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The Gold Clause Cases and Constitutional Necessity

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THE GOLD CLAUSE CASES AND CONSTITUTIONAL NECESSITY

Gerard N. Magliocca*

Abstract

This Article presents a case study of how constitutional actors respond when the rule of law and necessity are sharply at odds and provides some background on Section Four of the Fourteenth Amendment.

In 1935, the Supreme Court heard constitutional challenges to the abrogation of “gold clauses” in contracts and Treasury bonds. Gold clauses guaranteed that creditors would receive payment in gold dollars as valued at the time a contract was made. Due to the deflation that followed the Great Depression, this meant that debtors were being forced to pay back much more than they owed originally. To stop a looming wave of bankruptcies, Congress passed a Joint Resolution declaring all gold clauses null and void.

Following oral argument, President Franklin D. Roosevelt was concerned that the Court would invalidate the Joint Resolution. He concluded that he could not accept this result, and thus drafted a Fireside Chat announcing that he would not comply with such a decision. This unprecedented statement, which invoked the New Testament and necessity as the grounds for rejecting the Court’s decision, has never been closely analyzed until now.

In the end, the Court did not hold that the gold clauses must be enforced. With respect to Treasury Bonds, however, a plurality of the Justices concluded that the Joint Resolution was unconstitutional but that the bondholders were not entitled to relief. This slippery reasoning (in *Perry v. United States*) harkened back to Chief Justice Marshall’s approach in *Marbury v. Madison*—another case in which the Court was confronted with presidential defiance.

By recounting how President Roosevelt and Chief Justice Hughes—the author of *Perry*—sought to defuse (or, in some cases, exacerbate) the gold crisis, the dark arts of constitutional interpretation are exposed.

INTRODUCTION	1244
I. TOPPLING THE CROSS OF GOLD	1248
A. <i>The Election of 1896</i>	1249
B. <i>The Great Depression</i>	1251
C. <i>Section Four of the Fourteenth Amendment</i>	1254

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D. *The Oral Argument* 1256

II. THE PRESIDENT SEEKS A HIGHER POWER 1258

 A. *Beyond the Looking Glass at 1600 Pennsylvania Avenue*..... 1259

 B. *The End of Judicial Supremacy–The Draft Fireside Chat*..... 1262

III. THE COURT FINDS AN EXCUSE 1265

 A. *Backing Down and Saving Face* 1265

 B. *The Perils of Perry* 1267

CONCLUSION..... 1273

APPENDIX: ROOSEVELT’S GOLD SPEECH 1275

*“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”*¹

Marbury v. Madison

*“Few more baffling pronouncements, it is fair to say, have ever issued from the United States Supreme Court.”*²

Henry M. Hart, Jr. (describing *Perry v. United States*)

INTRODUCTION

Constitutional leaders must mediate the tension between the rule of law and the law of necessity.³ Thomas Jefferson, who made the Louisiana Purchase in spite of serious concerns about its legality, once wrote that “[a] strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”⁴ Abraham Lincoln defended his unilateral

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

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

3. See, e.g., Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 132 n.169 (1991) (quoting Justice Hugo Black’s view that “a judge who refuses ever to stray from his judicial philosophy, and be subject to criticism for doing so, no matter how important the issue involved, is a fool”); see also *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that . . . [the Court] will convert the constitutional Bill of Rights into a suicide pact.”).

4. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) (emphasis omitted), reprinted in 4 THE FOUNDERS’ CONSTITUTION 127 (Philip B. Kurland & Ralph Lerner eds., 1987); see also RON CHERNOW, ALEXANDER HAMILTON 671 (2004) (quoting Jefferson’s comment to

suspension of habeas corpus at the beginning of the Civil War by asking, “[a]re all the laws but one to go unexecuted, and the government itself go to pieces lest that one be violated?”⁵ And law students are typically introduced to the Supreme Court with a lesson on how Chief Justice John Marshall balanced principle and politics when he established judicial review and pontificated about the importance of civil remedies as he denied William Marbury a remedy in order to avoid a damaging confrontation with the President.⁶

One recent constitutional necessity argument came during the 2011 debt ceiling standoff between the House of Representatives and President Barack Obama. Faced with the prospect that the Treasury might be unable to borrow more money, some prominent figures, including former President Bill Clinton, urged the President to issue debt without congressional authorization and prevent a default on federal bond payments.⁷ They argued that Section Four of the Fourteenth Amendment, which says that “[t]he validity of the public debt of the United States, authorized by law . . . shall not be questioned,” gave the President this power in an emergency, though others claimed that he could act on his own based on the “necessities of state, and on the [P]resident’s role as the ultimate guardian of the constitutional order.”⁸ A deal was struck before the debt ceiling was reached, but this question may again become relevant the next time the debt level approaches the ceiling established by Congress.

To explore how constitutional actors think through claims of legality and pragmatism under tremendous stress, this Article examines the *Gold Clause Cases*, in which the Justices rejected various challenges to the devaluation of our currency during the 1930s and to the invalidation

Madison that “[t]he less we say about the constitutional difficulties respecting Louisiana, the better”).

5. Abraham Lincoln, Special Session Message (July 4, 1861), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3226 (James D. Richardson ed., 1897) (emphasis omitted); see also *Ex Parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (holding that only Congress could suspend the writ); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L. J. 600, 637–52 (2009) (discussing various aspects of the habeas suspension during the Civil War).

6. See *Marbury*, 5 U.S. (1 Cranch) at 177–78; see also BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 60–63 (2009) (providing a summary of *Marbury*); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 538–43 (2004) (discussing *Marbury* in more detail).

7. See, e.g., Adam Liptak, *The 14th Amendment, the Debt Ceiling and a Way Out*, N.Y. TIMES, July 25, 2011, at A10 (quoting President Clinton’s view that, if the debt ceiling was reached, he would borrow the money unilaterally and “force the courts to stop [him]”).

8. U.S. CONST. amend. XIV, § 4; Eric A. Posner & Adrian Vermeule, Op-Ed., *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/22/opinion/22posner.html>.

of contracts denominated in predevaluation gold dollars.⁹ New Deal historians compare the Court's handling of *Perry v. United States*,¹⁰ the case on the abrogation of the gold clause in federal bonds, to *Marbury v. Madison* because *Perry* headed off a showdown with the Executive Branch by ruling that the bondholders were not entitled to damages even though their rights were violated.¹¹ Notwithstanding that intriguing parallel, most lawyers know nothing about *Perry*.¹² This is a glaring omission from professional lore, because that case—along with the companion decision of *Norman v. Baltimore and Ohio Railroad Co.*,¹³ which upheld the abrogation of gold clauses in private contracts—presented two branches of government with a difficult necessity question at the same time.¹⁴ Moreover, *Perry* is the only Supreme Court case that talks about Section Four of the Fourteenth Amendment, and thus is highly relevant to any future debt ceiling debate.

In a recent article, Sanford Levinson and Jack M. Balkin explained that there are many types of constitutional crises.¹⁵ A “type one” crisis

9. See *Perry v. United States*, 294 U.S. 330, 358 (1935); *Nortz v. United States*, 294 U.S. 317, 329–30 (1935); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 316 (1935); see also David Glick, *Conditional Strategic Retreat: The Court's Concession in the 1935 Gold Clause Cases*, 71 J. POL. 800, 805 (2009). Cf. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 3 (Paul Smith ed., 2001) (1872) (“[A]n observer who looks at the living reality [of a constitution] will wonder at the contrast to the paper description. He will see in the life much which is not in the books; and he will not find in the rough practice many refinements of the literary theory.”).

10. 294 U.S. 330 (1935).

11. See *id.* at 354 (“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.”); see also ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 259 (1960) (stating that the “opinion was a masterpiece of judicial legerdemain hardly matched in the annals of the Court since Marshall’s opinion in *Marbury v. Madison*”); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS* 697 (2009) (“Not since *Marbury v. Madison* had a chief justice come up with such an ingenious way out of a political thicket.”). Some useful analogies can also be made between Chief Justice Hughes’s opinion in *Perry* and Chief Justice Roberts’s opinion upholding the individual health insurance mandate in the Affordable Care Act. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2584–601 (2012) (Roberts, C.J.).

12. *Perry* was the subject of some major law review articles in 1935. See Hart, *supra* note 2, at 1057; see also John P. Dawson, *The Gold Clause Decisions*, 33 MICH. L. REV. 647, 647 (1935) (“The gold clause decisions of February 18, 1935, have already taken their place among the great landmarks of American constitutional history.”). But in the past thirty years, only one has discussed the case in any detail. 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, 516–18 (1983).

13. 294 U.S. 240, 240 (1935).

14. *Norman* presented a conundrum for the President. See *infra* text accompanying notes 103–14. But one cannot say, as one can with *Perry*, that *Norman* posed a significant problem for the Court. See *infra* text accompanying notes 145–49.

15. See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 714 (2009). What Levinson and Balkin call a “type three” crisis is not relevant to this

occurs when “leaders publicly claim the right to suspend features of the Constitution in order to preserve the overall social order and to meet the exigencies of the moment.”¹⁶ “Type two” crises, by contrast, “arise from excess fidelity, where political actors adhere to what they perceive to be their constitutional duties even though the heavens fall.”¹⁷ *Perry* was at the center of both a type one and a type two crisis. In the event of an adverse decision by the Supreme Court, President Franklin D. Roosevelt was ready to give a speech stating that he would not comply because doing so would lead to an economic catastrophe.¹⁸ Meanwhile, the Justices struggled with what to do since deciding *Perry* based on their best interpretation of the Constitution—that the United States could not devalue its own debt—would lead to chaos.¹⁹ The intense pressure on the Court was reflected in its unprecedented decision to announce on two occasions that its opinions in the *Gold Clause Cases* would not be issued at its next session.²⁰ By recounting how the President and Chief Justice Charles Evans Hughes—the author of the plurality opinion in *Perry*—dealt with the crisis, the dark arts of constitutional law are exposed in a way that raises deeper questions

Article. *See id.* (“Type three crises involve situations where publicly articulated disagreements about the Constitution lead political actors to engage in extraordinary forms of protest beyond mere legal disagreements and political protests: people take to the streets, armies mobilize, and brute force is used or threatened in order to prevail.”).

16. *Id.* at 721.

17. *Id.* at 729 (emphasis omitted).

18. *See, e.g.*, 1 F.D.R.: HIS PERSONAL LETTERS, 1928–1945, at 456–60 (Elliott Roosevelt ed., 1950) [hereinafter *Gold Speech*] (reproducing the draft intended for delivery if the Court decided the *Gold Clause Cases* against the Government); *see also* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 87–88 (1995) (discussing the President’s thinking on this issue); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 99 (2010) (stating that FDR’s draft “was a declaration of independence, of sorts, from the system of checks and balances”).

A comparison of the draft address in the files of the FDR Library and the one reproduced in a published collection reveals some minor differences. I am going to treat the latter as authoritative because it is more easily accessible to researchers and because the choice does not affect my analysis. In addition, I cannot establish which of the two versions is more accurate.

19. *See, e.g.*, Elliot Thurston, *Court Hears Closing Plea in Gold Case*, WASH. POST, Jan. 12, 1935, at 1 (observing that at oral argument the Government “put vast emphasis on what would happen if action already taken is undone rather than upon the legal issue of the power of Congress to abrogate gold clauses”). *Cf.* Glick, *supra* note 9, at 807 (noting that Chief Justice Hughes’s papers on the *Gold Clause Cases* included a newspaper article that warned of dire consequences for the Court if it ruled against the Government).

