

Conditional Strategic Retreat: The Court's Concession in the 1935 Gold Clause Cases

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Though forgotten by history, the 1935 Gold Clause cases concerning abrogation of gold-indexed bonds were instantly dubbed historical landmarks. Perry v. U.S., the case addressing federal bond contracts, should be remembered as an important instance of strategic judicial retreat. Expecting that the wrong outcome would provoke an attack and harm its legitimacy, the Supreme Court granted the administration an important technical victory. This paper elucidates three conditions necessary for retreat: (1) very strong government outcome preferences, (2) signals of a direct attack, and (3) an environment which makes these threats credible. It compares the Gold Clause cases with a control case, U.S. v. Butler. It shows that the former strongly met the conditions while the latter, in which the Court made a sincere decision, did not. Finally, it refutes legal and attitudinal explanations and argues that the Perry opinion was written to grudgingly reach the strategically necessary result by granting a technical victory in the remedy.

Recently, the dignified Supreme Court of the United States pushed women spies, dirigible disasters, child murders and even Mussolini off the front pages of every newspaper in the world. Lombard, the Place de la Bourse, and all other Wall Streets of Europe dared to begin planning their own financial futures for the first time since the New Deal got under way. Speculators, bankers, politicians and probably a king or two breathed a sigh of relief when the cables of two oceans brought them the long-delayed words of nine old men.

—Harold Calhoun referring to the *Gold Clause cases* (*Los Angeles Times* 3/10/1935)

In the winter of 1935, the Supreme Court considered the government's abrogation of gold clauses in bonds. The *Gold Clause cases* generated relentless attention, excitement, and tension. The Court took but a few weeks to hear and decide them. This abnormally short period suggests their import. Overwhelming anticipation dominated as the cases captivated the country. The Court twice attempted to calm nerves by making unprecedented announcements that there would not be a decision for at least another week. Financial trading slowed, the papers analyzed the Court's every action, and the SEC prepared to close the markets.¹ Though they have faded from

prominence, when argued and decided, the *Gold Clause cases* were as salient as any in American legal history.

After the decisions, revelations surfaced that President Roosevelt had prepared a radio address. If necessary, he was prepared to tell the nation why he would be ignoring the Court's decision. "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" (Roosevelt and Roosevelt 1950). This address could have sparked the "most sensational and historic episode in the constitutional history of the United States since Andrew Jackson" (Krock 1935). The Court averted this spectacle by reluctantly granting the Administration a narrow victory. The speech was never delivered.

In at least some cases, the Supreme Court must rule against its inclinations in a way amenable to the other branches. Motivated by concerns about political ramifications and its legitimacy, it will retreat in these rare but important instances to disarm or preempt costly threats, attacks, and other adverse

¹The markets had only been closed on two previous occasions since 1900.

reactions. In a strategic retreat, as I define it, the Court capitulates to government pressure and renders a different decision than it would have rendered if it followed its own legal and/or policy views in the absence of pressure. Empirically, in a retreat, the case outcome will coincide with the government's preferences and conflict with what legal and attitudinal explanations would suggest. These retreats concern all three branches. They relate to the Court's decision making² and to others' ability to affect it in a small number of very important moments. This paper argues, via analytical historical narrative, that the 1935 *Gold Clause cases* were one of these instances. The Court realized that it was better off granting the Administration a victory than inviting a spectacular confrontation.

More specifically, this paper compares the set of four *Gold Clause cases* (primarily *Perry v. U.S.* (1935)) to *U.S. v. Butler* (1936). *Perry* concerned the abrogation of gold clauses in the *government's own bonds*. *Butler* considered the constitutionality of the Agricultural Adjustment Act (AAA), the New Deal effort to raise agricultural prices. The paper highlights conditional strategic retreat by focusing on *Perry* and incorporating *Butler* as a control and foil. It introduces, and uses the comparison to elucidate, three conditions which may lead to such retreats. These three conditions are (1) very strong government interest in the outcome, (2) signals of a direct attack on the Court, and (3) an environment which makes these threats credible. *Perry* met all three and the Court retreated. *Butler* did not and the Court ruled against the government. Both cases were major tests of early federal New Deal legislation concerning economic rights, liberties, and limits on governmental action. Moreover, both were highly salient and critical to the administration. The Government prevailed in one when the Court retreated and had its program devastated in the second when it did not.

