that parts of the National Industrial Recovery Act were unconstitutional,⁶¹ left significant doubts about whether the Court would side with the government. As Robert H. Jackson, then a Treasury Department lawyer, wrote, "[s]ome very disturbing questions had been put . . . from the bench and these the President viewed as an indication that the devaluation policy might be held unconstitutional."⁶²

Indeed, while the participants, press, and public awaited the results, the Roosevelt administration began preparing for an adverse ruling. Federal officials were aware of the importance of the abandonment of the gold standard to their economic recovery program and understood that a decision striking down the Joint Resolution might undercut these efforts in critical ways. Because all outstanding Liberty Bonds as well as many other public and private

⁵⁷ See Magliocca, *The Gold Clause Cases and Constitutional Necessity* at 1257.

⁵⁸ See *id.* at 1258.

⁵⁹ See Price Fishback, *US monetary and fiscal policy in the 1930s*, 26 OXFORD REV. OF ECON. POLICY 385, 394-95 (2010).

⁶⁰ See Elwell, *Brief History of the Gold Standard in the United States* at 10.

⁶¹ See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

⁶² ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 101 (1941), cited in Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 1256.

financial obligations contained gold clauses,⁶³ invalidation of the Joint Resolution would represent a significant drain on the Treasury. In its brief to the Court, the government argued that requiring repayment at a pre-devaluation rate would “introduce[] an important problem due to the overwhelming amount of obligations calling for payment in gold coin of the old standard outstanding at the time of the passage of the Joint Resolution of June 5, 1933.”⁶⁴ The government estimated that the principal amounts of federal interest-bearing obligations containing gold clauses exceeded \$20 billion.⁶⁵ Assuming annual interest rates of 3 ½ percent on such debt, the government would have to pay about \$700 million to its creditors each year if the Joint Resolution was invalidated.⁶⁶ Requiring the government to repay such sums, it argued, “could in a relatively short time have drained all of the available gold held by the Treasury.”⁶⁷ In other words, “[t]he gold clause in Federal obligations, if enforceable by these creditors, would have transferred the destiny of the gold reserves [of the United States] and the destiny of the currency to private hands.”⁶⁸ By contrast, if the Court upheld the validity of the Joint Resolution, the government could repay its creditors at a post-devaluation rate, a savings of 69 percent.⁶⁹

⁶³ See Brief for the United States, *Perry v. U.S.*, 1935 WL 32938 (U.S.), 24 (U.S., 2006) (“Besides the holders of some \$20,000,000,000 of gold-clause interest-bearing obligations of the Federal Government, there were the holders of more than \$5,000,000,000 of currency issued or guaranteed by the Federal Government, not to mention the holders of a much vaster amount of obligations in the form of bank deposits, insurance contracts, and other agreements payable in currency of the United States. Gold clauses were contained in or made with respect to all of this currency; in the case of the greenbacks by a specific provision that such notes when presented to the Treasury for redemption, shall be redeemed in gold coin of the standard fixed by the Act of March 14, 1900 (c. 41, Sec. 2, 31 Stat. 45); in the case of gold certificates by the provision that they should be redeemable in gold coin on demand (c. 41, Sec. 6, 31 Stat. 47, as amended; in the case of Federal Reserve notes by the provision that they should be redeemable in gold when presented at the Treasury (Section 16, Federal Reserve Act, as amended, 38 Stat. 265); and in the case of all currency by the provisions of the parity acts that “all forms of money issued or coined by the United States shall be maintained at a parity of value with” the gold dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine (Act of Nov. 1, 1893, c. 8, 28 Stat. 4; act of March 14, 1900, c. 41, 31 Stat. 45; Federal Reserve Act of Dec. 23, 1913, c. 6, sec. 26, 38 Stat. 251, 274).”).

⁶⁴ See *id.* at 13.

⁶⁵ See *id.*

⁶⁶ See *id.* at 13-14.

⁶⁷ See *id.* at 26-27.

⁶⁸ See *id.* at 27.

⁶⁹ See *id.* at note 24.

In the weeks after oral arguments, the White House began preparations for an adverse decision. As Gerard Magliocca has documented, these preparations “included fairly modest steps, such as the imposition of a new tax to erase any windfall that a creditor would get from the enforcement of a gold clause, and more extreme ideas such as packing the Court.”⁷⁰ Evidence also suggests that the Roosevelt administration sought to pressure the Justices into siding with the government by leaking word that the President was determined to refuse to comply with an adverse ruling.⁷¹ This whispering campaign may have been designed to influence the Court, but the claims behind them were true. In the days after oral arguments, President Roosevelt began drafting a speech announcing that he would ignore a decision to strike down the Joint Resolution.⁷² One of the purposes of this announcement would be to compel Congress to pass a statute granting the government sovereign immunity from claims arising out of the invalidation of gold clauses.⁷³ On the day following the conclusion of oral arguments, Robert H. Jackson informed the President that one means of protecting against an adverse Court ruling would be “invoking the doctrine of sovereign immunity and refusing to give consent to actions against the United States growing out of the devaluation measures.”⁷⁴ As Jackson recalled,

The statute of consent [waiving sovereign immunity and allowing the government to be sued in *Perry*] was limited so as not to permit any claim growing out of the destruction or taking of property during the Civil War. I suggested that it would be possible to protect the Treasury from a multiplicity of litigations by amendment of that statute to provide that no claim could be prosecuted against the United States growing out of the gold proclamation and the devaluation. Even if the United States would wish to meet the obligations that an adverse decision might impose upon the Treasury, there should be some procedure by which the amount should be determined outside of court. Later I discussed this with the

⁷⁰ Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 1258.

⁷¹ *See id.* at 1260.

⁷² *See id.* at 1258.

⁷³ *See id.* at 1261.

⁷⁴ *See* ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 65 (2003).

President and I think this plan would have been adopted—a withdrawal of consent to be sued.⁷⁵

2. *The decisions*

Roosevelt never had to give this speech. The Court released its decisions in mid-February, five weeks after the oral arguments. Most of the important issues were discussed in *Perry*, the case involving a gold clause in a Liberty Bond. Along with *Nortz*, the other case concerning government contracts, the Court's decision in *Perry* established that government debt contracts are binding commitments and may override Congress' power to regulate the nation's monetary system. At the same time, however, the Court sided with the government in both of these cases while also declining to invalidate the Joint Resolution as applied to private contracts in *Norman* and *Banker's Trust*. All four cases were decided by the same 5-4 margin—Chief Justice Hughes and Justices Brandeis, Cardozo, Roberts, and Stone for the government and private debtors; Justices Butler, McReynolds, Sutherland, and Van Devanter for the creditors—with Hughes penning the majority opinion in each.

Hughes's opinion in *Perry* contained the most extensive discussion of the legality of the Joint Resolution. In *Perry*, the Court affirmed the principle that government debt obligations are legally binding commitments but ruled for the government on the grounds that the plaintiff did not have a cognizable claim for damages. As such, the Court did not decide whether impossibility or changed circumstances that arose as a result of the Joint Resolution excused government nonperformance.⁷⁶

The majority opinion in *Perry* is notable for its articulation of the constitutional limits on Congress' ability to repudiate public debt obligations. Hughes located these limits in Article I,

⁷⁵ See *id.* at 65-66.

⁷⁶ See *Perry*, 294 U.S. at 358.

Section 8, Clause 2 (the Borrowing Clause)⁷⁷ and Section 4 of the 14th Amendment (the Public Debt Clause).⁷⁸ With regards to Article I, the majority based its reasoning on structural, doctrinal, and ethical inferences from the Constitution, rather than specific language obligating the government to pay its debts without alteration. As Hughes wrote:

In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money “on the credit of the United States,” the Congress is authorized to pledge that credit as an assurance of payment as stipulated, as the highest assurance the government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise; a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our government.⁷⁹

In so doing, the Court rejected the government’s contention that Congress was entitled to use its power to regulate the nation’s monetary system to unilaterally modify its debt obligations. In support of its position, the government had argued, *inter alia*, that the Congress which authorized the issuance of the Liberty Bond had no power to prevent subsequent congresses from fulfilling their constitutional prerogative to regulate the value of money.⁸⁰ While affirming Congress’ monetary authority, the Court rejected this claim on the grounds that it would undermine the country’s creditworthiness. Allowing later congresses to alter the standard of payment by which the government repaid its debts would, in the Court’s view, necessarily mean that “the obligation as to the amount to be paid may also be repudiated.”⁸¹ In other words, unilateral, *ex post* revisions of government debt contracts would render “the credit of the United States . . . an illusory pledge.”⁸²

⁷⁷ U.S. CONST. art. I, § 8, cl. 2. (“The Congress shall have Power To . . . borrow Money on the credit of the United States.”)

⁷⁸ U.S. CONST. amend. XIV, § 4. (“The validity of the public debt of the United States . . . shall not be questioned.”)

⁷⁹ *Perry* at 351.

⁸⁰ *See id.* at 350 (summarizing the government’s position).

⁸¹ *Id.*

⁸² *Id.*

In addition to the Borrowing Clause, the majority held that the Joint Resolution violated Section 4 of the 14th Amendment, which declares that “[t]he validity of the public debt of the United States, authorized by law . . . shall not be questioned.”⁸³ The Public Debt Clause was drafted in the aftermath of the Civil War and intended to affirm the federal government’s commitments to meeting the financial obligations that it incurred during the war, including pensions for Union veterans,⁸⁴ as well as to explicitly disclaim any duty to pay Confederate obligations.⁸⁵ While acknowledging that this provision was drafted in the post-Civil War context, the Court recognized its continued relevance. Hughes noted that the Amendment’s “language indicates a broader connotation” than just the repayment of the Union’s Civil War debts.⁸⁶ Rather, the majority considered the Public Debt Clause “confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted,” that the debts of the United States could not be repudiated.⁸⁷ The Court further held that “the public debt” referred not just to debt instruments but, rather, “embrac[ed] whatever concerns the integrity of the public obligations.”⁸⁸

Despite concluding that the Joint Resolution’s invalidation of gold clauses in public contracts constituted a repudiation of government debt that was outlawed by two separate constitutional provisions, the majority ruled for the government on the grounds that the plaintiff had not suffered any damages. The Court came to this conclusion by reasoning that the absence

⁸³ U.S. CONST. amend. XIV, § 4.

⁸⁴ *See id.* (noting that public debts of the United States, authorized by law included those “incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion.”)

⁸⁵ *See id.* (“But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.”) [Secondary source on original intent of Public Debt Clause]

⁸⁶ *Perry*, 294 U.S. at 354.

⁸⁷ *Id.*

⁸⁸ *Id.*

of a domestic market for gold and the universality of the dollar in domestic transactions meant that the plaintiff's purchasing power would not be reduced if he was paid in the equivalent amount of dollars, determined at a post-devaluation rate of exchange. Thus, the Court held that the "equivalent" in currency of the gold coin promised to him pursuant to the Liberty Bond contract "cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used."⁸⁹ These purposes, the Court continued, were limited to those of legal tender currency, since the use of gold in foreign exchange, export financing, and domestic use had been validly restricted by Congress. In other words, "[p]laintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever."⁹⁰ Indeed, the Court reasoned that the plaintiff would be unjustly enriched if awarded the pre-devaluation worth of his bond, \$16,931.25, rather than its \$10,000 face value.⁹¹ In dispensing with *Perry* through this purchasing power analysis, the Court refused to consider the claim as anything other than one for breach of contract in which the plaintiff was only entitled to compensatory damages.⁹²

Justice Stone wrote a separate opinion concurring in the judgment. Stone agreed with the majority that the plaintiff was not entitled to damages but objected to the Court's decision to pass on the constitutionality of the Joint Resolution. While he disagreed with the Joint Resolution, Stone was concerned that by declaring Congress' monetary powers subservient to its debt obligations, the Court might impede the ability of future congresses to regulate the nation's monetary system.⁹³

⁸⁹ *Id.* at 357.