20. *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.”); *No Gold Decision Coming Tomorrow, Court Announces*, N.Y. TIMES, Feb. 10, 1935, at 1 [hereinafter *No Gold Decision*] (describing one of the announcements).

about when the legal ends justify the means.²¹

Part I of this Article examines the diminution of the gold standard with respect to contracts and the subsequent litigation attacking that action, with a special focus on the arguments about Section Four of the Fourteenth Amendment. Part II explores President Roosevelt's secret deliberations about how to respond if the Justices ruled against the Government and closely reads his draft speech announcing that he would defy such a decision. Part III analyzes how *Perry* resolved the issue and followed in *Marbury*'s footsteps by finding a convoluted way to hold that the bondholders were not entitled to relief. Lastly, the Appendix reprints President Roosevelt's abandoned gold speech in its entirety.

I. TOPPLING THE CROSS OF GOLD

This Part explains why the link between gold and the dollar was weakened in the 1930s and describes the legal challenges to that decision as applied to contracts requiring repayment in gold dollars. The arguments presented to the Supreme Court must be set against the backdrop of the 1896 presidential race between William Jennings Bryan and William McKinley; the severe hardships the Great Depression imposed on debtors; and the growing agitation by populist critics of the President, especially Senator Huey P. Long of Louisiana, for more radical reform.²² By the time the Justices heard the *Gold Clause Cases* in 1935, the nation's attention was riveted on the outcome.²³

21. This Article provides a case study for the burgeoning literature on constitutional crises. See, e.g., Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1045–46 (2008); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2099–2100 (2002). Moreover, the *Gold Clause Cases* foreshadowed the unorthodox tactics that the President and the Chief Justice would use in their fight over the Court-packing plan in 1937. See SHESOL, *supra* note 18, at 392–400 (describing the Chief Justice's letter on Court-packing to the Senate Judiciary Committee); *id.* at 400 (quoting the President's view that Hughes was "the best politician in the country").

22. See ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION* 111, 211 (1982) (explaining that Long and Coughlin opposed the gold standard and backed the remonetization of silver); GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* 98–115 (2011) (discussing the 1896 presidential race between Democratic nominee William Jennings Bryan and Republican nominee William McKinley that would also decide the broader question of whether "the Populist reform project" would go forward); AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 156 (2007) ("Many, especially from the West, were arguing for a currency backed by silver as well as gold. Bryan had died, but never had the Cross of Gold seemed more punishing or his arguments against it more compelling."); see also UROFSKY, *supra* note 11, at 696 (stating that Roosevelt modified the gold standard in part "to counter the severe deflation in wages and prices then gripping the country").

23. See Arthur Krock, *In Washington Gold Case Crowds All Other Topics Into the Background*, N.Y. TIMES, Jan. 15, 1935, at 18 ("Three days after the close of the arguments, the

A. *The Election of 1896*

It is impossible to understand how the constitutional debate over the gold standard unfolded without reviewing Bryan's "Cross of Gold" speech during the 1896 Democratic National Convention.²⁴ At that point, there was no doubt that Congress possessed the power to create a monetary system.²⁵ In *Juilliard v. Greenman*, the Court held that this choice was a political question that could not be reviewed by the courts.²⁶ Bryan called on Congress to increase the coinage of silver, which would expand the money supply and aid farmers who were suffering from years of deflation in commodity prices.²⁷

The "Cross of Gold" speech made free silver the defining issue of the presidential election. Bryan told the delegates that if Republicans "ask us why we say more on the money question than we say on the tariff question, I reply that, if protection has slain its thousands, the gold standard has slain its tens of thousands."²⁸ He added that "[i]f they ask us why we do not embody in our platform all the things that we believe in, we reply that when we have restored the money of the Constitution all other necessary reforms will be possible; but until this is done there is no other reform that can be accomplished."²⁹ This was the basis for Bryan's ringing line that "we will answer their demand for a gold standard by saying to them, You shall not press down upon the brow of labor this crown of thorns; you shall not crucify mankind upon a cross of gold."³⁰

William McKinley's victory in the fall campaign (and his reelection over Bryan in 1900) transformed the gold standard into a cornerstone of a new constitutional regime.³¹ Bryan's defeat was treated as a

discussion of facts and consequences has crowded social security legislation and the Lindbergh [kidnapping] case from the Washington foreground.").

24. See MICHAEL KAZIN, *A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN* 59–61 (2006). In the 1920s, Bryan recorded portions of his address; the audio can be found at *Bryan's "Cross of Gold" Speech: Mesmerizing the Masses*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/5354/> (last visited June 29, 2012).

25. For a more detailed discussion of this debate following the Civil War, see generally Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119 (2006) (discussing the effect of the *Legal Tender Cases*).

26. See *Juilliard v. Greenman*, 110 U.S. 421, 450 (1884).

27. See MAGLIOCCA, *supra* note 22, at 34–37 (describing the crisis in the rural economy); *id.* at 100–01 (explaining why the Populists rallied around free silver in 1896).

28. William Jennings Bryan, *The Cross of Gold Speech at the Democratic National Convention (July 9, 1896)*, reprinted in *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 770 (William Safire ed., 1992).

29. *Id.*

30. *Id.* at 772.

31. See MAGLIOCCA, *supra* note 22, at 114–15 (analyzing the election results); see also Act of Mar. 14, 1900, ch. 41, § 1, 31 Stat. 45, 45 ("[T]he dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine . . . shall be the standard unit of value, and all forms

referendum on the currency issue that contributed to a realignment of the electorate in favor of the Republicans.³² Indeed, when Bryan ran for a third time as the Democratic nominee in 1908, he tried unsuccessfully to reassure voters by explaining that the silver issue was now “dead.”³³ Put another way, while Congress retained the power to abolish the gold standard, only a political mobilization on the scale of what occurred in the 1890s could make that happen.

The most visible sign of this constitutional reliance came in private contracts and in Treasury bonds, which were drafted with a standard provision stating that the creditor would be repaid in gold dollars.³⁴ Typically, this boilerplate provided that any debts would be “payable in principal and interest in United States gold coin of the present standard of value,” which referred to the value at the time the contract or bond was executed.³⁵ Many scholars see the inclusion of this language as security in case Congress ended the gold standard,³⁶ but that description is incomplete. While gold clauses were a hedge against devaluation, they were also an expression of the prevailing consensus on the role of gold in the monetary system.³⁷

of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity.”).

32. The closest analogy is President Andrew Jackson’s destruction of the Second Bank of the United States, which was the central issue in the 1832 and 1834 elections. *See generally* GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* 51–59, 62–65 (2007) (describing the debate and how President Jackson equated his reelection to a referendum by the American people against the Second Bank of the United States). President Jackson’s triumph did not overrule *M’Culloch v. Maryland*, but in practice the idea of recreating a central bank was a nonstarter for decades. *Id.* at 71–73.

33. LOUIS W. KOENIG, *BRYAN: A POLITICAL BIOGRAPHY OF WILLIAM JENNINGS BRYAN* 444 (1971) (internal quotation marks omitted); *see* BRINKLEY, *supra* note 22, at 111 (quoting FDR’s private view that “Bryan killed the remonetization of silver in 1896”).

34. *See* JACKSON, *supra* note 20, at 98 (“For many years lawyers had used with the regularity of a ritual a clause by which their contracts and mortgages, even farm and home mortgages, simply declared in substance that they were immune from the effect of any use Congress might find it necessary or expedient to make of its constitutional power to regulate the value of money.”).

35. SHLAES, *supra* note 22, at 157; *see also* *Perry v. United States*, 294 U.S. 330, 346–47 (1935) (stating that the Treasury bond at issue provided that “[t]he principal and interest hereof are payable in United States gold coin of the present standard of value”); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 293 (1935) (stating that the corporate bond in that case provided that payment would be made “in gold coin of the United States of America of or equal to the standard weight and fineness existing on February 1, 1930”).

36. *See* Dam, *supra* note 12, at 523 (stating that “if gold clauses had become a matter of form, it was for good economic reasons”); Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 *GEO. L.J.* 2399, 2415 (2000) (“For years, sophisticated institutions had anticipated a possible currency devaluation. To protect themselves, many had included clauses in their written contracts calling for payment not in dollars, but rather in a specified weight of gold coin . . . or its currency equivalent.”).

37. After all, contracts often incorporate existing law without any serious thought that the

B. *The Great Depression*

The settled expectations surrounding gold were upset by the Crash of 1929. As the financial panic deepened, many countries dropped the gold standard, which caused the dollar to appreciate and put the United States at a trading disadvantage.³⁸ Furthermore, the deflation that accompanied the economic decline crippled debtors who found their obligations growing in value while their incomes were falling, which was the same vicious cycle that had motivated the “Cross of Gold” speech in the 1890s.³⁹ Most estimates state that the dollar appreciated from \$1 in 1929 to roughly \$1.69 in 1933.⁴⁰

To counteract this economic trend, the President and Congress attempted to create inflation by imposing sweeping restrictions on the use of gold as a medium of exchange.⁴¹ Part of that strategy involved removing gold from circulation. For instance, in March 1933 Congress passed the Emergency Banking Act, which gave the Treasury Secretary the power, which he immediately exercised, to compel all Americans to

doctrine will change. The relevant provisions are declaratory or reflect well-settled customs.

38. See JACKSON, *supra* note 20, at 96 (“England, in September 1931, suspended redemption in gold of its circulating notes, and sixteen countries followed the same year.”); see also DAM, *supra* note 12, at 509 (“By the time Roosevelt came to office the gold standard was near collapse. Britain left it in 1931 under the pressure of gold outflows and sterling weakness. Sterling depreciated sharply against the dollar. Many other countries were forced to follow suit, leaving the United States and the small European ‘gold bloc’ as isolated adherents to the gold standard.” (footnotes omitted)).

39. See Waxman, *supra* note 36, at 2415 (“Debtors, whose income was in devalued dollars, would be required to discharge their obligations in the equivalent of pre-1933 dollars . . .”). Cf. HERBERT CROLY, MARCUS ALONZO HANNA: HIS LIFE AND WORK 210 (1912) (explaining that the Panic of 1893 “stirred the American people more deeply and had graver political consequences than had any previous economic famine”).

40. See, e.g., *Perry v. United States*, 294 U.S. 330, 347 (1935) (stating that the bondholder claimed that he was entitled to \$16,931.25 on a bond worth \$10,000 in gold dollars); Hart, *supra* note 2, at 1060 (observing that private gold clauses were “construed so as to entitle the investor under present circumstances to be paid in a ratio of 1.69 to 1”); *Capital Debates Gold Issue; Justices Confer for 5 Hours*, N.Y. TIMES, Jan. 13, 1935, at 1 (“A decision against the government would mean, in short, that gold bonds and contracts would be worth, in present devaluated currency, 169 per cent of their face value.”).

41. See Glick, *supra* note 9, at 804 (“The Government attempted to invigorate the economy by inflating the depressed paper currency to increase circulation and activity.”); see also SHESOL, *supra* note 18, at 93 (stating that this “was part of a complex, interlocking set of policies designed to create inflation”).