Cases which satisfy the conditions and fit the strategic retreat framework are rare. The conditions are only relevant when a case (a) engenders strong disagreement between the Court and at least one other branch and (b) makes it onto the docket.³ The appointments process and docket discretion eliminate most potential instances and greatly constrict the set of plausible observations. The paper argues that

the three conditions eliminate most others. It does not claim to explain how the Supreme Court makes the dozens of decisions it does every year. Rather, it addresses when and why the Court occasionally retreats strategically. These occasional retreats enable it to make meaningful decisions in all of its other cases. Strategic retreat is important because of the significance of its applications rather than the frequency of its applicability.

Generalizing from case studies can be problematic but they are well suited for grappling with strategic retreat. They support matching details about information, signals, and timelines to behavior. I chose *Butler* as a control, without knowing how strongly it would meet the conditions, because it shared much with *Perry* except for the dependent variable - strategic retreat. Both were early New Deal cases concerning federal economic legislation central to the recovery efforts. The same Court heard both before the famous "switch in time." *Butler* is a useful control because, despite these similarities, the Court appears to have made an unconstrained decision and comprehensively stuck down federal legislation. The paper does not give *Butler* the full attention that it gives the *Gold Clause cases*. *Butler* serves as a control and is of less interest as an apparently sincere decision. It establishes a baseline suggesting that when the conditions were only weakly met, the Court was unconstrained. It thus brings the *Gold Clause cases'* unique and important aspects into sharper relief.

This historical institutional analysis makes four primary contributions. First, it provides evidence of strategic behavior in judicial review. Second, it offers and evaluates theoretical conditions in which the other branches can prompt the Court to retreat. Third, it recalls the *Gold Clause* narrative which has faded in historical prominence from its lofty contemporaneous salience. Finally, the analysis may at least partially, though cautiously, expand our understanding of the New Deal by shedding light on why the Government won some cases and not others (see e.g., Cushman 1998; Leuchtenburg 1995).

Before analyzing the cases, the paper reviews existing explanations for the Supreme Court's behavior, particularly strategic ones. It then details the three conditions. Beginning with some brief historical background, it then measures the gold clause and AAA cases against the conditions. It suggests that they were all strongly met in one instance and not in the other. Since meeting the conditions merely suggests the theory's applicability, the paper next argues that *Perry* was indeed a strategic decision. It does so by refuting legal and attitudinal explanations of the

²Here the President primarily interacts with the Court, though Congress may in other instances.

³The paper only concerns strategic decisions. The Court may often act strategically by denying certiorari and/or ducking sticky issues on jurisdictional grounds.

outcome and by making a positive case for strategic retreat. The *Perry* opinion is consistent with strategic behavior. It not only conflicts with the Justices' policy preferences. Its structure suggests that it was grudgingly geared towards reaching a necessary outcome. While it is quite possible that the *Gold Clause cases* concerning both public and private bonds were strategic, the evidence is strongest in *Perry* which applied to the Federal Government's agreements. I cautiously limit claims about strategic behavior to *Perry* while jointly discussing all of the cases. As the Court heard all of the cases together, and the media largely treated them as one, it is impossible to attribute parts of the history to any one of them.

Strategic Courts: Protecting Institutional Legitimacy

Strategic approaches to judicial decision making posit that courts, at least at times, must be sensitive to the demands of other actors, incentives, and political contexts. The literature often contrasts this view with legal and attitudinal perspectives. The former emphasizes materials like doctrine and precedent while the latter views judges as unconstrained policy maximizers who decide cases based on ideological preferences (Segal and Spaeth 2002). The common assumption of three distinct and internally cohesive models is misleading. It both understates the overlaps across, and overstates the homogeneity within, the three perspectives. While there is an explicitly defined attitudinal model, there is neither one "legal model," nor one "strategic model." Rather, they are classes of analyses which emphasize particular premises, variables, and motivations. Nevertheless, the three broad approaches do prioritize different explanations. Any application of one to a particular case should account for the others as plausible alternatives.