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *See id.* ("The action is for breach of contract. As a remedy for breach, plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched.")

⁹³ *Id.* at 358-61 (Stone, J., concurring).

The Court also held for the government in *Nortz*. The dispute there concerned the validity of the Joint Resolution’s invalidation of gold clauses as applied to gold certificates of the U.S. Treasury. Like the Liberty Bond at issue in *Perry*, the gold certificates were government-issued debt instrument that could, at the election of the holder, be redeemed in gold from the Treasury. However, they differed from Liberty Bonds insofar as they provided for repayment in “currency” rather than a fixed amount of gold “as a commodity.”⁹⁴ Accordingly, the analysis in *Nortz* departed slightly from that in *Perry*. Writing again for the majority, Chief Justice Hughes explained that the issue concerned whether the plaintiff, who had redeemed his certificates with the Treasury for dollars at a rate fixed at the time the certificates were created, was entitled instead to a dollar value fixed at the time in which the certificates were redeemed.⁹⁵ The Court held that granting the plaintiff this difference would constitute an unjust enrichment rather than compliance with the terms of the contract, and the Court thus denied his challenge.⁹⁶

The majority opinions in the two cases concerning the legality of the Joint Resolution as applied to gold clauses in private contracts—*Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240 (1935) and *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935)—further affirmed the extent of Congress’ monetary powers. As noted above, the Court had previously upheld the validity of private gold clauses in *Bronson* and *Trebilcock*. In those cases, the Court affirmed the ability of private parties to specify particularities about the units of payment in a contract, in spite of Congress’ plenary power to regulate the nation’s monetary affairs. The Court distinguished *Norman* and *Bankers Trust* by holding that the gold clauses at issue in these cases were “not contracts for payment in gold coin as a commodity . . . but were contracts for the

⁹⁴ *Id.* at 326-27.

⁹⁵ *See Nortz* 294 U.S. at 318.

⁹⁶ *See id.* at 328-29. (“The asserted basis of plaintiff’s claim for actual damages is that, by the terms of the gold certificates, he was entitled, on January 17, 1934, to receive gold coin. It is plain that he cannot claim any better position than that in which he would have been placed had the gold coin then been paid to him.”)

payment of money.” As such, these provisions were subservient to Congress’ Article I power to establish and regulate the nation’s monetary system. Because Congress has the power to “invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority,” the Court held the private gold clauses in these contracts invalid.

The Court’s four conservative Justices—Justices McReynolds, Van Devanter, Sutherland, and Butler—dissented in all four of the cases. The opposition of the “Four Horsemen” to the government’s position was not surprising given their hostility to the Roosevelt administration’s agenda. Indeed, the dissent, authored by Justice McReynolds, reads as something of a broadside against centralized government. The dissent noted the Court’s long history of respecting gold clauses in public and private contracts and listed the various dangers that might result if the federal government was left free to abrogate its financial commitments. The dissent also picked up on the challengers’ claims that Congress lacked the authority to invalidate gold clauses by noting that this was not within the “delegated and limited powers which derive from the Constitution.”⁹⁷ However, for reasons that remain unclear, the dissent did not reckon with the majority’s damages calculation, the dispositive issue in *Perry* and *Nortz*.

Before considering the short and long-term consequences of the Cases, it may be worthwhile to highlight two other aspects of the decisions. Despite its extensive focus on the Joint Resolution’s constitutionality under the Borrowing and Public Debt Clauses, the Court gave only cursory attention to due process. Specifically, the Court dismissed claims that the devaluation effected by the Joint Resolution constituted a taking of private property for public use requiring just compensation under the Takings Clause of the Fifth Amendment.⁹⁸ The Court largely dispensed with this issue in *Nortz*. There, the plaintiff claimed that the Treasury’s

⁹⁷ *Norman*, 55 S.Ct. at 420-27 (McReynolds, J., dissenting).

⁹⁸ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

requirement that he redeem his gold certificates in dollars instead of gold constituted a “taking of the contract” which required just compensation.⁹⁹ Yet in considering this allegation, the Court came to the conclusion that, even if the Joint Resolution did effect a taking within the meaning of the Fifth Amendment, the Treasury had justly compensated the plaintiff by redeeming his certificates at an amount of dollars equivalent to the amount of the gold he was due under the contract, even if the value of this payment was less than he anticipated because the gold was priced at a post-devaluation rate.¹⁰⁰

The Court’s treatment of sovereign immunity is another interesting aspect of the decisions. As discussed below,¹⁰¹ under the doctrine of sovereign immunity the government may be sued only when it explicitly consents. In *Perry*, the Court found that sovereign immunity did not bar suit against the government for a claim arising out of a government debt contract. Yet the Court left it unclear whether the government’s issuance of the Liberty Bond rendered it subject to suit in claims arising out of its breach or, instead, whether other waivers of sovereign immunity, such as the Tucker Act,¹⁰² applied.¹⁰³ Thus, rather than barring such claims, Chief Justice Hughes dispensed with sovereign immunity by noting that it was “a matter of procedure which does not affect the legal and binding character of [government] contracts.”¹⁰⁴ At the same time, however, the Court acknowledged that the government’s liability for such claims was limited. Although the existence of a contract might be enough to waive sovereign immunity, Hughes noted that “the Congress is under no duty to provide remedies through the courts.”¹⁰⁵

⁹⁹ *Nortz*, 294 U.S. at 328.

¹⁰⁰ *See id.* (“The currency paid to the plaintiff for his gold certificates was then on a parity with that standard of value. It cannot be said that, in receiving the currency on that basis, he sustained any actual loss.”)

¹⁰¹ *See infra* Part II.D.1.

¹⁰² *See infra* Part II.C.2.

¹⁰³ *See Perry*, 294 U.S. at 354.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Thus, while a “contractual obligation still exists” under the law, this obligation was only “binding upon the conscience of the sovereign.”¹⁰⁶

C. Aftermath

1. *Legal consequences*

The primary consequence of the Gold Clause Cases was the invalidation of gold clauses in public and private contracts. Without expressly affirming the legality of the Joint Resolution, the decisions rendered such provisions unenforceable. As such, the Cases can be seen as marking a turning point in the Court’s treatment of contractual rights and duties. Whereas the judiciary had long respected the ability of parties to include gold clauses in contracts, the Court’s recognition of Congress’ ability to invalidate such provisions signaled a recognition that public policy considerations may sometimes override freedom of contract principles. Thus, the Gold Clause Cases can be seen as an indication of the Court’s rethinking of economic regulation post-*Lochner*.¹⁰⁷ The Court’s recognition of the freedom to contract independently of government interference is generally considered to have held sway until its decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld the constitutionality of the state of Washington’s minimum wage law. However, the outcome of the Gold Clause Cases suggest that the Court, whose composition did not change until Justice Van Devanter’s departure at the end of the 1937 spring term, was willing to recognize public policy limits on contractual freedom prior to 1937.

2. *Economic consequences*

The Gold Clause Cases also had significant economic impacts. Economic historians generally consider the abandonment of the gold standard an important factor in lessening the extent and duration of the Great Depression, both in the United States and in other countries that

¹⁰⁶ *Id.*

¹⁰⁷ See *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York labor regulation on the grounds it violated the “liberty of contract” implicit in the Due Process Clause of the Fourteenth Amendment).

did likewise.¹⁰⁸ Although these devaluations were spurred by competitiveness concerns and thus entailed some beggar-thy-neighbor effects, the abandonment of the gold standard is generally considered to have reduced debt overhangs,¹⁰⁹ boosted aggregate demand, and thereby stimulated economic activity.¹¹⁰ In refusing to undermine the federal government's inflationary efforts, the Gold Clause Cases can thus be credited with contributing to a public policy that mitigated some of the Depression's effects.

3. *Political consequences*

The Gold Clause Cases also constituted a political victory for the Roosevelt administration. As noted above, in the weeks leading up to the announcement of the decisions, there was a palpable sense among key officials that the Supreme Court might invalidate the Joint Resolution and thereby undermine a key part of the administration's recovery plan. Nevertheless, the Court ultimately sided with the government. The fact that the majority did so on narrow, technical grounds was likely of little import to an administration focused on substance rather than form. Moreover, the possibility that the whispering campaign influenced some of the Justices may have emboldened administration officials, including the President, to use their bully pulpit to influence the Court over the coming years. The most notorious example of this was the President's plan, announced in February 1937, to expand the membership of the Court in the hopes of ensuring a reliable liberal majority.¹¹¹ As such, the Gold Clause Cases not only constitute a rare example of the Court upholding New Deal legislation before the "switch in time

¹⁰⁸ See Bernanke and James, *The Gold Standard*.

¹⁰⁹ See Randall S. Kroszner, *Is It Better to Forgive than to Receive? Repudiation of the Gold Indexation Clause in Long-Term Debt during the Great Depression*, CRSP WORKING PAPER, CENTER FOR RESEARCH IN SECURITY PRICES, UNIVERSITY OF CHICAGO (1998): <http://faculty.chicagobooth.edu/finance/papers/repudiation11.pdf> (noting that the invalidation of gold clauses constituted a form of large-scale debt relief).

¹¹⁰ See Barry Eichengreen and Jeffrey Sachs, *Exchange Rates and Economic Recovery in the 1930s*, 45 J. ECON. HIST. 925 (1985).

¹¹¹ The Judicial Procedures Reform Bill of 1937 would have given the President the authority to appoint up to six new Justices for every member of the Court over the age of 70 ½ who refused to retire. See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2011).

that saved nine”¹¹² but may also have encouraged the administration to proceed with its court-packing plan two years later.

II. CONTEMPORARY IMPLICATIONS

Henry M. Hart, Jr., who would later gain renown as one of the founders of the legal process theory of jurisprudence,¹¹³ penned the most extensive analysis of the Gold Clause Cases while a junior faculty member at the Harvard Law School.¹¹⁴ Writing just three months after the decisions, Hart noted the novelty of the issues and the existence of significant authority supporting both the plaintiffs and the defendants.¹¹⁵ Like Justice Stone, however, Hart took issue with the Court’s willingness to pass on the constitutionality of government default. In Hart’s view, the question presented in the Gold Clause Cases concerned the ability of Congress to regulate the country’s currency, not “whether obligations of the United States can be repudiated altogether.”¹¹⁶ Hart also criticized the majority’s conclusion that the Joint Resolution was unconstitutional as inconsistent with earlier decisions recognizing the legality of the government’s policy to eliminate gold as a medium of exchange.¹¹⁷

Hart based his reasoning on the special character of government obligations. Although he felt it evident that private parties should be held to the terms of their contracts, Hart argued that a different legal framework prevails in sovereign debt matters. In Hart’s telling, the fact that

¹¹² See Daniel E. Ho and Kevin M. Quinn, *Did a Switch in Time Save Nine?* 2 J. LEGAL ANALYSIS 69 (2010) (providing empirical evidence on the impact of FDR’s court-packing plan).

¹¹³ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIS PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2006); HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953); see also William N. Eskridge, Jr. and Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1993).

¹¹⁴ See Henry M. Hart, Jr., *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057 (1935).

¹¹⁵ See *id.* at 1068. (“The question was whether ‘punctilious fulfillment of contractual obligations’ of the United States is more important than the freedom of Congress to exercise its regulatory powers in whatever manner it deems to be in the public interest. This was an open question under the Constitution and under the prior decisions of the Supreme Court. There were ample materials for a decision either way.”)

¹¹⁶ *Id.* at 1069.