The abolition of the gold standard was also a necessary prerequisite to the adoption of Keynesian economics, as deficit spending to stimulate demand could not be done on a massive scale if the nation was required to maintain ample gold reserves. Congress’s action, though, was not taken for this reason, as Keynesian thought did not become important until later in the 1930s. See generally JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY (1936).

sell their gold to the government.⁴² Shortly thereafter, Congress gave the President the authority to cut the dollar's gold weight, which he did in January 1934.⁴³ Finally, the Gold Reserve Act ordered virtually all gold coins smelted into bullion—a credible sign that gold would not be back in circulation anytime soon.⁴⁴

These efforts to reverse deflation would be for naught, however, if the contracts and bonds that included gold clauses were enforced. Congress therefore passed a Joint Resolution declaring that these gold clauses were unenforceable.⁴⁵ The Joint Resolution stated: “[E]very 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 in money of the United States measured thereby, is declared to be against public policy.”⁴⁶ Furthermore, “[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.”⁴⁷ Finally, Congress made it clear that this abrogation included both private contracts and Treasury bonds.⁴⁸

Unhappy creditors quickly filed suit, alleging that the Joint Resolution was unconstitutional. Their leading argument was that the invalidation of existing contracts by Congress violated the Due Process and Takings Clauses.⁴⁹ Private debtors and the United States responded

42. See ch. 1, § 3, 48 Stat. 1, 2 (1933); SHLAES, *supra* note 22, at 157 (“[The President] asked the treasury secretary to call in all the gold in the country, forcing citizens to sell their gold to the Treasury for dollars. There must be no hoarding and no exporting. Citizens must hand in their gold and take dollars in exchange.”); see also *Perry*, 294 U.S. at 355 (“Before the change in the weight of the gold dollar in 1934, gold coin had been withdrawn from circulation.”).

43. See Dam, *supra* note 12, at 513–14 (“[T]he President proclaimed a new gold content of 15-5/21 grains 9/10 fine gold, a reduction to 59.06% of the former weight, equal to an official gold price of thirty-five dollars per ounce.”); see also *Perry*, 294 U.S. at 355 (explaining that his proclamation devalued the dollar from the level established by statute in 1900).

44. See ch. 6, §§ 5, 10, 12, 48 Stat. 337, 340 (1934); Dam, *supra* note 12, at 514 (“Gold was thereafter to be a commodity, not money. It could be sold for industrial and dental issues. Coin collectors could still hold gold coins but only those of numismatic value.”).

45. Ch. 48, 48 Stat. 112 (1933).

46. *Id.* § 1(a).

47. *Id.*

48. See *id.* § 1(b) (“[T]he term ‘obligation’ means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States . . .”).

49. 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”). There was also a related claim that Congress lacked the enumerated power to abrogate contracts. See *id.* at 247 (stating the

that contracts could not defeat congressional authority when their modification served the public good.⁵⁰ As the *Gold Clause Cases* worked their way to the Court, some of the Justices expressed deep misgivings about the abrogation of the gold clause in Treasury bonds.⁵¹ Justice Louis Brandeis told Professor Felix Frankfurter that “[t]he action on the gold clause is terrifying in its implications.”⁵² He explained that “[i]f the Government wished to extricate itself from the assumed emergency, taxation would have afforded an honorable way out.”⁵³ Justice Harlan Fiske Stone vowed that he would never buy another federal bond.⁵⁴ Justice Benjamin Cardozo was also uneasy, but told a friend that “[t]here is room for a lot of immorality within the confines of the Constitution and of constitutional law.”⁵⁵ And these were the Justices who were sympathetic to the New Deal.

At the same time, others were attacking the Administration for not going far enough. Father Charles E. Coughlin, a Michigan priest who had a tremendous radio following, urged the President to adopt the solution that was rejected in 1896—the remonetization of silver.⁵⁶ He argued at one point that the dollar should be backed by seventy-five cents of silver and twenty-five cents of gold, and went on to call for the abolition of the Federal Reserve and its replacement by a central bank

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”).

50. See *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”); see also *Perry*, 294 U.S. at 350 (quoting the Government’s view 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”).

51. This Article does not discuss *Nortz v. United States*, which was the third gold clause decision alongside *Norman* and *Perry*. *Nortz* presented the issue of whether someone who redeemed gold certificates (i.e., notes payable in gold coin) pursuant to the redemption order was entitled to compensation based on the market price of gold abroad or on the lower price set by the Treasury. See *Nortz v. United States*, 294 U.S. 317, 323–24 (1935). The Court held that because Congress had banned the gold trade in the United States, the market price was irrelevant for the redemption rate. See *id.* at 330 (“Plaintiff insists that gold had an intrinsic value and was bought and sold in the world markets. But plaintiff had no right to resort to such markets.”).

52. SHESOL, *supra* note 18, at 93–94.

53. UROFSKY, *supra* note 11, at 697.

54. See SHESOL, *supra* note 18, at 94.

55. *Id.* at 94.

56. See BRINKLEY, *supra* note 22, at 111; BRINKLEY, *supra* note 22, at 83 (stating that Coughlin’s radio sermons “attracted an audience estimated as high as forty million”); cf. *Coughlin Urges A New Gold Law*, N.Y. TIMES, Jan. 14, 1935, at 4 (discussing his radio address on the *Gold Clause Cases*).

controlled by an elected representative from each state.⁵⁷ *The Nation* denounced Coughlin's proposal as "based upon the theory that the imbecility of the plain people is usually greatly underestimated."⁵⁸

Although Father Coughlin was an effective rabble-rouser, the real political threat to the President came from "The Kingfish"—Huey P. Long.⁵⁹ The charismatic Senator from Louisiana complained that "[w]e are practically the only country in the world to-day that has not remonetized silver,"⁶⁰ and that the Treasury was controlled by "the [J.P.] Morgan House."⁶¹ In 1934, Senator Long announced the creation of the "Share Our Wealth" movement, which contended that the cure for the Depression was the redistribution of wealth.⁶² Millions answered Long's call and joined clubs dedicated to the cause, where they got a copy of his autobiography, his Senate speeches, and a subscription to his newspaper at no charge.⁶³ This was a prelude to Long's planned presidential campaign in 1936, in which he would take on Roosevelt for the Democratic nomination or as a third-party candidate.⁶⁴ The President and his aides took that threat seriously, and this looming contest may have influenced Roosevelt's thinking about how to act if the Supreme Court invalidated the Joint Resolution.⁶⁵

C. Section Four of the Fourteenth Amendment

Another argument made against the abrogation of the gold clauses in Treasury bonds relied on Section Four (the Public Debt Clause) of the Fourteenth Amendment. Since this provision was at the heart of the recent debt-ceiling battle, that issue deserves some extra attention. The parties in *Perry* agreed that Section Four applied to the national debt issued after the Civil War, but they disagreed about the scope of that principle.⁶⁶

57. See BRINKLEY, *supra* note 22, at 112.

58. *Id.* at 113.

59. For a comprehensive discussion of the authoritarian regime that Long built in Louisiana and the federal response, see Gerard N. Magliocca, *Huey P. Long and the Guarantee Clause*, 83 TULANE L. REV. 1 (2008).

60. BRINKLEY, *supra* note 22, at 211.

61. *Id.* at 153.

62. See T. HARRY WILLIAMS, HUEY LONG 692–97 (1969) (describing the platform as explained by Senator Long in a February 23, 1934 radio address).

63. See ALLAN P. SINDLER, HUEY LONG'S LOUISIANA: STATE POLITICS, 1920–1952, at 85 (1956); WILLIAMS, *supra* note 62, at 700–01 (estimating that the "Share Our Wealth" clubs had four million members).

64. See Magliocca, *supra* note 59, at 25–36 (chronicling the political jousting between FDR and Long leading up to Long's assassination in September 1935).

65. See SCHLESINGER, *supra* note 11, at 251–52 (stating that the President's political pollsters thought that Long could garner more than two million votes if he ran as a third-party candidate in 1936).

66. The United States included a footnote in its brief citing scholars who believed that

The United States maintained that the Public Debt Clause barred only a total repudiation of federal bonds. This interpretation rested in part on the meaning of the word “validity” in Section Four, which the Government read as referring “to the essential existence of the obligation.”⁶⁷ Moreover, the legislative history backed this view, because the main concern during Reconstruction was that the South would refuse (following their readmission to Congress) to honor the debts racked up by the Union during the Civil War.⁶⁸ Furthermore, none of the cases addressing changes to the value of legal tender (for example, the composition of the dollar or its convertibility into gold) said anything about Section Four. That was telling because some of those changes diminished the value of government bonds.⁶⁹ As a result, the United States maintained that the “absence of any reference to Section Four of the Fourteenth Amendment in any case involving the question of the constitutionality or interpretation of the Legal Tender Acts tends to indicate the fact that no one considered that the validity of a debt was questioned by changing the medium of payment.”⁷⁰

Opponents of the Joint Resolution replied that the Public Debt Clause also prohibited a partial repudiation of Treasury bonds. They relied heavily on an 1869 Act of Congress, which said that “the faith of the United States is solemnly pledged to the payment in coin or its equivalent . . . of all the interest bearing obligations of the United States”⁷¹ This contemporaneous legislative interpretation of Section Four confirmed that “[t]he purpose of the fourth section of the Fourteenth Amendment was definitely to prevent any attempt either to repudiate or to scale down the principal of, or interest on, the public debt.”⁷² The lawyers for the bondholders also rejected the Government’s definition of “validity” and raised doubts about its reading of Section Four’s original understanding.⁷³

“Section 4 limits its concept of public debt to that public debt existing at the time of the adoption of the amendment,” but the brief did not actually make that claim. *See* Brief for the United States at 67 n.51, *Perry v. United States*, 294 U.S. 330 (1935), 1935 WL 32938, at *29.

67. *Id.* at 62, 1935 WL 32938, at *28.

68. *See id.* at 62–64, 1935 WL 32938, at *28 (reviewing the legislative history in support of a narrow construction of Section Four).

69. *See id.* at 63–64, 1935 WL 32938, at *28 (“[T]he Joint Resolution involves the same principles as the Legal Tender Acts The principal of some of the public debt not expressly payable in coin became payable, by the Legal Tender Acts, in greenbacks alternatively with coin. Yet nowhere in . . . any of the other cases involving the validity or the interpretation of the Legal Tender Acts as applied to public or private obligations is any reference whatsoever made to section 4 of the Fourteenth Amendment . . .”).

70. *Id.* at 64, 1935 WL 32938, at *28.

71. Brief of Claimant at 18, *Perry v. United States*, 294 U.S. 330 (1935), 1934 WL 31880, at *12.

72. *Id.* at 20, 1934 WL 31880, at *12.

73. *See* Reply Brief for Claimant at 6–9, *Perry v. United States*, 294 U.S. 330 (1935),

Neither position is entirely persuasive. The view that only a total repudiation violates Section Four would impose no real limit on federal authority, as Congress could decide to meet .01% of bond payments and still be acting lawfully. On the other hand, the failure of the bondholders to answer the point about the validity of the Legal Tender Acts was instructive. Not all devaluations of public debt are unconstitutional. The best way to reconcile these positions is that the Public Debt Clause bars the federal government from substantially defaulting on its bonds. A short suspension of debt payments—as was threatened during the 2011 debt ceiling debate—would probably not meet this standard, especially if the bondholders were made whole when payments resumed. A longer delay, or one where retroactive payments were not made, though, could violate the Fourteenth Amendment.⁷⁴ Unfortunately, no Justice commented on the Section Four issue at oral argument, and the Court did not forge a majority position in its *Perry* opinions.