The diverse literature which emphasizes strategic forces comprises game theoretic and statistical applications (e.g., Knight and Epstein 1996; Maltzman et al. 2000) alongside descriptive and qualitative analyses (Graber 1995, 2006).⁴ Such approaches prioritize the fact that the Supreme Court must first protect judicial review to have influence (Epstein et al. 2004). They build from the premise that the Court must, at least conditionally, recognize political realities and act strategically. They do not necessarily deny the relevance of doctrine or policy preferences.

⁴See also Pritchett (1961), Murphy (1962), and Clayton and Gillman (1999).

Retreat is one important manifestation of strategic behavior. In it, the Court capitulates to pressure from the political branches and reaches an outcome different than the one it would have reached in the absence of pressure. In routine operations the Court is essentially free from these concerns. Attacks from other branches are rare because they are also costly to the attacker. Nevertheless, under the right conditions, political actors will deem their goals worth the costs of confronting the Court (Whittington 2003). Courts strongly prefer avoiding these attacks irrespective of their efficacy. A successful one "may seriously, or even irrevocably, harm its (the Court's) reputation, credibility and legitimacy—thereby imposing a potentially infinite cost on the institution." Following a failed attack, "the integrity of the Court may be damaged, for the assault may compromise its ability to make future constitutional decisions" (Epstein et al. 2004, 178). Strategic retreat is a step courts will take to avoid such attacks.

While macrolevel evidence of political pressure and Court acquiescence exists (Clark 2008; Rosenberg 1992), very few specific instances of retreat have been identified and detailed. The current list of such retreats in the literature includes *Marbury v. Madison* (1803; Graber 1999; Knight and Epstein 1996), *Cohens v. Virginia* (1821; Graber 1995) and *United States v. Schooner Peggy* (1803; Graber 1998) in the early republic, *Roosevelt v. Meyer* and *Ex Parte McCardle* (1869; Graber 2006)⁵ in the 1860s, and twentieth-century cases such as *Barenblatt v. United States* (1959; Epstein et al. 2004) and *Ex Parte Quirin* (1942; Katyal and Tribe 2002). Unpacking the micro-behavior requires observing the administration pose, and the Court act on, a threat. This is difficult, and thus the list above is short. The branches are rarely engage in explicit public dialogue, and the Court is highly secretive. The *Gold Clause cases* largely avoid these concerns. First, they provide an additional observation of retreat by a solidly established, relatively modern, and independent Court (see Whittington 2007). Secondly, this looming clash and strategic confrontation largely took place in the open in a highly salient case. Without knowing exactly what the Court was thinking, it is possible to observe the machinery of the threats and responses to a much greater extent in this case than in others.

Similar to scholars such as Graber (1999, 2006) and Klarman (2004),⁶ I presume that legal, attitudinal,

⁵Graber does cast doubt about whether *McCardle* was indeed a strategic decision.

⁶See also George and Epstein (1992).

and strategic factors will interact in different proportions to shape decisions in different cases.⁷ Cases in which strategic forces dominate the legal and attitudinal ones are quite exceptional. The Court has significant institutional legitimacy and authority such that it rarely needs to fret over its legitimacy. The *Gold Clause cases*, especially *Perry*, are one example of such conditional strategic retreat. Specifically, they fit Graber's (1995) "Passive-Aggressive" framework which is but one manifestation of retreat. The Court made strong assertions about its authority and declarations about the law, but then granted a hostile government a technical victory paralleling the Marshall Court cases.