¹¹⁷ See *id.* at 1074. (“Congress can take the promised coin away from the bondholder altogether, and hence that it can refuse to pay it to him in the first place.”)

sovereigns may be able to shirk duties that would be legally binding on a private party constituted the very nature of sovereignty. Thus, Hart explained that instead of holding the invalidation of gold clauses in public contracts unconstitutional, the Court could have used the occasion to explain how the government's financial obligations differ from private obligations. "[T]he cases involved the freedom of government to govern," Hart wrote, and the Court should have taken care to make "candid recognition of the peculiar character of governmental undertakings [and] of the inapplicability to such undertakings of conceptions too easily drawn from the imperfect analogue of undertakings between private individuals."¹¹⁸ Hart concluded by noting that, while the government has a responsibility to live up to its financial commitments, the judiciary might not be the best institution to ensure that it does so:

This is not for a moment to say that the Government owes no obligation of good faith. It is only to say, as this decision itself bears witness, that the obligation perforce is different. The obligation needs to be defined, but the definition loses its usefulness if it overlooks or conceals the differences. Consideration must be given in this connection not only to the peculiar position of the United States in making contracts but to the peculiar position of the courts in enforcing them.¹¹⁹

Subsequent events confirmed many of Hart's conclusions. As detailed below, courts have afforded the federal government significant leeway when the government fails to live up to its financial commitments. Among of things, the continued salience of Hart's analysis exemplifies the ways legal process theory has come to define the scope of modern adjudication. For instance, Hart's conclusion regarding the inadequacy of the judiciary as a check on government default anticipated what he and Albert Sacks would come to term "the principle of institutional settlement"¹²⁰ under which authority to settle legal questions are allocated to different

¹¹⁸ *Id.* at 1098-99.

¹¹⁹ *Id.* at 1099.

¹²⁰ *See* HART & SACKS, THE LEGAL PROCESS.

government institutions depending on their comparative institutional competencies.¹²¹ When it comes to questions of government delinquency, the general trend has been for the judiciary to cede authority to the elected branches. Thus, while the U.S. government's history of repayment has meant that challenges to debt default are rare, nonlegal forces constitute the primary reasons why the federal government has fulfilled its financial obligations.

Nevertheless, this has not always been true, and the laws governing the federal government's financial obligations have evolved in some important ways since the Gold Clause Cases were decided. In part, this is because the size and scope of federal obligations have expanded tremendously over the past eighty years. Before 1935, the government's financial obligations were largely limited to various debt instruments that it sold to private parties, as well as the contracts it entered into with private parties. Since the Gold Clause Cases were decided, however, the size and scope of U.S. federal debt and contract obligations has grown tremendously. Moreover, over the past eighty years the federal government has assumed new sorts of financial obligations. These include both explicit and implicit government guarantees, as well as statutory commitments to pay individual citizens certain retirement, disability, and health benefits.

This remainder of the paper outlines some of the main legal issues surrounding government default and delinquency across the broad array of financial obligations. It examines how courts and commentators have interpreted the Cases in light of contemporary fiscal issues, including the constitutionality of the federal debt ceiling, and considers what the Cases tell us

¹²¹ See Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 179 (1997) (summarizing the principle of institutional settlement). See also Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994) (explaining the salience of legal process theory for federal courts scholarship).

about when the federal government may legally renege, repudiate, modify, or otherwise fail to live up to its financial commitments.

A. Debt Repudiation

Most of the scholarly attention on the Gold Clause Cases has centered over the constitutionality of federal debt repudiation.¹²² As noted above, the majority in *Perry* articulated two bases by which the federal government is constitutionally obligated to fulfill its debt obligations: the Borrowing Clause of Article I, Section 8 and the Public Debt Clause of Section 4 of the 14th Amendment. Although some scholars have taken the Court's decision in *Perry* to stand for the proposition that government default is inexcusable,¹²³ the majority's reasoning and its subsequent application by courts shows that this is not uniformly true.

1. Borrowing Clause

The *Perry* Court based its conclusion that Congress could not constitutionally repudiate public debt on a particular reading of Article I, Section 8, Clause 2 of the Constitution. The Court did not engage in a textual analysis but rather pointed to what it considered the problematic consequences of the government's position. Allowing the federal government to abrogate its debts would render "the credit of the United States . . . an illusory pledge," a conclusion the Court considered plainly at odds with the Constitution.¹²⁴

This argument has a great deal of merit from both a constitutional and policy perspective. To the extent the federal government is not obligated to repay its debts according to terms specified in the debt contract, the public credit of the United States is undermined. Moreover, there is little basis for exempting the government from the duties facing other creditors

¹²² Repudiation, often used interchangeably with the term default, exists when a borrower refuses to honor all or some of the terms of a debt contract. Repudiation most often occurs when a borrower fails to make an interest, coupon or principle payment at the time specified in the contract.

¹²³ See Hazan, *Unconstitutional Debt Ceilings*; Ostro, *In the Debt We Trust*.

¹²⁴ *Perry*, 294 U.S. at 350.

borrowing on the private market. As such, the Borrowing Clause can be read as including a requirement that the government faithfully repay its debts. Indeed, though the Court in *Perry* did not explicitly state this, Article I, Section 8, Clause 1 gives Congress the power to “levy and collect taxes, duties, imposts, and excises” in part as a means “to pay the Debts” of the government.¹²⁵

It is also possible to take the opposite view. As noted above, the Borrowing Clause itself does not explicitly state that Congress must repay the public debt. Rather, it simply authorizes Congress “to borrow money on the credit of the United States.”¹²⁶ While this may be read as implying a prohibition on default, the absence of any express limitation to that effect makes the *Perry* majority’s reading of Article I, Section 8, Clause 2 non-self-evident. Further, while the government’s creditworthiness might be improved if creditors know they have legal recourse in case of default, the impact of a constitutional prohibition on default on the willingness of creditors to lend money to the U.S. government seems limited.

Indeed, contra *Perry*, no courts which have considered the Borrowing Clause have found that it obligates the government to repay the public debt. Instead, Borrowing Clause litigation—most of which preceded the Gold Clause Cases—has largely been limited to determinations of the valid instrumentalities¹²⁷ and purposes of government borrowing,¹²⁸ as well as the states’

¹²⁵ U.S. CONST. art. I, § 8, cl. 1,

¹²⁶ U.S. CONST. art. I, § 8, cl. 2.

¹²⁷ See *U.S. v. Dauphin Deposit Trust Co.*, 50 F. Supp. 73, 75 (M.D. Pa. 1943)(issuance of U.S. savings bonds is valid exercise of Congress’ borrowing power, which “necessarily includes the power to fix the terms of the Government’s obligations.”).

¹²⁸ See *The Legal Tender Cases*, 110 U.S. 421, 444 (1884) (“The power ‘to borrow money on the credit of the United States’ is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills or notes.”)

inability to interfere with congressional borrowing prerogatives.¹²⁹ Of course, the main reason why no court has followed *Perry*'s lead in finding an Article I limitation on government debt repudiation has to do with the fact that the U.S. government has not reneged on the public debt. Thus, the courts have simply not had occasion to consider this question. Nevertheless, the notion that constitutional restrictions on default, rather than political and economic considerations, explain the government's historical creditworthiness is contestable.

2. *Public Debt Clause*

In addition to the Borrowing Clause, the *Perry* Court based its claim that the Constitution prohibited Congress from repudiating government debt on the Public Debt Clause of the 14th Amendment. This part of the opinion has attracted most recent attention, largely because of its potential implications for the federal debt ceiling.¹³⁰ Some scholars have viewed the Court's conclusion regarding the applicability of the Public Debt Clause to government default as a basis for claims that the debt ceiling is unconstitutional, since by placing limits on the federal government's ability to borrow money prevents the Treasury from meeting the government's existing obligations.¹³¹

In *Perry*, the Court held that the Public Debt Clause had applicability beyond the Civil War context. In Hughes' words, the Clause's "language indicates a broader connotation" than just the repayment of the Union's Civil War debts.¹³² Rather, the majority considered Section Four of the 14th Amendment "confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those

¹²⁹ See *Weston v. City Council of Charleston*, 27 U.S. 449, 468 (1829) ("The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments."); *People of New York ex rel. Bank of Commerce v. Commissioners of Taxes for City & Cnty. of New York*, 67 U.S. 620, 627 (1862) (state taxation cannot interfere with federal borrowing).

¹³⁰ See 31 U.S.C. § 3101.

¹³¹ See Hazan, *Unconstitutional Debt Ceilings*; Ostro, *In the Debt We Trust*.

¹³² *Perry*, 294 U.S. at 354.

issued before the amendment was adopted,” that the public debts of the United States could not be repudiated.¹³³ The Court further held that “public debt” referred not just to the explicit debt obligations of the federal government but, rather, “embrac[ed] whatever concerns the integrity of the public obligations.”¹³⁴

The Court’s reading of the Public Debt Clause holds some interesting implications. Under this part of *Perry*, a plaintiff would be able to challenge a U.S. government policy to repudiate its debt, as long as that plaintiff suffered a redressable injury as a result of the action. For instance, should the U.S. government be late in making an interest payment on a Treasury security, a bond holder could bring suit alleging a violation of Section 4 of the 14th Amendment. This is because such securities undoubtedly constitute “public debt of the United States, authorized by law”¹³⁵ and because such delinquency would likely be considered a “questioning” of that debt. To draw an analogy closer to the Liberty Bond at issue in *Perry*, should the Treasury Department refuse to adjust a TIPS principal repayment upwards for inflation—or, even more tantalizingly, tweak the measure of inflation used to determine the adjustment—a bondholder might be able to recover under the Public Debt Clause.

Nevertheless, the contemporary significance of *Perry* in this respect is unclear given the range of federal financial commitments and the subsequent jurisprudence on the Public Debt Clause. While scholars have viewed *Perry* as standing for the proposition that government debt obligations are legally binding,¹³⁶ *Perry* has not exposed the government to liability for breaches of its financial commitments. The handful of courts considering the meaning of the Public Debt Clause have not followed *Perry* in finding that it imposes constraints on the government’s ability

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ U.S. CONST. amend. XIV, § 4.

¹³⁶ See, e.g., Ostro, *In the Debt We Trust*.

to alter the terms or otherwise fail to fully meet its financial obligations. Rather, courts have held that Section Four is “not so broad as to encompass within its coverage every debt of the United States,” such as obligations arising out of federal statutes, but instead may only be applicable for “bond debts.”¹³⁷ Courts have also summarily rejected claims that congressional modifications of such obligations constitute a “questioning” within the meaning of the Public Debt Clause.¹³⁸

Still, it is worth pondering when the Public Debt Clause might limit federal government delinquency. This inquiry would seem to focus on two questions: whether the obligation at issue constitutes “public debt” and whether the delinquency amounts to a “questioning” of that debt.

With respect to the first issue, courts could take very different approaches to the meaning of “public debt.” The phrase is not defined in the Constitution and, despite its prominence in public discourse, is subject to a range of meanings.¹³⁹ Depending on one’s perspective, “public debt” could be taken to mean only federal debt instruments or, at the other end of the spectrum, all federal financial and nonfinancial commitments “authorized by law.”¹⁴⁰ Between these two poles lie a range of government obligations and promises the legal bindingness of which are unclear. For instance, it is plausible that courts would have different views on whether a government statutory scheme establishing a program providing grants-in-aid to the states would impose a public debt obligation on the federal government.

Similarly, it is unclear what would constitute a “questioning” of the public debt within the meaning of Section 4 of the 14th Amendment. The Court in *Perry* considered a statute invalidating anti-inflationary provision in a government debenture to be such a questioning of the public debt. Thus, under *Perry*, the Public Debt Clause seems applicable to cases in which the

¹³⁷ *State of Del. v. Cavazos*, 723 F. Supp. 234, 245 (D. Del. 1989) *aff’d*, 919 F.2d 137 (3d Cir. 1990).