D. *The Oral Argument*

When the Court took up the challenges to the gold clause abrogation, the Administration found itself on the defensive. Robert H. Jackson, who was a lawyer in the Treasury Department at the time, later dismissed the argument for discussing “precedents, such as the argument based on the ancient custom of kings to ‘clip’ coins, [that] were of no more real value to a modern society than the ritual of Druid priests.”⁷⁵ But he conceded that “[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”⁷⁶

The Attorney General, Homer Cummings, made his first argument before the Court in *Perry* to emphasize its importance, and he focused on the consequences of unraveling the Joint Resolution.⁷⁷ Cummings

1934 WL 31881, at *4–5.

74. The United States also argued that “debt” in Section Four should be defined as the “sum of money due.” Brief for the United States at 66, *Perry v. United States*, 294 U.S. 330 (1935), 1935 WL 32938, at *29. If that reading is correct, then any suspension of debt payments would not violate Section Four if the bondholders were made whole after the shutdown was over. Nothing in the *Perry* arguments speaks to whether the President can issue debt or raise taxes unilaterally to prevent a Section Four violation.

75. JACKSON, *supra* note 20, at 101.

76. ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 65 (John Q. Barrett ed., 2003); *see also* Arthur Krock, ‘Brain Trusters’ Concerned Over Gold Clause Suit, N.Y. TIMES, Jan. 12, 1935, at 14 (“[T]he questions asked from the bench by the Chief Justice and several of his associates have produced an increasing degree of thoughtfulness and concern among even those Presidential aides who are most impatient for economic and social reform.”).

77. *See* SHESOL, *supra* note 18, at 94 (noting that the Solicitor General did not command

said that requiring the United States to pay bondholders according to gold clauses would cause the national debt to skyrocket and would be a “stupendous catastrophe.”⁷⁸ “It would not be a case of ‘back to the Constitution,’” he informed the Justices, “[i]t would be a case of ‘back to chaos.’”⁷⁹ Indeed, the Supreme Court reporter for the *Washington Post* commented that Cummings’s presentation “had more the ring of a political exhortation than a legal argument.”⁸⁰

At oral argument, the Justices were not receptive to the claim that Congress had the authority to strike the gold clauses in Treasury bonds. Chief Justice Hughes pointedly asked whether “[it is] not the very essence of sovereignty to be able to bind a sovereign State in a contract to borrow money[.]”⁸¹ Likewise, Justice Stone suggested that bonds represented “the power of the government to pledge the credit of the United States” rather than a pledge to repay in dollars that Congress could redefine later.⁸² Lastly, Justice Willis Van Devanter, one of the four conservatives—the “Four Horsemen”—on the Court who opposed Roosevelt’s constitutional agenda at almost every turn dismissed the Government’s contention that the implementation of gold devaluation elsewhere was relevant, since “[w]hat England can do, what Germany or any other nation can do has no controlling influence here.”⁸³ When

the confidence of the Administration); see also Glick, *supra* note 9, at 806 (“For the first time, U.S. Attorney General Homer Cummings personally led the legal team into court to argue in front of a capacity crowd of interested dignitaries.”); *Chaos Over Debts Pictured If Court Backs Gold Plea*, N.Y. TIMES, Jan. 10, 1935, at 1 (“Chaos would follow a Supreme Court ruling declaring unconstitutional the Congressional resolution of 1933 which voided the gold payment clause in private and public contracts, Attorney General Cummings told the court today.”).

78. See *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 256 (1935) (reproducing the Attorney General’s oral arguments in *Norman and Perry*).

79. *Id.*; see also JACKSON, *supra* note 20, at 102 (“Any decision that upset the law as Congress had enacted it, however sound in lawyer logic, could only breed widespread trade mischief, commercial confusion, and debtor disaster.”); *supra* text accompanying notes 3–6.

80. Elliott Thurston, *Court Hears Closing Plea in Gold Case*, WASH. POST, Jan. 12, 1935, at 1. At this time, there was a custom that an Attorney General would not be asked questions if he argued before the Court. See SHESOL, *supra* note 18, at 95. I do not know the origin of this practice or what led to its demise. As a result, the questions from the bench were directed at other Justice Department lawyers who argued before and after the Attorney General. SHESOL, *supra* note 18, at 95.

81. *Gravity of Issue in Gold Decision Urged on Court*, N.Y. TIMES, Jan. 12, 1935, at 2 [hereinafter *Gravity of Issue*]; see also Waxman, *supra* note 36, at 2416 (“The Justices were clearly repelled by the argument that the government could breach its promises. At oral argument, Chief Justice Hughes hounded Assistant Solicitor General Angus MacLean. In its hour of need, during the First World War, the United States had borrowed money by issuing Liberty Bonds to finance the war effort, and it had promised to repay those loans in gold, the Chief Justice pointed out; what was the source of Congress’s authority to break that promise?”).

82. *Gravity of Issue*, *supra* note 81, at 2.

83. *Hughes Asks Where Power Was Found To Alter U.S. Bond*, N.Y. TIMES, Jan. 11, 1935, at 1; see also LEUCHTENBURG, *supra* note 18, at 132–33 (explaining that Justices George

Professor Frankfurter later asked Brandeis why he asked no questions, Brandeis replied that given his own reservations about the case he thought it best to say nothing.⁸⁴

For five tense weeks, nobody was sure what the Court would do, but behind the scenes one person was certain about something.⁸⁵ President Roosevelt knew that he could not accept a decision that revived the gold clauses. A constitutional crisis was at hand.

II. THE PRESIDENT SEEKS A HIGHER POWER

This Part examines the debate within the White House about how to react if the Justices ruled against the Administration's gold policy. These discussions 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.⁸⁶ Ultimately, President Roosevelt resolved that he would not enforce a "bad" decision and would seek remedial legislation from Congress.⁸⁷ The speech that would have announced this bombshell, which would have been unprecedented in its brazen rejection of a Supreme Court decision, has not received the attention that it deserves.⁸⁸

Sutherland, Pierce Butler, Willis Van Devanter, and James McReynolds were implacably hostile to the Administration's policies).

84. See UROFSKY, *supra* note 11, at 698.

85. See Turner Catledge, *Capital Tense, Expects Decision on Gold Today; Roosevelt is Prepared*, N.Y. TIMES, Feb. 18, 1935, at 1 (observing that the decisions would be handed down the next day).

86. See SHESOL, *supra* note 18, at 96 (summarizing the chatter about adding some new Justices but stating that "[n]o plans were drafted, memos written, or meetings held" to develop this idea). Cf. Catledge, *supra* note 85, at 2 ("One suggestion, emanating from a Congressional source, was that Congress might quickly enact a tax . . . [on] the 69 cents premium on every \$1 of face value . . ."); Krock, *supra* note 23, at 18 (pointing out that the tax solution was "subject to the criticism that a court which had knocked out the retroactive gold clause repeal would hardly sustain such a tax under the 'due process' clause").

87. See Arthur Krock, *Roosevelt Speech Was Ready in Case He Lost on Gold*, N.Y. TIMES, Feb. 21, 1935, at 1 (disclosing this secret after the cases were decided).

88. Abraham Lincoln did ignore Chief Justice Taney's circuit opinion holding that the President could not unilaterally suspend habeas corpus, but that was not a Supreme Court opinion. See *Ex Parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.); BRIAN MCGINTY, LINCOLN AND THE COURT 65–91 (2008) (describing this episode). Many people believe that Andrew Jackson defied Chief Justice Marshall's ruling in *Worcester v. Georgia*, but that is not true because the Court never issued the mandate in that case. See MAGLIOCCA, *supra* note 32, at 49–50. Finally, President Roosevelt arguably disregarded an opinion limiting federal wiretapping authority, but this was not done openly. See *United States v. Nardone*, 308 U.S. 338, 339–40, 343 (1939) (holding that the 1934 Communications Act barred electronic surveillance by federal agents); Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1047–62 (2008) (examining FDR's successful effort to evade

A. *Beyond the Looking Glass at 1600 Pennsylvania Avenue*

Presidents are often unhappy with the Justices. When that happens, the standard response from the Executive Branch falls into one of three categories. First, the President can note his disagreement with the Court but follow the decision without further comment. Second, he can comply but denounce the Court and seek to blunt its opinion through a new statute or a constitutional amendment, which was President Obama's response to the *Citizens United*⁸⁹ decision on campaign finance regulation.⁹⁰ Third, a President can acknowledge that nothing can be done about the decision in the short run, but later wield the opinion as a political argument in favor of confirming justices with a different interpretive philosophy.

Roosevelt did not approach the *Gold Clause Cases* in the usual manner, because he was convinced that he could not afford to follow *Perry* or *Norman* (the challenge to the gold clauses in private contracts) if either came out the wrong way. As Robert H. Jackson later said: "The President was greatly concerned about the possible outcome . . . and was quite determined that he just could not accept an adverse decision."⁹¹ In part, FDR's reluctance was due to the predicted financial impact of a gold clause restoration, as described by the Attorney General at oral argument.⁹² Equally important, however, was the political cost of enforcing such a ruling. At a time when he was taking extraordinary steps to stop Huey Long, Roosevelt could not give the Kingfish a golden opportunity to tie the Administration to Wall Street.⁹³ Consequently, the President had to find a way to influence the Court's pending decision or develop a strategy that would win public support for openly flouting its holding.⁹⁴

Nardone); see also JACKSON, *supra* note 76, at 68 (stating Justice Jackson's view that "[t]he only case that I recall in which [FDR] declined to abide by a decision of the Supreme Court was its decision that federal law enforcement officers could not legally tap wires").

89. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

90. See David D. Kirkpatrick, *Democrats Try To Rebuild Campaign-spending Barriers*, N.Y. TIMES, Feb. 12, 2010, at A19 (discussing these legislative proposals); Sheryl Gay Stolberg, *Obama Turns Up Heat Over Ruling on Campaign Spending*, N.Y. TIMES, Jan. 24, 2010, at A18 (describing the President's criticism of *Citizens United* in his State of the Union Address).

91. JACKSON, *supra* note 76, at 65.

92. See *supra* text accompanying notes 77–80.

93. See Magliocca, *supra* note 59, at 25 (noting that the President ordered J. Edgar Hoover to put Long under surveillance); *id.* at 26 (stating that FDR also ordered the IRS to build a tax evasion case against Long); *id.* at 30–32 (stating that Roosevelt asked the Justice Department to investigate the possibility of declaring Louisiana in violation of the Guarantee Clause). I cannot find any direct evidence that the President considered the political implications of his planned response to an adverse Court decision.