Actors' Motivations and Three Conditions for Strategic Retreat:

The theoretical analysis builds from two simple and common assumptions. The first is that both the Court and the government have preferences over policy and the state of the law. The second is that direct and public confrontations in which the government ignores, attacks, and/or refuses to acknowledge a Court decision are costly to both institutions. The Court prefers to decide cases such that outcomes reflect its preferences and the government prefers that the Court not strike down its new policies. Both prefer to avoid conflict. In normal interactions, the branches may go back and forth in what many might consider a healthy functioning of the system under judicial review. The Court will strike down some laws and the government may pass altered legislation making the judicial veto a detour not a roadblock (Pickerill 2004). Strategic retreat represents one of the possible outcomes when this back and forth over policy is impossible, and the Court is indeed a potential roadblock. In these instances, the Court may rule contrary to its unconstrained preferences (legal or otherwise). It may do so to avoid an attack in which at least one other branch publicly undermines its legitimacy and influence.

A case must strongly meet three conditions to support strategic retreat. These three necessary conditions are: (1) the Court perceives that the government has a strong interest in the case being decided a particular way, (2) the Court recognizes threats of the government's willingness to directly challenge it after

an adverse decision, and (3) these threats to the Court are credible. These three conditions are connected to each other. The second does not make sense if a case does not meet the first, and the third is only relevant if the first and second are met. Therefore, in practice, only a few plausible permutations should concern us. Since we do not need to consider every conditional permutation, we can get significant leverage by comparing a case (*Perry*) that meets all three to one that fails at least one rendering the others moot (*Butler*). While the three conditions first appear too broad and too common to offer much insight, comparing *Perry* to *Butler* suggests that they are meaningful and tractable. While not a fourth condition, an all or nothing choice between achieving a policy goal and avoiding direct conflict is key to the realizing the conditions. If the process in which the Court rules on policy followed by the government amending is not possible, direct conflict and strategic retreat become real possibilities. This environment affects both actors' calculations and behaviors.

The first condition for strategic retreat is that the Court must perceive that the government has a strong interest in a policy outcome. If the Court does not recognize such an outcome preference, it will neither realize that it is in danger, nor know which way to retreat. This condition is obvious and insufficient, but there are many cases, even very salient ones, in which the other branches do not indicate a strongly preferred outcome. At times, they may even prefer that the Court deal with an important but sticky issue (Graber 1993). At others, they may not care enough to mount a public challenge. Since confronting the Court imposes a cost on the government, the use of court curbing actions and similar tools depends on both policy preferences, and the willingness to use them (Clark 2008). Retreat requires uncharacteristically high-intensity outcome preferences, and relatively few cases generate the requisite intensity.

The second condition is that the Court must perceive that the government is willing to attack it by ignoring or overtly defying an adverse decision. Even if the case is salient and the government demonstrates a strong interest in the outcome, the Court will only seriously consider retreat if genuinely threatened. The Government has two basic routes to pursue its policy following an adverse decision. It can either pass new legislation incorporating the Court's ruling, or it can dare the Court to enforce the decision by charging ahead with the policy. Only the latter is a serious attack on the Court. This is the important distinction between signaling an intention to continue pursuing a policy goal and signaling an intention to trample

⁷As Graber (2006) writes, "detailing the interactions between legal, strategic and attitudinal influences on the Supreme Court is likely to prove a more fruitful approach than academic competitions aimed at proving which single variable explains the most judicial behavior."

the Court while doing so. If the Court believes that the government will accept an unwelcome decision, or respond with modified legislation, it will feel empowered to make one. However, if the government signals a willingness to attack and/or ignore a decision, the Court will have to proceed cautiously.

The third and final condition is that threats to the Court must be credible. This notion of “credible” is broad and potentially vague. It comprises both environmental and case-specific factors. The environmental factors include the perceived strength of the President, the level of general support for the Court, and political stability. A Court that commands diffuse popular support and/or is making a popular decision, is less susceptible to attack (Knight and Epstein 2004; Vanberg 2000). Similarly, a strong reconstructive President (Skowronek 1997) may credibly collide with the Court over constitutional meaning and threaten judicial supremacy (Whittington 2007). Additionally, in periods of flux and upheaval, (e.g., war) when fundamental institutions may come into question, threats to the Court are likely more credible.