¹³⁸ *See Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10, 17-18 (7th Cir. 1990).

¹³⁹ *See* Michael J. Boskin, *Economic Perspectives on Federal Deficits and Debt*, in FISCAL CHALLENGES, 141-181.

¹⁴⁰ U.S. CONST. amend. XIV, § 4.

government expressly repudiates terms in a debt contract. However, this tells us little about different types of federal obligations and degrees of delinquency. As Michael W. McConnell has noted, “[d]efault is not the same as repudiation. If Congress repudiated the debt, it would be declaring that the debt is not owed. If Congress defaulted on the debt, the [debt] would still be owed; it would simply go (in part) unpaid.”¹⁴¹ Whether under *Perry* a government abrogation of a nondebt contractual obligation would be tantamount to a questioning of the public debt remains an open question whose answer would seem to depend on the degree of government delinquency. Thus, while the Gold Clause Cases may have breathed some life into this neglected part of the Fourteenth Amendment, the Public Debt Clause’s contemporary significance remains vague.

B. Monetary Policy

Another important aspect of the Gold Clause Cases is the way the decisions both affirmed and limited Congress’ power to regulate the nation’s monetary system. In addition to authorizing Congress to borrow money, Article I of the Constitution gives Congress “the power to ... coin money [and] regulate the value thereof.”¹⁴² The government based much of its argument in 1935 on the Coinage Clause, responding to the challengers’ claims that the Joint Resolution effected an invalid exercise of congressional authority by noting that the Constitution empowered Congress to regulate the nation’s monetary affairs. In the government’s view, the Joint Resolution was needed to eliminate the possibility that private parties would be allowed to contract around the unitary system of exchange decided upon by Congress.¹⁴³ As noted above, the Court in the Gold Clause Cases adopted a more modest view of Congress’ monetary powers.

¹⁴¹ Michael W. McConnell, *Origins of the Fiscal Constitution*, in *IS U.S. GOVERNMENT DEBT DIFFERENT?* 45, 50 (Franklin Allen et al. eds., 2012).

¹⁴² U.S. CONST. art. I, § 8, cl. 5.

¹⁴³ See Brief for the United States at 35-43, *Perry*, 294 U.S.

While the Court affirmed that the Constitution vested in Congress the power to regulate the nation's monetary affairs, it held that this power could not be used to undermine the government's debt obligations. The Court came to this conclusion by reasoning that allowing Congress to change the standard of payment by which it repaid its debts would "invariably" mean that it could also change the amount of debt that it repaid.¹⁴⁴

Compared to the Court's formulation of the Borrowing and Public Debt Clauses, the implications of the Court's decisions in terms of Congress' monetary powers have gone largely unnoticed. Nevertheless, the Gold Clause Cases stand as one of the few occasions in which the Court has ruled on the extent of Congress' monetary powers. Among other things, the decisions raise questions about the federal government's legal ability to breach its financial obligations through inflation. While the Court may have declared explicit debt repudiation unconstitutional, the outcome of the Cases indicates that the federal government may use its power to regulate the nation's monetary system to informally default on its obligations.

1. Who regulates the nation's money?

At the same time the Court declared the Joint Resolution an unconstitutional repudiation of government debt, it upheld Congress' power to regulate the nation's monetary system. In *Perry*, the Court noted that "[t]here is no question as to the power of the Congress to regulate the value of money: that is, to establish a monetary system and thus to determine the currency of the country."¹⁴⁵ Likewise, the plaintiff in *Nortz* "explicitly state[d] his concurrence in the government's contention that the Congress has complete authority to regulate the currency system of the country," which included the power to "compel all residents of this country to

¹⁴⁴ *Perry*, 294 U.S. at 350.

¹⁴⁵ *Id.*

deliver unto the Government all gold bullion, gold coins and gold certificates in their possession.”¹⁴⁶

In considering the contemporary implications of the Cases, the fact that the Constitution vests monetary authority in Congress raises a set of intriguing questions. Modern monetary policy is different from that envisaged by the founders, as well as that which existed in 1935. The primary development has been the growth of the Federal Reserve System, which controls the amount of money and credit in the U.S. economy in pursuit of its statutorily-defined goals of “maximum employment, stable prices, and moderate long-term interest rates.”¹⁴⁷ The Federal Reserve influences the nation’s money and credit supply through the buying and selling of government securities (open market operations), adjusting the rate on the loans it extends to private banks (the discount rate), and requiring banks to hold certain amounts of funds in reserve against their liabilities (reserve requirements).¹⁴⁸ While central banking has a long history in the United States,¹⁴⁹ and the Fed was already twenty-one years old by the time of the Gold Clause Cases,¹⁵⁰ the institution only emerged as the nation’s true monetary authority in the years following the decisions.¹⁵¹

The implications of the Court’s articulation of Congress’ monetary powers in light of the Federal Reserve’s dominant role therein are unclear. In part, this is because the Court in the Gold Clause Cases did not explain whether Congress’ monetary power was plenary. Clearly, Congress

¹⁴⁶ *Nortz*, 294 U.S. at 328.

¹⁴⁷ 12 U.S.C. § 225a (2000).

¹⁴⁸ See STEPHEN H. AXILROD, *THE FEDERAL RESERVE: WHAT EVERYONE NEEDS TO KNOW* (2013).

¹⁴⁹ See Daniel Feller, *The Bank War*, in JULIAN ZELIZER, ED., *THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY 153-167* (2004) (describing the conflict over the Second Bank of the United States);

¹⁵⁰ The Federal Reserve System was created on December 23, 1913 with the enactment of the Federal Reserve Act, ch. 6, 38 Stat. 251.

¹⁵¹ The Banking Act of 1935 revolutionized the Federal Reserve by creating the Federal Open Market Committee, which has come to serve as the central locus for the institution’s monetary policy decisions. [FOMC created in 1933 and reorganized in 1935.] The 1951 Treasury-Fed Accord further established the Fed’s authority by restoring policy autonomy to the Fed. See ALLAN H. MELTZER, *A HISTORY OF THE FEDERAL RESERVE, VOLUME 1: 1913-1951* (2003).

shares much of its monetary power with the executive branch. But how much of Congress' enumerated monetary powers, as well as those functions which fall within the executive branch's domain, can be imputed to the Federal Reserve? And in the absence of such authority, what other constitutional bases are there for the Federal Reserve's actions?

The constitutionality of the Federal Reserve System has received little scholarly attention. Yet as Peter Conti-Brown has recently explained, the Federal Reserve raises two sets of constitutional issues.¹⁵² The first relates to the appointment and removability of Fed officials. Pursuant to statute, the presidents of the Federal Reserve banks are appointed by two-thirds of the directors of each bank,¹⁵³ rather than going through Article II appointment procedures.¹⁵⁴ The President also has little authority to remove these officials. Because the presidents of the Federal Reserve banks exercise considerable power within the Federal Reserve System,¹⁵⁵ the lack of Presidential appointment and removal raises potential separation-of-powers concerns, particularly if these officials are considered principal officers within the meaning of the Court's Appointments Clause jurisprudence.¹⁵⁶ The second set of legal issues, which may implicate the Gold Clause Cases more directly, is the question of whether Congress' transfer of its monetary powers to the Federal Reserve System is unconstitutional on nondelegation grounds.¹⁵⁷

Additionally, to the extent that the Federal Reserve constitutes a nongovernmental actor, its

¹⁵² See Peter Conti-Brown, *The Structure of Federal Reserve Independence*, ROCK CENTER FOR CORPORATE GOVERNANCE WORKING PAPER SERIES NO. 139 (2013): <https://www.law.stanford.edu/sites/default/files/publication/431459/doc/slspublic/SSRN-id2275759.pdf>.

¹⁵³ 12 U.S.C. § 341.

¹⁵⁴ U.S. CONST. art. II, § 2, cl. 2. (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”)

¹⁵⁵ Federal Reserve Education, *The Structure of the Federal Reserve System*, <https://www.federalreserveeducation.org/about-the-fed/structure-and-functions>.

¹⁵⁶ See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

¹⁵⁷ See *Panama Refining v. Ryan*, 293 U.S. 388 (1935) and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

statutory powers could be considered a violation of the Subdelegation Act's limits on the ability of the government to transfer public functions to the private sector.¹⁵⁸

2. *Inflation as debt repudiation*

Putting aside questions regarding the constitutionality of the Federal Reserve, the Gold Clause Cases also raise an interesting set of questions about the government's ability to inflate away its debts. To a considerable degree, the Court's finding in *Perry* that the plaintiff had not suffered any damages undermined its claim that the devaluation effected by the Joint Resolution constituted an unconstitutional repudiation of the public debt. The Court, recall, found that the absence of a domestic market for gold and the universality of the dollar in domestic transactions meant that the plaintiff's purchasing power would not be reduced if he was paid in the equivalent amount of dollars calculated at a post-devaluation rate.¹⁵⁹ Yet because Congress' powers to regulate the nation's monetary system include the ability to require that the country adopt a uniform medium of exchange, and because the existence of a unitary monetary system might render inapplicable claims to payment in another medium of exchange (or, more precisely, at a rate determined before devaluation), the decisions left unclear when a plaintiff might have a cognizable damages claim. Should this always involve a determination about whether a party's purchasing power has been adversely affected? If so, how should this be determined? And given the ease with which people can transact across borders and in other currencies, is it realistic to think that devaluation has no effect on a person's economic situation?

¹⁵⁸ 3 U.S.C. §§ 301, 302. See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007) (explaining the Subdelegation Act's limitations on the ability of the government to transfer functions to the private sector).

¹⁵⁹ See *Perry v. United States*, 294 U.S. 330, 357-58 (1935) ("Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment.").

The lack of statutory or case law on this question means that answers must remain speculative. Nevertheless, one can engage in some interesting thought exercises. A not-inconceivable situation would concern a time in which the nation's monetary authorities, i.e. the Federal Reserve, engaged in expansionary policies that significantly increased inflation. This would reduce the real value of outstanding debts, including those owed by the federal government. At what point would devaluation turn into an unconstitutional repudiation? Unfortunately for the purposes of this exercise, and fortunately for everyone else, courts have not had to consider this question. Nevertheless, the legal implications of government-induced inflation point to a tension underlying the Gold Clause Cases. If missing an interest payment is a legal event that constitutes a constitutional violation under *Perry*, it would seem to follow that an inflation that similarly impacts creditors would give rise to the same legal rights and duties. Of course, one way to extricate ourselves from this potential legal morass is to recognize that the price of debt often reflects the risks of default or other forms of delinquency. Purchasers of sovereign and other forms of marketable debt know what they are buying and will demand harsher terms, usually in the form of higher interest rates, if the risk of nonpayment is great. Although holders of inflation-protected securities might be better positioned to assert legal rights in such cases, they too can be assumed to have factored the costs of potential nonperformance into the price of the debt. Thus, the possibility that the government would be legally liable for inflating away its debts seems dubious at best.

C. The Bindingness of Government Obligations

Despite the fact that federal default has been a relative nonissue, courts have occasionally considered the degree to which some of the federal government's other financial promises are legally binding. Generally, the government has greater latitude to unilaterally modify statutorily-

defined benefits that are funded through taxation, “new property,”¹⁶⁰ than it does to refuse to fulfill commitments imposed on it through specific contractual claims or debt agreements.