94. Another option was to withdraw the Court's jurisdiction to hear the appeal. That is what Congress did during Reconstruction when a case was argued challenging the constitutionality of the occupation of the South. See *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506

Though there was no overt plan to send the Justices a message, after oral argument there were some suspicious quotes attributed to anonymous sources describing the President's intent to resist any decision in favor of the creditors.⁹⁵ For example, the *Los Angeles Times* ran a front-page story on February 4, 1935, that stated: "President Roosevelt, it was learned tonight, has definitely decided against restoration of the former gold value of the dollar, even if the Supreme Court should rule adversely to the Government . . . [and is] ready to put his hold on the people to the test if it becomes necessary."⁹⁶ An article in the *Washington Post* picked up on this chatter and said: "[I]t would be difficult to think of nine men in the world less likely to be swayed by intimidation than this court."⁹⁷ As bluffing was less expensive than acting, using leaks to pressure the Justices would have made sense.⁹⁸

One piece of evidence suggesting that Roosevelt did mount a whispering campaign against the Court comes from a conversation with Treasury Secretary Henry Morgenthau Jr. At a lunch shortly after oral argument, the President asked if the Treasury could deliberately take action to unsettle the financial markets, pressure the Court, and lay the groundwork for declining to enforce the decision.⁹⁹ When Secretary

(1869); 2 BRUCE ACKERMAN, *WE THE PEOPLE* 223–25 (1998) (providing an account). Cf. FRIEDMAN, *supra* note 6, at 58 (observing that Congress cancelled the Court's 1802 Term to postpone a challenge to the repeal of the 1801 Judiciary Act). As far as I can tell, FDR did not consider this idea, though there was some discussion of stripping the jurisdiction from the Court of Claims to hear suits from Treasury bondholders demanding payment. See *Course Is Mapped On Gold Decision*, N.Y. TIMES, Feb. 1, 1935, at 11 (stating that one rumored course of action was an "amendment of the Court of Claims Act, depriving the tribunal of authority to consider gold clause claims in government securities . . .").

95. See Glick, *supra* note 9, at 806 ("Whether or not the White House strategically leaked its plans to browbeat the Court, any reader of the newspapers could have little doubt that the Administration would not sit idly by if it lost."); *Capital Debates*, *supra* note 40, at 2 ("[A]ll were agreed that certainly President Roosevelt would leave nothing undone to offset a decision which would destroy the new monetary system built up by the Administration. Another possible avenue of action might lie in the President's declaring an emergency and asserting control over the currency . . .").

96. *Gold Policy Decided by Roosevelt*, L.A. TIMES, Feb. 4, 1935, at 1.

97. Elliott Thurston, *New Deal Structure Hangs on Gold Issue*, WASH. POST, Jan. 13, 1935, at B2.

98. There is an analogy here to President Jefferson's refusal to allow James Madison to appear before the Court in *Marbury*, which sent an unmistakable signal that the wrong decision would not be enforced. See FRIEDMAN, *supra* note 6, at 60 ("Madison, on direct orders from President Jefferson, had refused even to respond to the Court's show cause order, making clear their shared contempt for the entire *Marbury* proceeding.").

99. See SCHLESINGER, *supra* note 11, at 257 ("On January 14, Roosevelt actually told Morgenthau that he wanted the Treasury to keep things as unsettled as possible while the Court was making up its mind."); SHESOL, *supra* note 18, at 98 ("The sense of crisis, Roosevelt said, would prompt average citizens to say, 'For God's sake, Mr. President, do something about it.' And 'if I do,' Roosevelt concluded, 'everybody in the country will heave a sigh of relief and say thank God.'").

Morgenthau refused and hinted that he might resign, Roosevelt said, “Henry, you have simply given this thing snap-judgment. Think it over.”¹⁰⁰ The next day, with no indication that Morgenthau would change his mind, the President retreated and explained that he was just floating the idea to clarify his thinking—“but of course,” he said, “I didn’t believe in those arguments.”¹⁰¹ His explanation (of course) was implausible, especially since word just happened to get out that Roosevelt had told Joseph P. Kennedy, the Chairman of the Securities and Exchange Commission (SEC), to close the financial markets if the Justices struck down the Joint Resolution.¹⁰² Perhaps this information was not intentionally given to the press, but that seems unlikely.

If the Court did not heed these warnings and decided against the Government in *Perry*, Roosevelt settled on a plan to ignore the opinion until a statute invoking sovereign immunity to bar gold bondholder suits was enacted.¹⁰³ Robert H. Jackson was the source of the sovereign immunity idea, and an emergency decree was drafted ordering that no payment be made according to a gold clause in any contract for ninety days.¹⁰⁴ The legality of this decree was far from obvious, but Congress could always have retroactively blessed such a move. That “shoot first, ask questions later” approach is one way to resolve the inconsistent demands of law and necessity. After all, Congress arguably authorized Lincoln’s suspension of habeas corpus after the fact.¹⁰⁵ If the creditors

100. SCHLESINGER, *supra* note 11, at 257; *see also* SHESOL, *supra* note 18, at 98 (stating that Morgenthau responded, “Mr. President, don’t ask me to do this,” and was contemplating resignation if Roosevelt did not back down).

101. SHESOL, *supra* note 18, at 98.

102. *Cf. SEC, With Power to Close Stock Exchanges, Is Ready to Do So on Adverse Gold Decision*, N.Y. TIMES, Feb. 2, 1935, at 21. Joseph P. Kennedy was John F. Kennedy’s father.

103. *See* LEUCHTENBURG, *supra* note 18, at 87; *infra* text accompanying notes 121–22. *Cf. Washington Scans Markets Closely*, N.Y. TIMES, Jan. 16, 1935, at 2 (“The President simply could issue a statement, [a Senator] contended, saying there would be no change in the monetary policy, and the demanders of gold payments could do nothing about it. He suggested that Congress might even ignore such a decision and refuse to appropriate funds to meet the spread between the face value of its bonds and the value in terms of the devalued currency.”).

104. *See* JACKSON, *supra* note 76, at 65–66 (explaining his advice to Roosevelt); LEUCHTENBURG, *supra* note 18, at 87 (describing the draft order); *see also* *Lynch v. United States*, 292 U.S. 571, 582 (1934) (upholding Congress’s power to use sovereign immunity to extinguish remedies for a breach of a federal contract). The availability of sovereign immunity supports the view that the President could have the power to unilaterally prevent a violation of Section Four under some circumstances. The alternative remedy would be a suit from the bondholders demanding payment, but Congress can erase that claim (albeit only with a two-thirds majority in each House if the President objects). If there is no other way to prevent the Public Debt Clause from being trampled upon, then the President may have the power to act. That scenario, though, is far-fetched.

105. *See* Tyler, *supra* note 5, at 637–39 (describing the events leading up to the enactment of the suspension legislation in 1863); Tyler, *supra* note 5, at 639 (observing that the statute straddled the issue of whether Congress authorized the President’s actions or was declaratory of

won in *Norman*, though, the President's decree would have been illegal. In that scenario, Congress would have lacked the authority to prohibit debt-collection suits in state and federal courts. Thus, the President would need a really convincing explanation for his radical course of action.

B. *The End of Judicial Supremacy—The Draft Fireside Chat*

On February 9, 1935, Roosevelt summoned some of his advisors and dictated a speech “for use if needed.”¹⁰⁶ Though minor changes were made in the editing process, the final draft was substantially the same as what the President dictated.¹⁰⁷ After reading the speech to Morgenthau, Roosevelt noted that Joseph P. Kennedy believed that “the statement is so strong they will burn the Supreme Court in effigy.”¹⁰⁸ Let us now turn to the text of this undelivered radio address.¹⁰⁹

As one might expect, the President spent most of his time emphasizing the necessity of abrogation, since the enforcement of gold clauses would bring about “universal bankruptcy.”¹¹⁰ Debtors expected to pay back and creditors expected to receive, Roosevelt stated, “the same kind of dollars with approximately the same purchasing power” as those loaned at the time that they entered into their contracts.¹¹¹ Allowing creditors to get a substantial windfall because of subsequent deflation would thus be “unconscionable” and “would automatically throw practically all the railroads of the United States into bankruptcy.”¹¹² Worse still, many homeowners, municipalities, and other firms with debt obligations would face default.¹¹³ While this disaster would be traceable to the wrong decision in *Norman*, Roosevelt also claimed that a holding in *Perry*, making the gold clauses in Treasury bonds binding, would force Congress to raise taxes and put “125,000,000 people into

his authority to act).

106. See SHESOL, *supra* note 18, at 99.

107. *Id.* at 99–100 (“The draft, over the coming days, made the rounds among a small circle of officials, accumulating small revisions but not changing much in substance.”).

108. SCHLESINGER, *supra* note 11, at 258.

109. The President's personal involvement in explaining his decision to defy the Supreme Court belies the argument that the Executive Branch can always find a legalistic fig leaf to justify its acts. See Balkin & Levinson, *supra* note 15, at 724–25 (“[O]ur tradition of constitutional interpretation allows such flexibility in making constitutional arguments that no President ever need admit that he or she is disobeying the Constitution.”). Cf. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–116 (2010) (arguing that the rise of the Office of Legal Counsel and the White House Counsel's Office makes it easier for the President to present a legal opinion validating executive decisions).

110. *Gold Speech*, *supra* note 18, at 457.

111. *Id.* at 456–57.

112. *Id.* at 457–58.

113. *Id.* at 458.

an infinitely more serious economic plight than we have yet experienced.”¹¹⁴

Next, the President sought to explain why the rule of law—or what he artfully called “the legal proposition that the exact terms of a contract must be literally enforced”—could not be honored under these extreme circumstances.¹¹⁵ While Roosevelt stated that he did “not seek to enter into any controversy with the distinguished members of the Supreme Court,” he argued, citing Lincoln’s first inaugural address, that “[i]t is the duty of the Congress and the President to protect the people of the United States to the best of their ability.”¹¹⁶ Enforcement of gold clauses “would so imperil the economic and political security of this nation that the legislative and executive officers of the Government must look beyond the narrow letter of contractual obligations, so that they may sustain the substance of the promise originally made . . . [by] the parties.”¹¹⁷

At this stage, Roosevelt’s explanation was not much different from what presidents often say in the national security context when they act in the absence of legal authority.¹¹⁸ They start by stressing the unthinkable consequences of inaction, then offer another reading of the disputed law—in this case, the idea that the proper construction of gold clauses would give the parties dollars around the same value as when they struck their bargain. They conclude by invoking the duty to protect the nation from these devastating ends. The most plausible source for that necessity duty is the Commander in Chief Clause, but even an eager apologist for executive power could not stretch that provision to cover monetary action in peacetime.¹¹⁹ As a result, the President needed an external source of authority to justify his departure from settled law.

Roosevelt’s answer was to draw on the Bible. The President argued that the principle holding that “[f]or value received the same value should be repaid . . . would seem to be . . . in accordance with the Golden Rule, with the precepts of the Scriptures, and the dictates of

114. *Id.* at 458–59.

115. *Id.* at 457.

116. *Id.* at 459; see *Gold Speech*, *supra* note 18, quoting Lincoln’s position that “if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal”.

117. *Id.* at 459–60.

118. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589–92 (1952) (attaching President Truman’s executive order seizing the steel mills as a national security measure during the Korean War).

119. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States . . .”).

common sense.”¹²⁰ Consistent with these teachings, he said that he would “by proclamation and by message to the Congress” seek to block the Court’s gold decisions.¹²¹ “In the meantime,” he concluded, “I ask every individual, every trustee, every corporation[,] and every bank to proceed on the usual course of their honorable and legitimate business.”¹²² That way the American people could “rest assured that we shall carry on the business of the country tomorrow just as we did last week or last month, on the same financial basis, on the same currency basis, and in the same relationship of debtor and creditor as before.”¹²³ Put another way, the President was asking the nation to join his rebellion against the Court.