Factors specific to the observational case (the legal case and the politics around it) also affect threat credibility. Two such factors that are directly relevant to this paper are the options the government has following an adverse decision and control over implementation.⁸ The specifics of the issue will shape the options the government has to pursue its agenda after an adverse ruling. A threat to attack is more credible when an adverse ruling would back the government into a corner such that its only options are to attack or do nothing. It is less credible when less costly options such as devising a modified policy are plausible. Secondly, credibility increases when the actor making threats, i.e., the Executive, has control over implementation (or more precisely, nonimplementation). If the Executive can insure that the Court’s ruling will not take hold, its threats to negate it are more credible than when it must rely on others’ defiance.

Case Background

The gold clause episode began at 1 a.m. on March 6, 1933, Franklin Roosevelt’s first Monday as President. He declared an economic emergency and closed the banks to stop the hoarding of gold and silver coins. At this time, gold was an intrinsically valuable commodity and a denominated currency. Gold coins cir-

culated freely with paper bills. The dual currencies system functioned as long as the gold content of a gold dollar coin equaled one paper dollar’s worth of gold. Unfortunately, the depression had shattered confidence in the dollar skewing the values. The Government attempted to invigorate the economy by inflating the depressed paper currency to increase circulation and activity. This effort included monetary reforms such as the Emergency Banking Act which granted the President broad powers over currency policy. These powers were soon augmented when he was given emergency authority to literally take some of the physical gold out of gold dollars (See Barry 1934 and Kroszner 2003 for background).

Gold clauses in bonds obstructed the Government’s efforts. They protected many creditors by pegging bonds’ worth to their gold value at issuance and were understood as measures against inflation. For example, the gold clause in the World War I Liberty Bond at issue in *Perry* read, “the principal and interest hereof shall be payable in United States gold of the present standard of value.” In essence, the creditor was owed the quantity of gold that corresponded to the dollar value of the loan when the bond was purchased. There was approximately \$168 billion of debt outstanding at the time, and more than an estimated \$100 billion of it contained gold clauses (Government brief in *Perry*, 13). Since the paper equivalent of the gold value implicit in the initial contract (e.g., 50 ounces) grew as currency devalued, debtors, including major corporations and the U.S. Government, were now obligated to pay creditors more nominal dollars. This eventuality threatened to increase the debt burden, catalyze bankruptcies, and endanger the Government’s entire monetary recovery program because debtors were conducting business in the inflated currency but obligated to pay preinflation value.

To avert this problem, on June 5, 1933 Congress passed a joint resolution declaring gold clauses “against public policy.” It demanded that “every obligation . . . shall be discharged upon payment, dollar for dollar, in any coin or currency which at that time of payment is legal tender for public and private debts” (Joint Resolution, 48 Stat. 112, 6/5/33). In other words, creditors were to be repaid in current dollars which had been rendered less valuable than those they had loaned. Creditors’ grievances were exacerbated in January of 1934 when President Roosevelt reduced the actual gold content of the dollar by 41%. The gold value implicit in debt incurred in early 1933 (not to mention before) was to be repaid in devalued dollars making it worth 69% less than it would have been without abrogation.

⁸A third case-specific factor is the alignment of the political branches on the policy issue at stake (Vanberg, 2000). Threats are more credible when the other branches have similar preferences.

Not surprisingly, gold clause abrogation made its way to the Supreme Court as five challenges collectively referred to as the *Gold Clause cases*. Three, decided together, involved private bonds and were consolidated under *Norman v. Baltimore and Ohio Railroad* (1935). The other two cases addressed public obligations. *Nortz v. United States* (1935) concerned gold deposit certificates, and *Perry v. United States* (1935) concerned a gold clause Liberty Bond. The cases were heard in January of 1935. At the time, the Court had just struck down part of the National Industrial Relations Act with its 8–1 *Panama Refining Company v. Ryan* decision (the “Hot Oil” case). This decision curtailed the optimism its flexibility in the *Home Building and Loan Association v. Blaisdell* (1934) and *Nebbia v. New York* (1934) cases had created. Oral arguments in the *Gold Clause cases* commenced the very next day making them a highly anticipated early test of federal New Deal legislation.