1. *Debt instruments*

As described above, the federal government’s debt instruments are legally binding contracts. Despite the ways courts have ignored or limited its holdings, *Perry* has not been overturned. Accordingly, the government is constitutionally obligated to pay its debts according to terms specified in the agreement. That said, the liability that the government might face if it defaulted on its debt is limited. As discussed below, and as highlighted in the Gold Clause Cases, creditors may face various hurdles in obtaining redress from the courts. Because government debt defaults are most likely to arise in times of economic or political crisis, and may involve claims by large numbers of individuals, courts may also be unwilling or unable to hear these cases. Further, default would likely imply that the government does not have sufficient resources to meet its obligations. In this case, creditors may be unable to obtain adequate redress, even if they are able to maintain suit.

2. *Nondebt contracts*

Although the federal government might seem to have less ability to repudiate its debt obligations than to abrogate other financial duties imposed on it through contract, the government is liable for breaches of its nondebt contractual obligations.

Until 1887, a party seeking damages for a breach of its contract with the federal government had to obtain a specific appropriation from Congress to that end.¹⁶¹ The growth of federal contracting highlighted the cumbersomeness of this system and led to passage of the

¹⁶⁰ See Harrison, *New Property*, 401.

¹⁶¹ See RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 859-61 (6th ed. 2009).

Tucker Act in 1887.¹⁶² The Tucker Act gives the United States Court of Federal Claims jurisdiction over claims “founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States.”¹⁶³ In so doing, the Tucker Act “constitutes a waiver of [the federal government’s] sovereign immunity with respect to those claims.”¹⁶⁴

Since the passage of the Tucker Act, courts have enforced various nondebt contractual obligations of the federal government. For instance, in *Lynch v. United States*, 292 U.S. 571 (1934), decided less than a year before the Gold Clause Cases, the Supreme Court ruled against the government after it failed to pay benefits to qualified individuals under insurance policies issued pursuant to the War Risk Insurance Act of 1917. At the same time, however, various defenses have limited the federal government’s contractual liability. One of the most important of these has been the unmistakability defense, which holds that in order to be enforceable, surrenders of sovereign authority, including promises to refrain from subsequent regulatory changes, must appear in unmistakable terms in the contract.¹⁶⁵

The federal government’s ability to rely on the unmistakability defense to escape contractual liability changed significantly as a result of the Supreme Court’s decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). The dispute in *Winstar* concerned a commitment by Congress not to pass legislation that would contravene the terms of a contract between a federal agency and private parties. As part of its effort to help manage the fallout from the savings and loan crisis of the 1980s, the Federal Home Loan Bank Board, which had been

¹⁶² See Robert Porter, *Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies*, HARVARD LAW SCH. BRIEFING PAPERS ON FEDERAL BUDGET POLICY, NO. 22, MAY 2, 2006, http://www.law.harvard.edu/faculty/hjackson/ContractClaims_22.pdf.

¹⁶³ 28 U.S.C. § 1491(a)(1); see also 28 U.S.C. § 1346(a)(2).

¹⁶⁴ *United States v. Mitchell, et al.*, 463 U.S. 206, 212 (1983).

¹⁶⁵ See *Bowen*, 477 U.S. at 52. (“[S]overeign power . . . governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.”)(quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

created in the Federal Home Loan Bank Act of 1932, had offered “express agreements” to encourage investors to take over failing thrifts. These agreements included various incentives, such as guarantees that they could use goodwill and capital credits in meeting their reserve requirements. Congress subsequently passed a law forbidding the counting of goodwill and capital credits towards reserve requirements, which had the effect of making some of the taken-over thrifts “subject to seizure by thrift regulators.”¹⁶⁶ The government based its argument that the new law should be respected and the breach excused on the unmistakability defense, but the Court rejected this position on the grounds that the government’s sovereign authority would not be affected by enforcement of the contractual provision.¹⁶⁷ As such, the Court held that the passage of the new law rendered the federal government liable for breach under regular contract principles.¹⁶⁸

By limiting the availability of the unmistakability defense—as well as affirming background principles that governments may be liable for breach of contract even for sovereign acts¹⁶⁹—*Winstar* reduced the ability of the government to effect a change in public policy that might modify the terms of its agreement with a private party. Thus, courts have regularly held the federal government liable in cases where it breached contractual obligations through subsequent legislative or regulatory actions.¹⁷⁰

¹⁶⁶ *United States v. Winstar Corp.*, 518 U.S. 839, 858, (1996).

¹⁶⁷ *See id.* at 879-887.

¹⁶⁸ *See id.* at 910.

¹⁶⁹ The Court in *Winstar* also rejected the government’s three other defenses: “the rule that an agent’s authority to make such surrenders must be delegated in express terms, the doctrine that a government may not, in any event, contract to surrender certain reserved powers, and, finally, the principle that a Government’s sovereign acts do not give rise to a claim for breach of contract.” *Id.* at 860 (internal citations omitted).

¹⁷⁰ *See, e.g., Cuyahoga Metropolitan Housing Authority v. U.S.*, 57 Fed. Cl. 751 (Fed. Cl. 2003) (1994 amendments to U.S. Housing Act caused federal government to breach Housing Assistance Payment contracts with local housing authority).

3. *New property*

Whereas the federal government may be bound to comply with its debt and contractual obligations, it has significant leeway to modify the benefits it pays its citizens. Since 1935, the federal government has passed a number of statutes requiring it to provide qualified individuals with certain benefits. Social Security and Medicare are the most important and well-known entitlement programs and have come to constitute a significant and growing share of federal expenditures since their creation in 1935 and 1965, respectively.¹⁷¹

The Supreme Court clarified the extent to which the government's commitment to provide these forms of "new property" are legally binding in *Fleming v. Nestor*, 363 U.S. 603 (1960). There, the Court considered the claim of an individual who had been denied Social Security benefits because of his deportation from the United States. The appellee had become eligible for federal old-age benefits in 1955 but was expelled from the country the following year for having been a member of the Communist Party in the 1930s. Section 202(n) of the Social Security Act provided that old-age benefits could be terminated for a person so deported, and the government accordingly cut off his payments. The individual brought suit against the government, claiming that the provision denying him benefits was "unconstitutional under the Due Process Clause of the Fifth Amendment in that it deprived [him] of an accrued property right."¹⁷² The Court by a 5-4 margin held for the government on the ground that the individual did not hold an accrued property right. Although he had paid into Social Security, and as such might conceivably have some claim on Social Security receipts, the Court defined the program as a "form of social insurance, enacted pursuant to Congress' power to spend money in aid of the

¹⁷¹ See William C. Fay & Michelle D. Rodgers, *Appropriations for Mandatory Expenditures*, HARVARD LAW SCH. BRIEFING PAPERS ON FEDERAL BUDGET POLICY, PAPER NO. 17, MARCH 30, 2008, [http://www.law.harvard.edu/faculty/hjackson/MandatorySpending_17\(rev\).pdf](http://www.law.harvard.edu/faculty/hjackson/MandatorySpending_17(rev).pdf).

¹⁷² *Fleming*, 363 U.S. at 606.

general welfare.”¹⁷³ As Justice Harlan explained, “[t]o engraft upon the Social Security system a concept of ‘accrued property rights’ would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands.”¹⁷⁴

Fleming stands for the proposition that government benefits do not constitute accrued property rights, as in a contract, but are more akin to non-enforceable gratuities or promises.¹⁷⁵ As such, the federal government is relatively free—at least in legal terms—to alter the terms of benefit programs. While the Court in *Fleming* did note that, despite the absence of an accrued property right, individuals are entitled to some due process before being denied their government benefits,¹⁷⁶ this has not restricted Congress’ power to modify the terms of such programs.¹⁷⁷ Courts have regularly refused to hold the federal government liable for such modifications. For instance, in *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986), the Supreme Court upheld Congress’ power to amend the Social Security Act in a way that altered its relationships with state governments. In so doing, the Court rejected the claim that the Social Security Act had created contractual property rights for the states the suspension of which would constitute a Fifth Amendment taking.¹⁷⁸

D. The Justiciability of Government Delinquency

Perhaps the most important implication of the Gold Clause Cases is what they say about the willingness of courts to hold the government to its word. Courts have generally been reluctant to involve themselves in questions regarding the legality of government financial obligations. Even when they have heard these cases, courts have tended to avoid ruling against

¹⁷³ *Id.* at 609.

¹⁷⁴ *Id.* at 610.

¹⁷⁵ Harrison, *New Property*, 401.

¹⁷⁶ *Fleming*, 363 U.S. at 611-12.

¹⁷⁷ *See, e.g.*, H.R. 98-21 (P.L. 98-21) (1983 amendments to the Social Security Act).

¹⁷⁸ *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, (1986) (“[T]he contractual right’ at issue in this case bears little, if any, resemblance to rights held to constitute ‘property’ within the meaning of the Fifth Amendment.”).

the government. While the paucity of cases on government delinquency is largely explained by the fact that the U.S. government has tended to live up to most of its financial obligations, at least when compared with other nations,¹⁷⁹ it is also conceivable that federal judges, who are public officials paid out of the Treasury, may think twice about restricting the government's financial latitude.¹⁸⁰ Further, courts may be unwilling to hold the government liable in such cases given that government delinquency may arise during times of political or economic distress.¹⁸¹

In disposing of claims against the federal government, courts have drawn on three principles of nonjusticiability: sovereign immunity, standing and the political question doctrine. Taken together, these doctrines severely limit the government's liability for breaches of its financial commitments.

I. Sovereign immunity

The most important of these doctrines is sovereign immunity. As noted above, under the doctrine of sovereign immunity, the government may be sued only when it explicitly consents. Sovereign immunity is generally justified as a "structural protection for democratic rule."¹⁸² Allowing courts to pass judgment on executive and legislative actions may violate the separation of powers. Moreover, sovereign immunity is seen as necessary to the proper functioning of government. If private citizens could easily hale public officials or employees into court, the government might struggle to carry out its tasks and to recruit competent individuals to government service. At a more basic level, sovereign immunity arises from a belief that it is

¹⁷⁹ See CARMEN M. REINHART & KENNETH ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2011).

¹⁸⁰ See *Lockhart v. United States*, 546 U.S. 142 (2005) (upholding the government's power to garnish Social Security benefits for delinquent federal student loans); *Astrue v. Ratliff*, 130 S.Ct. 2521 (2010) (affirming that attorney fees paid pursuant to the Equal Access to Justice Act may be subject to offsets); *United States v. Bormes*, 133 S.Ct. 12 (2012) (holding that the Little Tucker Act's waiver of sovereign immunity does not apply to claims against the United States for violations of the Fair Credit Reporting Act.)

¹⁸¹ See Jackson, *Counting the Ways: The Structure of Federal Spending*, 212-13 (discussing the ways that politics, rather than the law, is the ultimate impediment to the government defaulting on its financial obligations).

improper to subject the lawmaker to the law. As Justice Holmes in *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907) put it, “[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”

Sovereign immunity may present a significant hurdle to claims of federal delinquency. While the Court in the Gold Clause Cases summarily dispensed with a sovereign immunity analysis,¹⁸³ other courts have considered sovereign immunity a bar to suit in cases where a party alleges that the federal government has failed to fulfill its financial commitments. For instance, in *Orff v. U.S.*, 545 U.S. 596 (2006), the Supreme Court denied a claim brought by farmers alleging that the federal government breached a water supply contract on the grounds that the government had not expressly waived its immunity to suit. Moreover, in considering cases of debt defaults by state governments, the Supreme Court has used sovereign immunity as a means to protect badly-off states from private lawsuits.¹⁸⁴ Thus, while the degree to which sovereign immunity might protect the government from suit in a case where it defaults on its debts is an unsettled question, Steven L. Schwarcz has noted that such “precedents suggest that when a government is faced with extraordinary debt demands, the Supreme Court might flexibly interpret the Constitution to suit government needs.”¹⁸⁵

2. *Standing*

Even if sovereign immunity does not bar suit, standing requirements may make it difficult for a party to bring a delinquency claim against the federal government. To have standing to bring a lawsuit, a party must have suffered an injury in fact caused by defendant’s

¹⁸² Harold Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1531 (1992).