Let us pause to consider the implications of this argument. Conceptually, one can understand that some form of higher law is necessary to support an action that is contrary to constitutional text or judicial precedent.¹²⁴ Indeed, Senator William Seward made a similar claim during the debate on the Compromise of 1850 when he said there was “a higher law than the Constitution” that supported resistance to slavery.¹²⁵ But Roosevelt’s use of the New Testament as paramount law was unusual because he was speaking as President.¹²⁶ (Imagine if President George W. Bush had given a speech in 2006 arguing that biblical teachings compelled him to reject the Court’s decisions on the detention of alleged enemy combatants.) Roosevelt’s address would have raised profound questions about the separation of powers—a real type one crisis under Balkin and Levinson’s framework in which a renegade President refuses to follow the law as articulated by the Court.¹²⁷

120. *Gold Speech*, *supra* note 18, at 460.

121. *Id.*

122. *Id.*

123. *Id.*

124. Article VII of the Constitution states that nine states were necessary for ratification. U.S. CONST. art. VII. When the Framers defended Article Seven, against the charge that this was a violation of the Articles of Confederation, which required unanimity for a constitutional amendment, they relied on popular sovereignty as higher law. *See* THE FEDERALIST NO. 40, at 263–67 (James Madison) (Jacob E. Cooke ed., 1961) (justifying this ratification standard).

125. *See* DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 146 (2005) (describing Seward’s speech).

126. Roosevelt’s address was different from the use of religious imagery in a speech, such as Lincoln’s second inaugural address, that did not claim the Almighty as a legal authority. *See* RONALD C. WHITE JR., *LINCOLN’S GREATEST SPEECH: THE SECOND INAUGURAL 19* (2002) (“[I]f God wills that [the war] continue, until all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said ‘the judgments of the Lord, are true and righteous altogether.’”).

127. *See supra* text accompanying note 16. I will not speculate about whether public opinion would have sustained the President. It is not obvious, however, that he would have lost.

When it became clear (for reasons that are explained in Part III) that the gold clause opinions would come down on February 18th,¹²⁸ official Washington went on high alert. The President and his aides gathered in the Cabinet Room to listen to the news, and Treasury officials waited in the Supreme Court Marshal's office on an open phone line to the SEC so that the markets could be closed.¹²⁹ But what would the Justices do?

III. THE COURT FINDS AN EXCUSE

This Part assesses the Supreme Court's disposition of *Perry* after considering how Justices react when they realize that their best reading of the Constitution is not politically viable. Chief Justice Hughes avoided a clash between law and necessity by reaching back to *Marbury* and holding that Treasury bondholders had a right to be paid pursuant to their gold clauses, but could not get a remedy.¹³⁰ His reasoning, much like Chief Justice Marshall's, was widely ridiculed, with Judge Learned Hand going so far as to say that *Perry* "[made him] puke."¹³¹ But in both instances the resulting opinion proved critical for upholding the integrity of the constitutional scheme by avoiding a damaging interbranch collision and preserving judicial authority.¹³²

A. *Backing Down and Saving Face*

The Justices often face the prospect of making a disruptive decision. When that is true, the Court can take several paths. One involves just issuing the opinion and taking the heat. Another is to blink and overrule (either expressly or *sub silentio*) precedent that is inconsistent with the popular constitutional interpretation.¹³³ There is also the option of avoiding a controversial decision through a clever reading of the law, though at some point that becomes implausible.¹³⁴ Finally, the Justices

128. See Catledge, *supra* note 85, at 1 ("Official Washington remained convinced tonight that a decision would be forthcoming tomorrow from the Supreme Court on the gold-clause cases."); *infra* text accompanying notes 141–44.

129. See SHESOL, *supra* note 18, at 104.

130. *Perry* never refers to *Marbury*, perhaps to avoid any embarrassing comparisons.

131. SCHLESINGER, *supra* note 11, at 260.

132. See Glick, *supra* note 9, at 814; *infra* text accompanying notes 165–68 (attacking the logic of *Perry*). For a sample of the critical reviews of *Marbury*, see FRIEDMAN, *supra* note 6, at 63 ("Marshall ignored settled legal rules in such a fashion as to suggest that it was politics as much as law driving him."); Tushnet, *supra* note 6, at 543 ("The logic of Marshall's opinion is, as every student of the case knows, hardly iron-clad."); *infra* text accompanying notes 136–41 (discussing *Marbury*).

133. See, e.g., *W. Coast Hotel v. Parrish*, 300 U.S. 379, 389–90 (1937) (commencing the famous "switch in time" by overruling *Adkins v. Children's Hospital*, U.S. 525 (1923)).

134. See, e.g., *Naim v. Naim*, 350 U.S. 891 (1955) (refusing on dubious jurisdictional grounds to hear the merits of a constitutional challenge to Virginia's antimiscegenation statute); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869) (upholding Congress's withdrawal of

can turn to the escape hatch of recognizing a right while delaying or rejecting the implementation of a remedy. *Brown v. Board of Education* is the best modern example, as the Court sought to appease critics (or acknowledge the practical difficulties involved) by stating that school desegregation should proceed “with all deliberate speed,” which was seen (rightly or wrongly) as code for “not anytime soon.”¹³⁵

The founding text for the right–remedy gap is *Marbury*, which is rich given that that opinion accepted that the essence of civil liberty is that rights and remedies are linked.¹³⁶ Almost every lawyer is aware of Chief Justice Marshall’s challenge in that case. President Jefferson would almost certainly have refused to follow a judicial order giving Marbury his commission as a justice of the peace.¹³⁷ Turning that into a holding that Marbury was not legally entitled to the office, though, would have been a betrayal of the rule of law. As a result, Marshall concluded that withholding the commission was “an act deemed by the court not warranted by law,” but held that Marbury could not get relief through a writ of mandamus in the Court’s original jurisdiction because Congress could not enlarge the original jurisdiction granted in Article III to include mandamus.¹³⁸

There is no need to repeat the standard criticisms of *Marbury* here, as the important point for its comparison to *Perry* is how Chief Justice Marshall’s opinion was organized. First, he tried to mask the impotence

appellate jurisdiction from the Court on the assumption that an alternative path was available); ACKERMAN, *supra* note 94, at 223–27 (pointing out that *McCardle* involved a highly charged constitutional attack on the military occupation of the South and that the Court could have, but chose not to, issue its opinion on the merits before the repeal statute came into effect). Cf. Posner & Vermeule, *supra* note 21, at 1019–20 (“Ambiguous acquiescence is possible only when the agent’s alternative explanation for its acquiescence is credible Over time, acquiescence will become less ambiguous and, eventually, unambiguous.”). Chief Justice Roberts’s opinion interpreting the individual mandate as a constitutionally valid tax even though the relevant provision says that the failure to comply with the mandate leads to a “penalty” could be seen as another example. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593–601 (2012) (Roberts, C.J.).

135. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (discussing the remedy); see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (addressing the right involved). A more stark (and disgraceful) example is *Giles v. Harris*, in which the Court rejected a suit by African-American voters in Alabama who challenged their disenfranchisement, on the ground that the Court could not provide a remedy in the teeth of white opposition. See *Giles v. Harris*, 189 U.S. 475, 482, 488 (1903); MAGLIOCCA, *supra* note 22, at 125–27 (discussing *Giles*).

136. See *supra* text accompanying note 1.

137. See FRIEDMAN, *supra* note 6, at 61 (“[T]he Justices could be certain that any order they issued in *Marbury* would be defied by Madison. If this happened, the inherent weakness of the judiciary would be on display for all to see.”); see also JACKSON, *supra* note 20, at 27 (“[T]here is little doubt that [Jefferson] would have defied the Court and at that time the people would probably have sustained him.”).

138. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162, 176 (1803); see also U.S. CONST. art III, § 2, cl. 2 (defining the Court’s original jurisdiction).

of the Court by delivering a long lecture about why it was improper for the Executive Branch to retain Marbury's commission.¹³⁹ Second, he gave a tortured explanation for why the Court could not give a remedy for this legal violation, which involved the deliberate distortion of the Judiciary Act of 1789.¹⁴⁰ Third, the Chief Justice did a great service to the rule of law generally, though not for Marbury personally, by shielding the Court from political retribution when it was vulnerable.¹⁴¹ More than a century later, Chief Justice Hughes would repeat this feat in much the same way.

B. *The Perils of Perry*

Before delving into the *Gold Clause Cases*, something must be said about the unique way in which the opinions were handled. On February 2nd, the Clerk of the Court issued the following statement:

The Chief Justice, in order to avoid an unnecessary crowding of the court room on Monday, directs the clerk to announce that the court is not ready as yet to announce a decision in the gold clause cases and hence there will be no announcement on that day.¹⁴²

That was the one and only time in Supreme Court history that an update was given on a pending case.¹⁴³ A week later, on the same day that the

139. See *Marbury*, 5 U.S. (1 Cranch.) at 156–68; FRIEDMAN, *supra* note 6, at 63 (“Marshall’s gratuitous tongue-lashing of Jefferson and Madison for failing to deliver Marbury’s commission was entirely unwarranted. If the Court had no jurisdiction, it should have said so and said nothing more.”).

140. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 232 (2005) (“Why did the First Congress try to expand the Supreme Court’s original jurisdiction, contrary to Article III’s letter and spirit? The short answer is that Congress in fact did no such thing. The statutory sentence that the *Marbury* Court flamboyantly refused to enforce did not say what the Court accused it of saying.”).

141. In this respect, Chief Justice Marshall surpassed Chief Justice Hughes by establishing judicial review as he sidestepped a conflict with the President. See *Marbury*, 5 U.S. (1 Cranch) at 176–80. *Perry* did not set forth any memorable principles, which is one reason why this Article is necessary. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), is similar to *Marbury* and *Perry* in several respects. Once again, Chief Justice Marshall was confronted with the very real possibility that his opinion would be ignored. See MAGLIOCCA, *supra* note 32, at 42 (noting that Georgia boycotted the oral argument). He again spent most of the opinion giving a lecture—this time about Cherokee sovereignty—even though it was dicta. See *id.* at 43–44. Finally, he also denied Worcester a remedy (and left him in jail) after recognizing his legal claim, which avoided a wound to the Court’s prestige. See *id.* at 49–50. The crucial difference is that *Worcester* did not say that a remedy would be denied. Instead, that resulted from a complex manipulation of the Court’s post-decision procedures. See *id.*

142. *No Court Finding on Gold Tomorrow, Hughes Announces*, N.Y. TIMES, Feb. 3, 1935, at 1.

143. See *id.* (“Officials connected with the court for years said the announcement was unprecedented.”).

President dictated his speech, the Clerk made a similar statement.¹⁴⁴ One week after that, though, no statement was issued, which was the signal that the opinions were coming.¹⁴⁵ The Justices clearly understood the importance of the moment.