The cases dominated the news throughout the period. On January 13, Elliott Thurston who covered them for *the Washington Post* wrote, “rarely, if ever, in its long history has the Supreme Court of the United States confronted issues of larger import (1935, B2)” On the morning after the decisions, the *New York Times* ran five front page articles about them, and they were the overwhelming focus of the news and business sections. The decisions received significantly more coverage in the *Times* than did other major New Deal cases. For perspective, the number of articles devoted to them more closely resembles that of historic moments like the moon landing or 9/11 attacks than it did other major Supreme Court decisions such as *Roe v. Wade*. The phrase “gold clause” appeared in more *Times* articles (49) on the day after the decisions than did “poultry,” (10) “minimum wage,” (19) and “abortion” (15) combined, on the days after *Schechter, West Coast Hotel*, and *Roe*.⁹ Academics also touted the cases’ magnitude and import. A month after the decisions, Michigan Law professor John Dawson began his analysis in the *Michigan Law Review* by writing “the

gold clause decisions of February 18, 1935, have already taken their place among the great landmarks of American Constitutional history” (1935, 647).

Since *Butler* has garnered relatively more attention over the years and merely serves as a control case, its history is given less attention (see, e.g., Maidment 1991, 105–21 for more background). The AAA, a major piece of New Deal legislation, sought to raise market prices of raw agricultural products. It accomplished this via supply suppression by subsidizing farmers who restricted their production to a set number of acres. It funded these subsidies through special taxes on the processing of raw farm goods. The Hoosac Mills Corporation of Massachusetts refused to pay the taxes it incurred through cotton manufacturing. It was sued in the case that became *U.S. v. Butler*. The central question was whether the manufacturing taxes were a legitimate use of the federal taxing power or an illicit federal regulatory regime. Like the *Gold Clause cases*, *Butler* was highly salient and received significant media coverage. While the one front page story that the *New York Times* devoted to *Butler* on the day after the decision pales in comparison to the five it devoted to the *Gold Clause cases*, *Butler* was nevertheless highly salient and contemporaneously recognized as critical.

Perry and the Three Conditions

The first condition is that the government expresses a strong interest in a particular policy outcome. While pinpointing a “strong interest” is often difficult, few cases have ever been as critical to the Government’s agenda as gold clause abrogation was. The Administration made it very clear that it viewed the *Gold Clause cases* as “must wins.” The Government’s *Gold Clause* briefs and oral arguments expressed the practical importance of the policy by arguing that it was absolutely necessary and that reversing it would lead to catastrophe.

Briefs play an important informational role for the Court (Epstein and Knight 1999). In the *Gold Clause cases*, the briefs informed the Court that not paying gold clause value was essential to the Government. For example, in the January 3rd *Washington Post*, Thurston wrote, “the Attorney General’s brief is an economic as well as a legal document. It gives graphs, charts and statistics culled from economics” (1935, 7). Following introductory materials, the *Perry* brief largely emphasizes the policy reasons for Gold Clause abrogation, highlights the financial consequences of undoing the policy, presents data

⁹I conducted simple searches of the *New York Times* archives (via Proquest) for the day following these landmark Supreme Court cases, and other major events, such as the moon landing, to assess how many articles the newspaper devoted to each. I attempted to use keywords that would hit all relevant articles. This approach is imperfect, but provides a reasonable idea of the relative amounts of coverage. The phrase “gold clause” appeared in 49 articles while the word “gold” appeared in 95, some of which were not about the cases. By comparison, on the day after the moon landing the word “moon” appeared in 97 *Times* articles, and the phrase “World Trade Center” appeared in 66 articles on September 12, 2001.

concerning gold indexing and currency parity in other countries, and considers other practical matters largely unconnected to case law. This policy discussion is only partially attributable to the need to demonstrate that the action was a necessary and proper extension of the currency powers. While all briefs explain, and stress the importance of, policies, the *Perry* brief emphasizes practical matters while barely linking back to case law, *Perry's* arguments, or other legal considerations until page 37. Eventually the brief shifts and emphasizes legal materials, but not until after emphasizing policy ones.