¹⁸³ See *supra* Part I.B.2.

¹⁸⁴ See *Hagood v. Southern*, 117 U.S. 52, 65, 69 (1886).

¹⁸⁵ Steven L. Schwarcz, *Rollover Risk: Ideating a U.S. Debt Default*, 55 B.C. L. REV. 1, 21 (2014).

alleged conduct that can be redressed by the court.¹⁸⁶ An injury in fact is “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural’ or hypothetical.”¹⁸⁷ For an injury is caused by a defendant’s alleged conduct, “there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”¹⁸⁸ To be redressable by the court, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”¹⁸⁹

Although standing has served as a greater bar to suit since the Supreme Court begin tightening such requirements in the last decades of the twentieth century,¹⁹⁰ the Gold Clause Cases demonstrate that courts had considered standing-type issues dispositive before. Recall that while the Court in *Perry* passed on the constitutional infirmities of the Joint Resolution, the dispositive issue concerned the plaintiff’s lack of damages, an essential element of standing.¹⁹¹ Indeed, it is easy to envision courts dispensing with federal delinquency claims on standing grounds. For instance, following *Perry* a court considering a case in which the government breached the terms of an inflation-protected debt obligation by altering the manner in which it calculates inflation may find that such injuries are not redressable.

¹⁸⁶ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (articulating the modern standing doctrine).

¹⁸⁷ *Id.* (internal citations and quotations omitted).

¹⁸⁸ *Id.* at 560-61 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42.)

¹⁸⁹ *Id.* at 561.

¹⁹⁰ See Drew McLelland and Sam Walsh, *Litigating Challenges to Federal Spending Decisions: The Role of Standing and the Political Question Doctrine*, HARVARD LAW SCH. BRIEFING PAPERS ON FEDERAL BUDGET POLICY, PAPER NO. 33, MAY 1, 2006: <http://isites.harvard.edu/fs/docs/icb.topic1379255.files/Briefing%20Paper%20on%20Litigating%20Federal%20Spending%20Decisions%20from%20a%20May%202006.pdf>.

¹⁹¹ See *Perry*, 294 U.S. at 354.

3. *Political question doctrine*

Courts have also refused to hear claims of federal delinquency on the grounds that these are nonjusticiable political questions. Like standing, the political question doctrine may be employed by courts seeking to avoid reaching the merits of a case. The political question doctrine has roots in Chief Justice Marshall's decision in *Marbury v. Madison* to read the Constitution in a way that limited the judiciary's ability to pass on certain questions that implicated procedural or policy issues best left to the elected branches.¹⁹² In *Baker v. Carr*, 369 U.S. 186 (1962), the Court laid out factors that might together or separately render a case nonjusticiable on political question grounds:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹³

Instances of courts refusing to consider government delinquency cases on political question grounds are rare. Indeed, the Supreme Court has rarely invoked the doctrine in the years following *Baker*, preferring instead to dispose of cases on standing grounds.¹⁹⁴ Nevertheless, as with standing, it is possible to imagine courts dismissing claims of federal government delinquency as nonjusticiable political questions. To return to an earlier example, a court would likely consider the federal government alteration the ways in which it calculates inflation for the purposes of a TIPS to be a matter that is not properly within the judiciary's purview. Rather, the

¹⁹² See McLelland and Walsh, *Litigating Challenges to Federal Spending Decisions*, 23.

¹⁹³ *Baker*, 369 U.S. at 217.

¹⁹⁴ See McLelland and Walsh, *Litigating Challenges to Federal Spending Decisions*, 33 (“[S]ince *Baker* the Supreme Court has only found a political question twice.”).

court could dismiss such a claim as nonjusticiable since it is incapable of “independent resolution without expressing lack of the respect due coordinate branches of government.”¹⁹⁵

CONCLUSION

In light of the foregoing, which federal government financial commitments are legally binding? While the executive and legislative branches have largely avoided answering this question, courts have had some occasion to weigh in on the legality of various forms of government delinquency. Generally, courts have found that the government has greater leeway to modify or abrogate promised financial benefits to citizens than it does to fail to live up to those financial promises that have been embodied in specific contracts or debt agreements. Thus, holders of U.S. treasury securities are more likely to be able to legally enforce their rights to be paid than are beneficiaries of government programs like Social Security. Yet even so, the legal liability of the federal government may be severely limited by the fact that courts are hesitant to rule against the government in such cases. The federal government may have a legal duty to pay its bondholders on time, but it is hard to envision a court forcing Congress or the Treasury to do so, particularly given the likelihood that debt repudiation would occur during a period of economic or political distress.

The Gold Clause Cases illustrate this paradox. Although the Court considered the government’s invalidation of gold clauses in public contracts to be an unconstitutional repudiation of the public debt, it ultimately sided with the government on fairly narrow, technical grounds. In *Perry*, the most well-known of the Cases, the Court chastised Congress for passing a law that it considered violated two separate constitutional provisions. Yet it then ruled for the government because it determined that the plaintiff had not suffered any damages. In this way, the Gold Clause Cases exemplify some of the limits of constitutional law. Specifically, the cases

¹⁹⁵ *Baker*, 369 U.S. at 217.

constitute an example of a situation in which courts affirm constitutional rights without providing a remedy for the plaintiff.¹⁹⁶

The limitations of the law as a means of enforcing the federal government to live up to its financial obligations highlights the centrality of economics and politics in federal budgeting and fiscal policy. As detailed above, the federal government has significant legal room to refuse to meet its financial commitments. With the notable exception of claims for breach of contract, courts have been hesitant to rule against the government in cases where a party alleges that the federal government has failed to live up to its financial obligations. Of course, debt instruments are contracts and, as such, the government might be susceptible to such legal challenge should it default. Nevertheless, the peculiar nature of sovereign borrowing makes it unlikely that a challenger could recover in such a case. A government in default has, by definition, limited resources to repay its creditors. Moreover, courts are government bodies and, as such, may be reluctant to rule against the sovereign. The sovereign may also simply refuse to waive its sovereign immunity, as FDR sought to do should the Court rule against the government in the Gold Clause Cases. This calculus changes in the context of international sovereign borrowing. Creditors may make use of other countries' judicial systems to enforce claims against the United States, much as U.S. courts have intervened on behalf of holders of non-U.S. government bonds.¹⁹⁷ But the likelihood of such a scenario playing out is limited given the special nature of U.S. government debt, which remains among the most valued in the world.

Importantly, the United States has established this creditworthiness largely because of the stability of its economy and political system, rather than because of constitutional or other legal

¹⁹⁶ See, e.g., Bruce K. Miller, *Constitutional Remedies for Underinclusive Statutes*, 20 HARV. C.R.-C.L. L. REV. 79 (1985).

¹⁹⁷ See *NML Capital, Ltd. V. Republic of Argentina*, 699 F. 3d 246 (2nd Cir. 2012) (one of series of cases in which Second Circuit sided with holders of Argentine debt against the government of Argentina over its 2001 default).

restrictions on its ability to default. In the case of a default, the government would likely prevail in court, but the officials who put the country in that situation would probably be voted out of office. Howell Jackson has highlighted this dynamic by noting that “governmental obligations, are binding not for purely legal reasons, but for political ones. In all cases, the government has the ‘legal’ option of adjusting statutory entitlements or exerting sovereign immunity, but it just does not chose to do so.”¹⁹⁸ Thus, to the extent the federal government’s word is worth its weight in gold, politics—not the law—is what matters.

¹⁹⁸ See Jackson, *Counting the Ways: The Structure of Federal Spending*, 213.

SELECTED BIBLIOGRAPHY

Allen, Franklin, Anna Gelpern, Charles Mooney, & David Skeel. *IS U.S. GOVERNMENT DEBT DIFFERENT?* (2012).

Axilrod, Stephen H. *THE FEDERAL RESERVE: WHAT EVERYONE NEEDS TO KNOW* (2013).

Beermann, Jack M. *The Public Pension Crisis*. 70 WASH. & LEE L. REV. 3 (2013).

Boskin, Michael J. *Economic Perspectives on Federal Deficits and Debt*, in Elizabeth Garrett, Elizabeth A. Graddy, and Howell E. Jackson, *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* (2008).

Dam, Kenneth W. *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*. 50 CHICAGO L. REV. 504 (1983).

Eichengreen, Barry. *GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919-1939* (1996).

Harrison, John. *New Property, Entrenchment, and the Fiscal Constitution* in Elizabeth Garrett, Elizabeth A. Graddy, and Howell E. Jackson, *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* (2008).

Hart, Henry M., Jr. *The Gold Clauses in United States Bonds*, 48 HARV. L. REV. 1057 (1935).

Hart, Henry M. Jr. and Albert M. Sacks, *THE LEGAL PROCESS: BASIS PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2006).

Hazan, Josh. *Unconstitutional Debt Ceilings*, 103 GEO L.J. ONLINE 29 (2014).

Jackson, Howell E. *Counting the Ways: The Structure of Federal Spending* in Elizabeth Garrett, Elizabeth A. Graddy, and Howell E. Jackson, *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* (2008).

Jackson, Vicki C. *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*. 35 GEO. WASH. INT'L L. REV. 521 (2003).

Kroszner, Randall S. *Is It Better to Forgive than to Receive? Repudiation of the Gold Indexation Clause in Long-Term Debt during the Great Depression*. UNIVERSITY OF CHICAGO CENTER FOR RESEARCH IN SECURITY PRICES WORKING PAPER SERIES NO. 481 (1999).

Magliocca, Gerard N. *The Gold Clause Cases and Constitutional Necessity*. 64 FLORIDA LAW REVIEW 1243 (2012).

McGuire, John. *Comment: The Public Debt Clause and the Social Security Trust Funds: Enforcement Mechanism or Historical Peculiarity?* 7 LOY. J. PUB. INT. L. 203 (2006).

McLelland, Drew and Sam Walsh, *Litigating Challenges to Federal Spending Decisions: The Role of Standing and the Political Question Doctrine*, HARVARD LAW SCH. BRIEFING PAPERS ON FEDERAL BUDGET POLICY, Paper No. 33, May 1, 2006.

Ostro, Zachary K. *In the Debt We Trust: The Unconstitutionality of Defaulting on American Financial Obligations, and the Political Implications of Their Perpetual Validity*, 51 HARV. J. ON LEGI. 241, 258-59 (2014).

Roots, Roger I. *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*. 33 SUFFOLK U.L. REV. 259 (2000).

Seam, Puja and Brad Shron, *Government Shutdowns*, HARVARD LAW SCH. BRIEFING PAPERS ON FEDERAL BUDGET POLICY, Paper No. 10, May 4, 2005.

Schwarcz, Steven L. *Rollover Risk: Ideating a U.S. Debt Default*. 55 B.C. L. REV. 1 (2014).

Timberlake, Richard H. *CONSTITUTIONAL MONEY: A REVIEW OF THE SUPREME COURT'S MONETARY DECISIONS* (2013).

Worthington, K. McKay. *Is Your Government Contract Worth the Paper It's Written On? An Examination of Winstar v. United States*. 1996 COLUM. BUS. L. REV. 119 (1996).

APPENDIX A – FOURTH LIBERTY LOAN BOND AND JOINT RESOLUTION OF JUNE 5, 1933

Source: Brief of Claimant, *Perry v. U.S.*, 294 U.S. 330 (1935), 1934 WL 31880 (U.S.) (U.S., 2006)

Fourth Liberty Loan 4¼ Percent Gold Bond of 1933-1938, Serial Number 19831:

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. 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, (40 Stat, 288) and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918.