The *Norman* decision about gold clauses in private contracts was relatively straightforward.¹⁴⁶ Writing for a 5–4 majority, the Chief Justice declared that “[t]he question before the Court is one of power, not of policy.”¹⁴⁷ He explained that many acts of Congress, such as bankruptcy laws, declarations of war, and trade embargos, nullified private contracts.¹⁴⁸ Thus, “[c]ontracts, however express, cannot fetter the constitutional authority of the Congress.”¹⁴⁹ And as the congressional policy on abrogation had “a reasonable relation to a legitimate end,” the Joint Resolution was constitutional as applied to private contracts.¹⁵⁰

144. See *No Gold Decision*, *supra* note 20, at 1 (“Announcing today that neither the eagerly expected decision on the gold clause cases, nor any other opinions, would be handed down on Monday, the traditional decision day, the Supreme Court provided another complete surprise, and again broke an old custom.”); *id.* (quoting the Court Clerk’s statement that “[t]here will be no opinions on Monday”); *supra* text accompanying note 106.

145. See *Gold Clause Ruling Expected Monday*, N.Y. TIMES, Feb. 17, 1935, at 1 (“A general conviction that the long awaited decision on the gold clause cases would be handed down by the Supreme Court on Monday was felt today when . . . Chief Justice Hughes failed to make any statement to the contrary as he had on the previous two Saturdays.”).

146. Melvin Urofsky says that “a majority would have liked to strike down the nullification of the gold clause in private contracts,” UROFSKY, *supra* note 11, at 697, but he provides no evidence for this claim and I can find none.

147. *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 297 (1935). Justice McReynolds’s dissents in *Norman* and *Perry* are discussed in a moment. See *infra* text accompanying notes 172–75.

148. See *Norman*, 294 U.S. at 304–05; see also Waxman, *supra* note 36, at 2416 (“With respect to private contracts, the government was in the position of a disinterested third party. Congress had no commercial stake in invalidating gold clauses in private contracts. Instead, it acted as an unbiased sovereign seeking to control the value of currency and to prevent private contracts from undermining that effort.”).

149. *Norman*, 294 U.S. at 307; see *id.* at 308 (pointing out that if interstate contracts provide for rates that Congress later outlaws, then the contracts are not enforceable); *id.* at 309 (making the same point about anticompetitive contracts). This decision built on one from the prior year, decided by the same 5–4 majority, which held that mortgage contracts could not bind state legislatures. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 446–47 (1934) (rejecting a Contract Clause claim against modifications to foreclosure procedures).

150. *Norman*, 294 U.S. at 311; see *id.* at 316 (“We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress, and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.”).

With respect to Treasury bonds, though, a plurality of the Court in *Perry* held that the Joint Resolution was unconstitutional.¹⁵¹ The Chief Justice, writing for himself and three others, rejected the notion that “Congress can disregard the obligations of the government at its discretion, and that, when the government borrows the money, the credit of the United States is an illusory pledge.”¹⁵² He said that “[t]here 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, 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.”¹⁵³ In essence, the plurality reasoned that the language in Article I, Section Eight, giving Congress the authority to “borrow money on the credit of the United States” meant that one Congress could bind future ones with respect to bonds.¹⁵⁴

This conclusion, the Chief Justice added, was supported by the Fourteenth Amendment’s language about the validity of public debt. Hughes said the following about Section Four:

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.¹⁵⁵

In this passage, the *Perry* plurality sided with the bondholders’ view of the Public Debt Clause. The problem for those concerned about the

151. *See Perry v. United States*, 294 U.S. 330, 354 (1935) (“We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond of suit, went beyond the congressional power.”).

152. *Id.* at 350; *see id.* at 351 (“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.”).

153. *Id.* at 350–51.

154. *See* U.S. CONST. art. I, § 8, cl. 2; *Perry*, 294 U.S. at 353–54 (“The Constitution gives to the Congress the power to borrow money on the credit of the United States 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.”).

155. *Perry*, 294 U.S. at 354.

modern debt ceiling issue is that this discussion is dictum. Moreover, this dictum was undercut by the Court's decision not to give a remedy to the injured parties.

With his discussion of Congress's power, the Chief Justice reprised *Marbury's* jeremiad on the rule of law to establish a credible predicate for folding on the remedy.¹⁵⁶ While his opinion was strong, Hughes gave an even more theatrical performance in the courtroom. A witness said that his reading of *Perry* scolded the Government "in a voice that sounded like that of a Secretary of State rebuking Latin American banana republics for their repudiations."¹⁵⁷ The propriety of this discussion was dubious since the Court was about to conclude that no relief could be granted, and hence the Court of Claims had no jurisdiction to hear *Perry's* case—a criticism that echoes the one made about *Marbury's* unnecessary discourse of the merits.¹⁵⁸ Nevertheless, the dicta on the bondholder's rights may have been necessary to hold the plurality together and make its retreat look like something other than a rout.¹⁵⁹

When the opinion turned to damages, though, *Perry* did an about-face and held that the bondholders were entitled to nothing. The key to Hughes's argument was that Congress had withdrawn all gold coin from circulation.¹⁶⁰ As a result, the "[p]laintiff's damages could not be assessed without regard to the internal economy of the country at the

156. See Glick, *supra* note 9, at 814 ("Why go to all the trouble to condemn the Government and tackle unnecessary questions in the first half of *Perry* before digging out of that hole in the second? The most logical explanation is that the first half represented sincere and strongly held opinions, and the second reached the necessary outcome.").

157. UROFSKY, *supra* note 11, at 697.

158. See Hart, *supra* note 2, at 1096 ("[T]he Court violated two of its most frequently repeated canons of constitutional decision. It decided a constitutional question when it was not necessary to do so; and it permitted that question to be raised by a litigant who was able to show no interest in its outcome."); see also *Perry*, 294 U.S. at 355 (explaining that "the Court of Claims has no authority to entertain an action for nominal damages"); *supra* note 138 (discussing *Marbury*).

159. See Dawson, *supra* note 12, at 658 ("The opinion of Chief Justice Hughes seems at first sight to be strangely inconsistent. An opportunity is seized to announce a proposition in constitutional law whose meaning is distinctly doubtful, and which has no bearing on the immediate decision."). Chief Justice Roberts's opinion upholding the individual mandate did something comparable by addressing (and rejecting) the Commerce Clause and Necessary and Proper Clause arguments on the merits before pivoting and accepting the Tax Clause argument. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600–01 (2012) (Roberts, C.J.) (attempting to explain why the commerce and necessary and proper discussions were not dicta). In *Perry* and *Sebelius*, a reasonable case can be made that the Chief Justice was paying lip service to a legal fiction—that Congress cannot repudiate national debt or does not have a police power—before coming down with a contrary result in practice.

160. See *Perry*, 294 U.S. at 355–56; *supra* text accompanying notes 41–44 (discussing the statutes that restricted gold).

time the alleged breach occurred. . . . A free domestic market for gold was non-existent.”¹⁶¹ The “[p]laintiff 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.”¹⁶² And the legal value of that gold was the (devalued) face amount of the bond, because any gold in private hands had to be sold to the Treasury at that fixed price.¹⁶³ Therefore, there was no compensable harm.¹⁶⁴

This reasoning was (at best) shaky, because it overlooked the fact that a gold clause was guaranteeing a level of value, which was widely known, rather than the gold itself.¹⁶⁵ Professor Henry Hart, writing in the *Harvard Law Review*, said that the remedial section of *Perry* was “nonsense” because “[t]he considerations which prompted the denial of specific performance [giving the bondholder gold] . . . have no necessary bearing upon the scope of the remedy”¹⁶⁶ In a similar vein, Professor Thomas Reed Powell, the leading constitutional scholar of his time, asked how the Court could “apply to the bondholder the tort measure of damages instead of the contract one”¹⁶⁷ In other words, Hughes was using the actual damages suffered (zero) as the relevant sum rather than the difference between what was promised and what was received, which was most definitely not zero. “The opinions are a fascinating study in legalistic reasoning,” Robert H. Jackson stated, though “[t]o the layman they were a Chinese puzzle.”¹⁶⁸

161. *Perry*, 294 U.S. at 357. *But see* Hart, *supra* note 2, at 1088 (“The reasons for thus confining the issue are elusive. What of buying power in terms of foreign currency? Of foreign commodities? Suppose that the bondholder travels abroad? Lives abroad? Suppose he is an importer?”).

162. *Perry*, 294 U.S. at 357.

163. *See id.* (“Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever.”).

164. The Government made this remedial argument in its brief. *Cf.* Waxman, *supra* note 36, at 2417–18, though it is not clear to what extent this point was discussed at oral argument.

165. *See* Waxman, *supra* note 36, at 2418 (“It has been rightly pointed out that this reasoning is not entirely persuasive.”); *see also* Glick, *supra* note 9, at 813 (“The logic of the majority’s opinion is strained. It initially interpreted the bonds as contracts for ‘gold value,’ security against inflation. . . . Once the Court wrote that the clause obviously was intended to afford protection against loss, the fact that *Perry* could not avail himself of a market for actual gold is an unsatisfying solution.” (internal quotation marks and citation omitted)).

166. Hart, *supra* note 2, at 1074. Anyone interested in *Perry* should read Professor Hart’s entire article, which tears the plurality’s reasoning to shreds.

167. Glick, *supra* note 9, at 814.

168. JACKSON, *supra* note 20, at 102; *see Perry*, 294 U.S. at 378 (McReynolds, J., dissenting) (“Obligations cannot be legally avoided by prohibiting the creditor from receiving the thing promised.”).

Justice Stone was the only member of the Court to take the position that the Joint Resolution was constitutional as applied to Treasury bonds. In his concurrence, Stone wrote: “As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States, . . . the government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability”¹⁶⁹ He then criticized the plurality for making it hard for Congress to restore gold to circulation, for if that happened then the bondholders would be able to reassert their damage claims unless sovereign immunity was raised as a bar.¹⁷⁰ More to the point, he argued that *Perry* was incoherent because “[i]t 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.”¹⁷¹

Justice James McReynolds spoke for the dissenters in *Perry* and *Norman*, and, according to the *New York Times*, his opinion “startled spectators in the Supreme Court chamber . . . with a blistering attack on New Deal currency policies.”¹⁷² He wrote that *Perry* amounted “to a declaration that the Government may give with one hand and take away with the other. Default is thus made both easy and safe!”¹⁷³ Turning conventional wisdom on its head, McReynolds wrote that “[l]oss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling.”¹⁷⁴ The real disaster, in other words, would be to block the enforcement of gold clauses and ignore the law. Finally, he said (in comments from the bench, and not in his published opinion) that “this is Nero in his worst form.”¹⁷⁵

While most lawyers greeted *Perry* with scorn, other observers applauded the Court’s statesmanship. Walter Lippmann, the most prominent columnist of that era, felt that “any other decision by the Supreme Court would have created an almost impossible situation. . . . The alternatives would have been an economic convulsion or a deliberate

169. *Perry*, 294 U.S. at 359 (Stone, J., concurring).

170. *See id.* at 359–60 (discussing the concern that *Perry* would “interpose a serious obstacle to the adoption of measures for stabilization of the dollar, should Congress think it wise to accomplish that purpose by resumption of gold payments . . . and by the re-establishment of a free market for gold and its free exportation”); *id.* at 360 (noting the “undoubted power of the Government to withdraw the privilege of suit”).

171. *Id.*

172. *See Constitution Gone, Says McReynolds*, N.Y. TIMES, Feb. 19, 1935, at 1 [hereinafter *Constitution Gone*].