The Government's oral arguments reinforced the importance of the desired policy outcome. 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. To say that the Government only argued economic implications would be a caricature of its performance. Nevertheless, it did emphatically claim that the consequences of upsetting the policy would be too great to endure. Cummings asserted that the cases were of "almost unprecedented importance" (Special to the *New York Times* 1935, 1) and declared that to rule against the Government "would not be a case of 'back to the Constitution.' It would be 'back to chaos'" (Cummings, Gold Clause cases Oral Arguments-Lexis Nexis). In the January 11 *Washington Post*, Thurston expressed frustration with the "great emphasis laid by the Attorney General upon the 'chaos' which would result from an adverse verdict." He wrote, "much of the argument has been far afield of the central question." He continued the next day: "the Government has 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..." The Government concluded its case in much the same way that it began it. Thurston wrote of Cummings' closing argument: "... his voice was impassioned as he delivered what had more the ring of a political exhortation than of a legal argument" (Thurston 1935a, 1). Finally, reemphasizing the need for a positive outcome one last time, Cummings made a final "prayer" to the justices, taking the unusual step of imploring them to contact his team if they had any further questions.

While it is generally difficult to divine when the government is truly serious and not just position taking, the *Gold Clause cases* are striking because it was so clear. The legislation was central to the Government's program, and the Government emphasized the primacy of the desired policy result throughout the proceedings. Moreover, the Govern-

ment made its willingness to directly challenge the Court very clear. This is the second important condition, and the *Gold Clause cases* would score very highly on any measure of it.

The Government planted the idea that it would not comply with a ruling requiring it to pay gold clause value towards the end of its *Perry* brief. It referenced *Lynch v. U.S.* (1934) which concerned the federal government's abrogation of its own veterans' insurance contracts. *Lynch* thus had important parallels to *Perry*. In it, the Court held that the government could not abrogate such contracts, but that it could revoke the right to sue for the payment of monies owed. If the Government took the same approach in *Perry*, functionally nullifying a decision requiring the payment of gold clause value, it would have damaged the Court. Invoking *Lynch* was therefore threatening. The government may often indicate a desire to continue pursuing a policy agenda irrespective of the Court's words, but there is a difference between pursuing it in a way which will damage the Court, akin to saying "now let them enforce it," and pursuing it in other ways. The notion of simply withdrawing should the Court demand gold value payments falls in the former category and is the type of attack the Court prefers to avoid.

With the *Gold Clause* oral arguments completed, the President, the press, the markets, and the public anxiously anticipated the decisions. The papers immediately filled with revelations of the Government's plans to counteract a potential loss. On January 13, the day after the arguments and the first day the cases went to judicial conference, the *New York Times* reported that "quick congress action is considered." According to the front page of the *Times*, "all 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." 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 if it lost. The *Los Angeles Times* wrote an illustrative—but not unique—front page article on February 4 with the subheadline "Course Fixed Regardless of Ruling by the Supreme Court." It reported: "President Roosevelt, it was learned tonight, has decided defiantly against restoration of the former gold value of the dollar, even if the Supreme Court should rule adversely to the Government in the *Gold Clause cases*." The article declared that Roosevelt "indicated that he is ready to put his hold on the people to the test if it becomes necessary" (*Los Angeles Times* 1935, 1).