Treasury Department Circular No. 121 (September 28, 1918):

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.

H.R.J. Res. 192, 73d Congress (1933) (enacted):

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.

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

APPENDIX B – PERRY V. U.S.

55 S.Ct. 432
Supreme Court of the United States.

PERRY

v.

UNITED STATES.

No. 532. | Argued Jan. 10, 11, 1935. | Decided Feb. 18, 1935.

On Certificate from the Court of Claims.

Suit by John M. Perry against the United States. Defendant demurred to the petition, and the Court of Claims certifies certain questions.

One question answered.

See, also, Norman v. Baltimore O.R. C/O., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885; NORTZ V. UNITED STATES, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907.

Mr. Justice McREYNOLDS, Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER, dissenting in part.

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***341** Messrs. Homer S. Cummings, Atty. Gen., and Angus D. MacLean, Asst. Sol. Gen., of Washington, D.C., for the United States.

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The certificate from the Court of Claims shows the following facts:

Plaintiff brought suit as the owner of an obligation of the United States for \$10,000, known as ‘Fourth Liberty Loan 4 ¼% Gold Bond of 1933—1938.’ This bond was issued pursuant to the Act of September 24, 1917, § 1 et seq. (40 Stat. 288), as amended, and Treasury Department circular No. 121 dated September 28, 1918. The bond ***347** provided: ‘The principal and interest hereof are payable in United States gold coin of the present standard of value.’

Plaintiff alleged in his petition that at the time the bond was issued, and when he acquired it, ‘a dollar in gold consisted of 25.8 grains of gold .9 fine’; that the bond was called for redemption on April 15, 1934, and, on May 24, 1934, was presented for payment; that plaintiff demanded its redemption ‘by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine’; that defendant refused to comply with that demand; and that plaintiff then demanded ‘258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing 15 ⁵/₂₁ grains of gold .9 fine, or 16,931.25 dollars in legal tender currency’; that

defendant refused to redeem the bond 'except by the payment of 10,000 dollars in legal tender currency'; that these refusals were based on the Joint Resolution of the Congress of June 5, 1933, 48 Stat. 113 (31 USCA §§ 462, 463), but that this enactment was unconstitutional, as it operated to deprive plaintiff of his property without due process of law; and that, by this action of defendant, he was damaged 'in the sum of \$16,931.25, the value of defendant's obligation,' for which, with interest, plaintiff demanded judgment.

Defendant demurred upon the ground that the petition did not state a cause of action against the United States.

The Court of Claims has certified the following questions:

'1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4 ¼ bond of the United States, of the principal amount of \$10,000, issued in 1918, which was payable ****434** 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?

***348** '2. Is the United States, as obligor in a Fourth Liberty Loan 4 ¼% 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?'

First. The Import of the Obligation. The bond in suit differs from an obligation of private parties, or of states or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress. Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, decided this day. The bond now before us is an obligation of the United States. The terms of the bond are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress. The Act of September 24, 1917, both in its original and amended form, authorized the moneys to be borrowed, and the bonds to be issued, 'on the credit of the United States,' in order to meet expenditures needed 'for the national security and defense and other public purposes authorized by law.' Section 1, 40 Stat. 288, as amended by Act April 4, 1918, § 1, 40 Stat. 503, 31 USCA § 752. The circular of the Treasury Department of September 28, 1918, to which the bond refers 'for a statement of the further rights of the holders of bonds of said series,' also provided that the principal and interest 'are payable in United States gold coin of the present standard of value.'

This obligation must be fairly construed. The 'present standard of value' stood in contradistinction to a lower standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the government's obligation. We think that the reasonable import of the promise is that it was intended ***349** to assure one who lent his money to the government and took its bond that he would not suffer loss through depreciation in the medium of payment.

The government states in its brief that the total unmatured interest-bearing obligations of the United States outstanding on May 31, 1933 (which it is understood contained a 'gold clause' substantially the same as that of the bond in suit), amounted to about twenty-one billions of

dollars. From statements at the bar, it appears that this amount has been reduced to approximately twelve billions at the present time, and that during the intervening period the public debt of the United States has risen some seven billions (making a total of approximately twenty-eight billions five hundred millions) by the issue of some sixteen billions five hundred millions of dollars ‘of non-gold-clause obligations.’

Second. The Binding Quality of the Obligation. The question is necessarily presented whether the Joint Resolution of June 5, 1933, 48 Stat. 113 (31 USCA §§ 462, 463), is a valid enactment so far as it applies to the obligations of the United States. The resolution declared that provisions requiring ‘payment in gold or a particular kind of coin or currency’ were ‘against public policy,’ and provided that ‘every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein,’ 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.’ This enactment was expressly extended to obligations of the United States and provisions for payment in gold, ‘contained in any law authorizing obligations to be issued by or under authority of the United States,’ were repealed.¹ Section 1(a), 31 USCA § 463(a).

350** There is no question as to the power of the Congress to regulate the value of money: that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use *435** that power so as to invalidate the terms of the obligations which the government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. In attempted justification of the Joint Resolution in relation to the outstanding bonds of the United States, the government argues that ‘earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce’; and, from this premise, the government seems to deduce the proposition that when, with adequate authority, the government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The government’s contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the government’s bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the government at its discretion, and that, when the government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority ***351** and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money ‘on the credit of the United States,’ the Congress is authorized to pledge that credit as an assurance of payment as stipulated, as the highest assurance the government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise; a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our government.

The binding quality of the obligations of the government was considered in the Sinking Fund Cases, 99 U.S. 700, 718, 719, 25 L.Ed. 496. The question before the Court in those cases was whether certain action was warranted by a reservation to the Congress of the right to amend the charter of a railroad company. While the particular action was sustained under this right of amendment, the Court took occasion to state emphatically the obligatory character of the contracts of the United States. The Court said: ‘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.’²

352** When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in United States v. Bank of the Metropolis, 15 Pet. 377, 392, 10 L.Ed. 774, except that the United States cannot be sued without its consent. See, also, The Floyd Acceptances, 7 Wall. 666, 675, 19 L.Ed. 169; *436** Cooke v. United States, 91 U.S. 389, 396, 23 L.Ed. 237. In Lynch v. United States, 292 U.S. 571, 580, 54 S.Ct. 840, 844, 78 L.Ed. 1434, with respect to an attempted abrogation by the Act of March 20, 1933, § 17, 48 Stat. 8, 11 (38 USCA § 717), of certain outstanding war risk insurance policies, which were contracts of the United States, the Court quoted with approval the statement in the Sinking Fund Cases, supra, and said: ‘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 expenditure, would ***353** be not the practice of economy, but an act of repudiation.’

The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.³ In the United States, sovereignty resides in the people who act through the organs established by the Constitution. Chisholm v. Georgia, 2 Dall. 419, 471, 1 L.Ed. 440; Penhallow v. Doane’s Administrators, 3 Dall. 54, 93, 1 L.Ed. 507; McCulloch v. Maryland, 4 Wheat. 316, 404, 405, 4 L.Ed. 579; Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the government, upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. ***354** The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists, and, despite infirmities of procedure,

remains binding upon the conscience of the sovereign. Lynch v. United States, supra, pages 580, 582, of 292 U.S. 54 S.Ct. 840.

The Fourteenth Amendment, in its fourth section, explicitly declares: 'The validity of the public debt of the United States, authorized by law, * * * shall not be questioned.' While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted. Nor can we perceive any reason for not considering the expression 'the validity of the public debt' as embracing whatever concerns the integrity of the public obligations.

We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

Third. The Question of Damages. In this view of the binding quality of the government's obligations, we come to the question as to the plaintiff's right to recover damages. That is a distinct question. Because the government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can ****437** recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched. ***355** Plaintiff seeks judgment for \$16,931.25, in present legal tender currency, on his bond for \$10,000. The question is whether he has shown damage to that extent, or any actual damage, as the Court of Claims has no authority to entertain an action for nominal damages. Grant v. United States, 7 Wall. 331, 338, 19 L.Ed. 194; Marion & Rye V. Railway Co. v. United States, 270 U.S. 280, 282, 46 S.Ct. 253, 70 L.Ed. 585; Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, decided this day.

Plaintiff computes his claim for \$16,931.25 by taking the weight of the gold dollar as fixed by the President's proclamation of January 31, 1934 (No. 2072, 31 USCA § 821 note), under the Act of May 12, 1933, § 43(b)(2), 48 Stat. 52, 53, as amended by the Act of January 30, 1934, § 12, 48 Stat. 342, (31 USCA § 821), that is, at 15 ⁵/₂₁ grains nine-tenths fine, as compared with the weight fixed by the Act of March 14, 1900, § 1, 31 Stat. 46 (31 USCA § 314), or 25.8 grains nine-tenths fine. But the change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed. The question of actual loss cannot fairly be determined without considering the economic situation at the time the government offered to pay him the \$10,000, the face of his bond, in legal tender currency. The case is not the same as if gold coin had remained in circulation. That was the situation at the time of the decisions under the legal tender acts of 1862 and 1863. Bronson v. Rodes, 7 Wall. 229, 251, 19 L.Ed. 141; Trebilcock v. Wilson, 12 Wall. 687, 695, 20 L.Ed. 460; Thompson v. Butler, 95 U.S. 694, 696, 697, 24 L.Ed. 540. Before the change in the weight of the gold dollar in 1934, gold coin had been withdrawn from circulation.⁴ The Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange. Acts of March 9, 1933, ***356** 48 Stat. 1 (Emergency Banking Relief Act, § 2, amending Trading with the Enemy Act, § 5(b), 12 USCA s 95a); January 30, 1934, 48 Stat. 337 (Gold Reserve Act of 1934, § 12, 31 USCA § 824). Such dealings could be had only for limited purposes and under license. Executive Orders of April 20, 1933 (No. 6111), August 28, 1933 (No. 6260), and January 15,

1934 (No. 6560), 12 USCA § 95 note; Regulations of the Secretary of the Treasury, January 30 and 31, 1934. That action the Congress was entitled to take by virtue of its authority to deal with gold coin as a medium of exchange. And the restraint thus imposed upon holders of gold coin was incident to the limitations which inhered in their ownership of that coin and gave them no right of action. Ling Su Fan v. United States, 218 U.S. 302, 310, 311, 31 S.Ct. 21, 23, 54 L.Ed. 1049, 30 L.R.A.(N.S.) 1176. The Court said in that case: ‘Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. * * * However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin.’ The same reasoning is applicable to the imposition of restraints upon transactions in foreign exchange. We cannot say, in view of the conditions that existed, that the Congress having this power exercised it arbitrarily or capriciously. And the holder of an obligation, or bond, of the United States, payable in gold coin of the former standard, so far as the restraint upon the right to export gold coin or to engage in transactions in foreign exchange is concerned, was in no better case than the holder of gold coin itself.

357** In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for recourse to foreign markets or for dealings in foreign exchange or for other purposes contrary to the control over gold coin which the Congress had the power to exert, *438** and had exerted, in its monetary regulation. Plaintiff’s damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred. The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which ‘all forms of money’ of the United States were to be ‘maintained at a parity’ had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was nonexistent.

Plaintiff demands the ‘equivalent’ in currency of the gold coin promised. But ‘equivalent’ cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And, in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On ***358** the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout

the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment.

Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to \$1.69 in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable.

In the view that the facts alleged by the petition fail to show a cause of action for actual damages, the first question submitted by the Court of Claims is answered in the negative. It is not necessary to answer the second question.

Question No. 1 is answered 'No.'

Mr. Justice STONE (concurring).

I agree that the answer to the first question is 'No,' but I think our opinion should be confined to answering that question, and that it should essay an answer to no other.