173. *Perry*, 294 U.S. at 377 (McReynolds, J., dissenting).

174. *Id.* at 381.

175. *See SHESOL*, *supra* note 18, at 103. In context, McReynolds was pointing out that Nero debased the currency, but his statement could also be taken as a broad indictment of Roosevelt. *See Constitution Gone*, *supra* note 172, at 1 (“There were gasps as the 73-year old Tennessean, scarcely glancing at his manuscript, declared that Nero undertook to use a debased currency . . .”).

nullification of the [C]ourt's decision by a Congress that would be branded as a violator of the sanctity of contracts."¹⁷⁶ Even Professor Hart, *Perry*'s leading academic critic, conceded that it "was not easy to come out baldly and announce that the public credit has no integrity, that the public faith is not inviolable."¹⁷⁷ A legal fiction is sometimes necessary to bridge the divide between what must be done and what people will accept.¹⁷⁸ *Perry*, like *Marbury*, discharged that task by affirming our core values before developing a rationale, weak though it was, for bowing to reality's demands.¹⁷⁹

Over at the White House, President Roosevelt issued a brief statement indicating his support for the Court's action.¹⁸⁰ Privately, he told Joseph Kennedy that "[t]he Nation will never know what a great treat it missed in not hearing the marvelous radio address the 'Pres' had prepared for delivery . . . if the cases had gone the other way."¹⁸¹ "What a tragedy," the President said, after quoting his line about the Golden Rule, "that posterity has been deprived of this and similar gems[.]"¹⁸²

CONCLUSION

The standoff between the President and the Justices in the *Gold Clause Cases* was a dry run for their fight just two years later. When Roosevelt gave an actual Fireside Chat defending his plan to pack the Court, he made the close call in *Perry* and *Norman* the opening salvo of his argument. He said that when he came into office, the country was in the throes of a bank panic, and "we asked the nation to turn over all of

176. Walter Lippmann, *Today and Tomorrow*, L.A. TIMES, Feb. 20, 1935, at A4; see Dawson, *supra* note 12, at 658 ("A broader strategy must have shaped the opinion of the Chief Justice and secured the concurrence of Justices Brandeis, Roberts, and Cardozo.").

177. Hart, *supra* note 2, at 1094.

178. Cf. JACKSON, *supra* note 20, at 293 ("Fictions are often the hostages that the forces of movement give to the forces of position."). Some familiar examples of this include a jury finding of liability with an award of nominal damages (say, \$1), or a criminal conviction that is swiftly followed by a pardon. In both cases, the rule of law is affirmed but the practical consequences are nonexistent. Saying that a jury or an executive can exercise discretion in this fashion, however, is quite different from saying that a court can or should do so.

179. Chief Justice Roberts's opinion on the Affordable Care Act can be viewed in a similar fashion. His rationale affirmed that the Commerce Clause is limited but still upheld a major piece of domestic legislation (enacted by Democrats) when invalidating that law on a party-line vote (by Justices appointed by Republicans) might have done lasting damage to the Court.

180. See SHESOL, *supra* note 18, at 104 ("The President is gratified by the decision of the Supreme Court.").

181. *Id.* at 105.

182. *Id.* A few days later, the substance of the speech was leaked to Arthur Krock, though without the choice quotes. See Krock, *supra* note 87, at 1 ("Had this address, presumably by radio, been delivered, it would have marked the most sensational and historic episode in the constitutional history of the United States since Andrew Jackson said of a Supreme Court ruling: 'John Marshall has made this decision; now let him enforce it.'").

its privately held gold, dollar for dollar, to the government of the United States. Today's recovery proves how right that policy was."¹⁸³ But "[t]he change of one vote would have thrown all of the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation."¹⁸⁴ In response to this speech, Chief Justice Hughes again wrote the key opinions that accommodated the New Deal and saved the Court, though this time the resulting legal change was more obvious.¹⁸⁵

Now we come to the final, and most tantalizing, question. What if the Court had stood its ground in *Perry*? While the answer requires a fair amount of speculation, two points seem clear. One is that a ruling restoring the gold clauses, even one quickly nullified by a sovereign immunity law, would have made the currency question more salient in national politics.¹⁸⁶ The 1930s would have looked more like the 1890s. Furthermore, an extended debate on the gold standard in 1935 would have taken at least some of the wind out of other congressional priorities, most notably Social Security, with repercussions that we cannot fully grasp.

The other thought is that a repudiation of the Court would have altered the balance of forces between the White House and the Justices. Since Congress could turn to a statutory remedy to thwart an adverse decision in *Perry*, the long-run effect of that precedent on judicial authority probably would have been minimal. At that time, though, such a severe putdown might have made the Justices more reluctant to stand in the way of other New Deal legislation. If not, then the foes of Court-packing would have been in a weaker position in 1937. A Court that had already been overruled once by the elected branches on an issue of vital importance may not have commanded the same level of respect.

The lesson of the *Gold Clause Cases* is that necessity is just one layer of the rule of law. In other words, a necessity argument is not

183. Franklin D. Roosevelt, A 'Fireside Chat' Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122 (Samuel I. Rosenman ed., 1941).

184. *Id.*

185. See *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), ending the *Lochner* era); *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

186. One could argue that the prominence of the gold question would have energized Roosevelt's populist foes, but that counterfactual runs into a problem. In September 1935, the leader of those forces—Huey Long—was assassinated. See Magliocca, *supra* note 59, at 36. Even with a boost from *Perry*, I do not think that another populist leader with Long's charisma would have emerged. That is why I see Long's death as the crucial moment for New Deal constitutionalism. See Magliocca, *supra* note 59, at 36–43.

beyond the reach of legal analysis. What makes necessity distinctive is that it is not grounded in doctrine. Nevertheless, lawyers can still test logic that draws exclusively from history, structure, text, or even religion. Mistakes come only when those making a necessity claim abandon that kind of careful examination.

APPENDIX: ROOSEVELT'S GOLD SPEECH¹⁸⁷

Two years ago the welfare of all our citizens in every section of the United States was endangered by increasing bankruptcies and bank failures. In the short space of the previous three and one half years the purchasing power of the dollar had increased about sixty per cent. This meant that debtors of all kinds, individuals, associations, institutions, corporations, municipal, county, state governments and the Federal Government itself, were being called on to pay their creditors in currency worth sixty per cent more in purchasing power than the money which had been loaned to them.

When the debts were originally incurred, the lender expected to get back the same kind of dollars with approximately the same purchasing power that he had loaned. The borrower expected to pay back the same kind of dollars with approximately the same purchasing power that he had borrowed. That was the essential understanding in every contract for the repayment of money loaned.

But on the day of my inauguration, any attempt to collect in substance one hundred and sixty cents for every dollar owed would have brought universal bankruptcy.

During the past twenty-three months we have moved rapidly toward establishing and maintaining a dollar of stable purchasing power. We have brought about present dollar value which is within twenty per cent of what it was when the majority of debts, private and governmental, were incurred. All of our legislation of the past two years has been aimed at creating a currency of sound and standard purchasing power and then maintaining it.

In working toward our broad objective, the American currency was first taken off what is commonly known as the Gold Standard. Later, by Act of Congress and by Presidential Proclamation, it was restored to a gold standard on a different weight of gold.

The decisions of the Supreme Court are, of course, based on the legal proposition that the exact terms of a contract must be literally enforced.

Let me for a moment analyze the effect of the present decision by giving a few simple illustrations:

187. The text reproduced in the Appendix can be found in *Gold Speech*, *supra* note 18, at 456–60.

First, in the case of the railroad bonds: Regardless of whether maturing bonds are owed by a bankrupt railroad or a solvent railroad, the bondholder is by this decision entitled to demand that the railroad pay him back, not the \$1000 which he paid for the bond, but—\$1690. Yet when he bought that bond he did not expect to get a clear net profit of \$690 in addition to the sum of \$1000 which he had invested.

It is unconscionable, not only for the individual investor to reap such a wholly unearned profit, but also to impose such a burden on shippers, travelers and stockholders. In fact, if the letter of the law is so declared and enforced, it would automatically throw practically all the railroads of the United States into bankruptcy.

Second: The principle laid down today in the railroad case applies to every other corporation which has gold bonds outstanding, driving many another huge enterprise into receivership! It must be applied likewise to the obligations of towns, cities, counties, and states; and these units of government, now working bravely to meet and reduce their debts, would be forced into the position of defaulters.

Third: Consider the plight of the individual who is buying a home for himself and his family and paying each month a specified sum representing interest and reduction of the mortgage. If there is a gold clause in his mortgage—and most mortgages contain that clause—this decision would compel him to increase his payments 69% each month from now on, and perhaps to pay 69% more on some payments already made. Home owners, whether city workers or farmers, could not meet such a demand.

Consider now the other two decisions relating to government obligations on gold notes, gold certificates and gold clause bonds. An old lady came to see me the other day. She is dependent heavily on the income from government bonds which she owns; and her total income is about \$800 a year. She owns \$10,000 of government gold clause bonds. Under this new decision she would be entitled to ask the Treasury for \$16,900. Being the right type of citizen, she volunteered to tell me that she does not consider herself entitled to more than the \$10,000 which she had saved and invested.

The actual enforcement of the gold clause against the Government of the United States will not bankrupt the Government. It will increase our national debt by approximately nine billions of dollars. It means that this additional sum must eventually be raised by additional taxation. In our present major effort to get out of the depression, to put people to work, to restore industry and agriculture, the literal enforcement of this opinion would not only retard our efforts, but would put the Government and 125,000,000 people into an infinitely more serious economic plight than we have yet experienced.

Finally, I again call attention to the fact that the total of debts secured by contracts containing a gold clause amounts to at least one hundred billion dollars which is a very large proportion of our total property value of all kinds. To meet this contract debt, there exists in the United States a total of about eight and one half billion dollars of gold and in all the rest of the world—Europe, Asia, Africa, Australasia, and the Americas—there is not more than twelve billions in gold.

I do not seek to enter any controversy with the distinguished members of the Supreme Court of the United States who have participated in this (majority) opinion. They have decided these cases in accordance with the letter of the law as they read it. But it is appropriate to quote a sentence from the First Inaugural Address of President Lincoln:

“At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between the parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”

It is the duty of the Congress and the President to protect the people of the United States to the best of their ability. It is necessary to protect them from the unintended construction of voluntary acts, as well as from intolerable burdens involuntarily imposed. To stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would so imperil the economic and political security of this nation that the legislative and executive officers of the Government must look beyond the narrow letter of contractual obligations, so that they may sustain the substance of the promise originally made in accord with the actual intention of the parties.

For value received the same value should be repaid. That is the spirit of the contract and of the law. Every individual or corporation, public or private, should pay back substantially what they borrowed. That would seem to be a decision in accordance with the Golden Rule, with the precepts of the Scriptures, and the dictates of common sense.

In order to attain this reasonable end, I shall immediately take such steps as may be necessary, by proclamation and by message to the Congress of the United States.

In the meantime, I ask every individual, every trustee, every corporation and every bank to proceed on the usual course of their honorable and legitimate business. They can rest assured that we shall carry on the business of the country tomorrow just as we did last week

or last month, on the same financial basis, on the same currency basis, and in the same relationship of debtor and creditor as before.