I do not doubt that the gold clause in the government bonds, like that in the private contracts just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause, Feist v. Societe Intercommunale Belge d'Electricite, (1934) A.C. 161, 170—173; Serbian and Brazilian Bond Cases, P.C.I.J., series A., Nos. 20, 21, pp. 32—34, 109—119. In the absence of any further exertion of governmental power, that obligation plainly could not be *359 satisfied by payment of the same number of dollars, either specie or paper, measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our internal economy at the due date.

I do not understand the government to contend that it is any the less bound by the obligation than a private individual would be, or that it is free to disregard it except in the exercise of the constitutional power 'to coin money' and 'regulate the value thereof.' In any case, there is before us no question of default apart from the regulation by Congress of the use of gold as currency.

While the government's refusal to make the stipulated payment is a measure taken in the exercise of that power, this does not disguise the fact that its action is to that extent a repudiation of its undertaking. As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States, I cannot escape the conclusion, announced for the Court, that in the situation now presented, the government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability for its action. To that extent it has relieved itself of the obligation of its domestic bonds, precisely as it has relieved the obligors of private bonds in Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, decided this day.

**439 In this posture of the case it is unnecessary, and I think undesirable, for the Court to undertake to say that the obligation of the gold clause in government bonds is greater than in the bonds of private individuals, or that in some situation not described, and in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency. I am not persuaded that we should needlessly intimate any opinion which

implies that the obligation may so operate, for example, as to interpose a serious obstacle to the adoption of measures for stabilization of *360 the dollar, should Congress think it wise to accomplish that purpose by resumption of gold payments, in dollars of the present or any other gold content less than that specified in the gold clause, and by the re-establishment of a free market for gold and its free exportation.

There is no occasion now to resolve doubts, which I entertain, with respect to these questions. At present they are academic. Concededly they may be transferred wholly to the realm of speculation by the exercise of the undoubted power of the government to withdraw the privilege of suit upon its gold clause obligations. We have just held that the Court of Claims was without power to entertain the suit in Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, because, regardless of the nature of the obligation of the gold certificates, there was no damage. Here it is declared that there is no damage because Congress, by the exercise of its power to regulate the currency, has made it impossible for the plaintiff to enjoy the benefits of gold payments promised by the government. It would seem that this would suffice to dispose of the present case, without attempting to prejudge the rights of other bondholders and of the government under other conditions which may never occur. It will not benefit this plaintiff, to whom we deny any remedy, to be assured that he has an inviolable right to performance of the gold clause.

Moreover, if the gold clause be viewed as a gold value contract, as it is in Norman v. Baltimore & Ohio R. Co., supra, it is to be noted that the government has not prohibited the free use by the bondholder of the paper money equivalent of the gold clause obligation; it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery. *361 In that case it would seem to be implicit in our decision that the prohibition, at least in the present situation, is itself a constitutional exercise of the power to regulate the value of money.

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

Mr. Justice McREYNOLDS, Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND and Mr. Justice BUTLER, dissent. For opinion, see Norman v. Baltimore & O.R. Co., 294 U.S. 240, 55 S.Ct. 407, at page 419, 79 L.Ed. 885.

Parallel Citations

55 S.Ct. 432, 95 A.L.R. 1335, 79 L.Ed. 912

Footnotes

¹ And subdivision (b) of section 1 of the Joint Resolution of June 5, 1933, provided: 'As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or

currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.' 31 USCA § 463(b).

- ² Mr. Justice Strong, who had written the opinion of the majority of the Court in the Legal Tender Cases (Knox v. Lee), 12 Wall. 457, 20 L.Ed. 287, dissented in the Sinking Fund Cases, 99 U.S. page 731, 25 L.Ed. 504, because he thought that the action of the Congress was not consistent with the government's engagement, and hence was a transgression of legislative power. And, with respect to the sanctity of the contracts of the government, he quoted, with approval, the opinion of Mr. Hamilton in his communication to the Senate of January 20, 1795 (citing 3 Hamilton's Works, 518, 519), that 'when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.'
- ³ Oppenheim, International Law (4th Ed.) vol. 1, §§ 493, 494. This is recognized in the field of international engagements. Although there may be no judicial procedure by which such contracts may be enforced in the absence of the consent of the sovereign to be sued, the engagement validly made by a sovereign state is not without legal force, as readily appears if the jurisdiction to entertain a controversy with respect to the performance of the engagement is conferred upon an international tribunal. Hall, International Law (8th Ed.) § 107; Oppenheim, *loc. cit.*; Hyde, International Law, vol. 2, § 489.
- ⁴ In its Report of May 27, 1933, it was stated by the Senate Committee on Banking and Currency: 'By the Emergency Banking Act and the existing Executive Orders gold is not now paid, or obtainable for payment, on obligations public or private.' Sen. Rep. No. 99, 73d Cong., 1st Sess.

APPENDIX C – TIPS: RATES & TERMS

31 C.F.R. § 356, Appendix B—Formulas and Tables

B. Treasury Inflation-Protected Securities

1. *Indexing Process.* We pay interest on marketable Treasury inflation-protected securities on a semiannual basis. We issue inflation-protected securities with a stated rate of interest that remains constant until maturity. Interest payments are based on the security's inflation-adjusted principal at the time we pay interest. We make this adjustment by multiplying the par amount of the security by the applicable Index Ratio.

2. *Index Ratio.* The numerator of the Index Ratio, the Ref CPI_{Date}, is the index number applicable for a specific day. The denominator of the Index Ratio is the Ref CPI applicable for the original issue date. However, when the dated date is different from the original issue date, the denominator is the Ref CPI applicable for the dated date. The formula for calculating the Index Ratio is:

$$\text{Index Ratio}_{\text{Date}} = \frac{\text{Ref CPI}_{\text{Date}}}{\text{Ref CPI}_{\text{Issue Date}}}$$

Where Date = valuation date

3. *Reference CPI.* The Ref CPI for the first day of any calendar month is the CPI for the third preceding calendar month. For example, the Ref CPI applicable to April 1 in any year is the CPI for January, which is reported in February. We determine the Ref CPI for any other day of a month by a linear interpolation between the Ref CPI applicable to the first day of the month in which the day falls (in the example, January) and the Ref CPI applicable to the first day of the next month (in the example, February). For interpolation purposes, we truncate calculations with regard to the Ref CPI and the Index Ratio for a specific date to six decimal places, and round to five decimal places.

Therefore the Ref CPI and the Index Ratio for a particular date will be expressed to five decimal places.

(i) The formula for the Ref CPI for a specific date is:

$$\text{Ref CPI}_{\text{Date}} = \text{Ref CPI}_M + \frac{t-1}{D} [\text{Ref CPI}_{M+1} - \text{Ref CPI}_M]$$

Where Date = valuation date

D = the number of days in the month in which Date falls

t = the calendar day corresponding to Date

CPI_M = CPI reported for the calendar month M by the Bureau of Labor Statistics

Ref CPI_M = Ref CPI for the first day of the calendar month in which Date falls, e.g., Ref CPI_{April 1} is the CPI_{January}

Ref CPI_{M+1} = Ref CPI for the first day of the calendar month immediately following Date

(ii) For example, the Ref CPI for April 15, 1996 is calculated as follows:

$$\text{Ref CPI}_{\text{April 15, 1996}} = \text{Ref CPI}_{\text{April 1, 1996}} + \frac{14}{30} [\text{Ref CPI}_{\text{May 1, 1996}} - \text{Ref CPI}_{\text{April 1, 1996}}]$$

where D = 30, t = 15

Ref CPI_{April 1, 1996} = 154.40, the non-seasonally adjusted CPI-U for January 1996.

Ref CPI_{May 1, 1996} = 154.90, the non-seasonally adjusted CPI-U for February 1996.

(iii) Putting these values in the equation in paragraph (ii) above:

$$\text{Ref CPI}_{\text{April 15, 1996}} = 154.40 + \frac{14}{30} [154.90 - 154.40]$$

$$\text{Ref CPI}_{\text{April 15, 1996}} = 154.633333333$$

This value truncated to six decimals is 154.633333; rounded to five decimals it is 154.63333.

(iv) To calculate the Index Ratio for April 16, 1996, for an inflation-protected security issued on April 15, 1996, the Ref CPI_{April 16, 1996} must first be calculated. Using the same values in the equation above except that t=16, the Ref CPI_{April 16, 1996} is 154.65000.

The Index Ratio for April 16, 1996 is:

$$\text{Index Ratio}_{\text{April 16, 1996}} = 154.65000/154.63333 = 1.000107803.$$

This value truncated to six decimals is 1.000107; rounded to five decimals it is 1.00011.

4. *Index Contingencies.*

(i) If a previously reported CPI is revised, we will continue to use the previously reported (unrevised) CPI in calculating the principal value and interest payments.

If the CPI is rebased to a different year, we will continue to use the CPI based on the base reference period in effect when the security was first issued, as long as that CPI continues to be published.

(ii) We will replace the CPI with an appropriate alternative index if, while an inflation-protected security is outstanding, the applicable CPI is:

- Discontinued,

- In the judgment of the Secretary, fundamentally altered in a manner materially adverse to the interests of an investor in the security, or

- In the judgment of the Secretary, altered by legislation or Executive Order in a manner materially adverse to the interests of an investor in the security.

(iii) If we decide to substitute an alternative index we will consult with the Bureau of Labor Statistics or any successor agency. We will then notify the public of the substitute index and how we will apply it. Determinations of the Secretary in this regard will be final.

(iv) If the CPI for a particular month is not reported by the last day of the following month, we will announce an index number based on the last available twelve-month change in the CPI. We will base our calculations of our payment obligations that rely on that month's CPI on the index number we announce.

(a) For example, if the CPI for month M is not reported timely, the formula for calculating the index number to be used is:

$$CPI_M = CPI_{M-1} \times \left[\frac{CPI_{M-1}}{CPI_{M-13}} \right]^{1/12}$$

(b) Generalizing for the last reported CPI issued N months prior to month M:

$$CPI_M = CPI_{M-N} \times \left[\frac{CPI_{M-N}}{CPI_{M-N-12}} \right]^{N/12}$$

(c) If it is necessary to use these formulas to calculate an index number, we will use that number for all subsequent calculations that rely on the month's index number. We will not replace it with the actual CPI when it is reported, except for use in the above formulas. If it becomes necessary to use the above formulas to derive an index number, we will use the last CPI that has been reported to calculate CPI numbers for months for which the CPI has not been reported timely.

5. Computation of Interest for a Regular Half-Year Payment Period. Interest on marketable Treasury inflation-protected securities is payable on a semiannual basis. The regular interest payment period is a full half-year or six calendar months. Examples of half-year periods are January 15 to July 15, and April 15 to October 15. An interest payment will be a fixed percentage of the value of the inflation-adjusted principal, in current dollars, for the date on which it is paid. We will calculate interest payments by multiplying one-half of the specified annual interest rate for the inflation-protected securities by the inflation-adjusted principal for the interest payment date.

Specifically, we compute a semiannual interest payment on the basis of one-half of one year's interest regardless of the actual number of days in the half-year.

Example

A 10-year inflation-protected note paying $3\frac{7}{8}\%$ interest was issued on January 15, 1999, with the first interest payment on July 15, 1999. The Ref CPI on January 15, 1999 (Ref $CPI_{\text{IssueDate}}$) was 164, and the Ref CPI on July 15, 1999 (Ref CPI_{Date}) was 166.2. For a par amount of \$100,000, the inflation-adjusted principal on July 15, 1999, was $(166.2/164) \times \$100,000$, or \$101,341. This amount was multiplied by $.03875/2$, or $.019375$, resulting in a payment of \$1,963.48.