Newspapers reported a variety of possible government actions. These included revoking the right to sue for gold value and special taxes on gold clause dollars. Presaging the Court Packing plan, the front page of the January 13 *New York Times* indicated that Government officials and members of Congress “were studying the possibility of increasing the membership of the Supreme Court from nine to eleven or twelve” (AP 1935, 1). Charles Evans Hughes’s papers on the *Gold Clause cases* include a newspaper article citing a “hysterical Attorney General” bringing “frothy warnings of disaster barely concealing plain threats to the integrity of the Court,” and highlighting the “threat of a political reprisal through the packing of the bench” (Hughes Papers container 67–68). While the exact steps the Administration planned to take, particularly the national address highlighted in the introduction, were not yet known, it was evident to casual observers and Supreme Court Justices that an adverse decision would prompt immediate action. Moreover, given the nature of the case and threats, it was clear that this action would be a direct affront to the Court rather than an attempt to pass new legislation amenable to the justices.

Finally, while not confirming that the Court retreated, the newspaper coverage contained speculation that it might be concerned about political reprisals. Thurston’s February 13 analysis, though skeptical of the possibility, suggests that notions of strategic retreat were floating around Washington. He wrote that the cases have produced much speculation, public and private to the “supposed political necessity for a decision favorable to the New Deal.” He concludes: “the manner in which the case was presented, the emphasis laid upon the dire economic (if not political) consequences of an adverse verdict, gave color to suppositions either that the Government sought to coerce the Court or that the Court could be forced in such a manner” (Thurston 1935c, B2).¹⁰ In sum, not only did the Government give the Court reasons to fear a potentially damaging challenge, but the Washington community picked up on these signals. The final question, and the final condition, is whether the Court would perceive these threats as credible?

¹⁰Thurston was skeptical that the Court would act strategically, but in doing so, implies that others thought otherwise. He wrote, “it is hastily and mistakenly assumed that the court would not dare render an adverse decision on the gold cases lest it be destroyed by an assumed popular disapproval, or defied by the Administration.” He also wrote “it would be difficult to think of nine men in the world less likely to be swayed by intimidation than this court,” and “any attempt to intimidate the court would tend only to sway it in the opposite direction from that intended” (Thurston, 1935, B2).

The *Gold Clause cases* score highly on both dimensions of threat credibility. The first dimension is environmental. The cases were heard in an environment which, all else equal, makes threats relatively credible. A popular President and a large coalition carried momentum for change. The regime gained seats, rare for the President’s party, in the 1934 mid-term elections yielding them 60 Senators and 313 Representatives in the 73rd Congress. Moreover, the President and Congress were largely aligned which increases threat credibility (Vanberg 2000). The papers reported that joint responses would quickly follow an adverse ruling if necessary. Finally, the New Deal period was similar the others in which the Court has been threatened. As in the Founding and Civil War periods, the present was unstable and the future uncertain.

The second dimension of threat credibility comprises factors which vary with the details of the case and issue. Two of these attributes in *Perry*, dichotomous outcomes and concentrated control over implementation, made direct threats particularly credible. The first element of this enhanced credibility was that the policy outcome would be dichotomous. If the Court ruled that the Government had to pay gold clause value, the bonds would be worth one of two amounts. The Government could comply and pay gold clause value, or it could ignore the Court and pay the paper money value. The issue was neither conducive to a middle ground comprise, nor did it offer the Government alternative methods to achieve the same goal. The only way to avoid paying gold clause value, aside from winning the case, was to trample the Court by defying it. Secondly, the Government had full control over implementation and noncompliance. As the payments would come from its own coffers, it did not require any other parties’ acquiescence to prevent bond holders from receiving gold clause value. This control over implementation made threats to disobey more credible since the Government had the capacity to insure noncompliance and could unilaterally impose its own policy. In short, direct challenge was the Government’s best, perhaps only, recourse, and the Government had the capacity to carry it out and enfeeble the Court. This reality made the threat to do so credible.

Butler and the Three Conditions

For the three conditions to be meaningful, they must actually distinguish cases. This section suggests that they do by measuring *Butler* against them. *Butler* meets the conditions differently than *Perry*, particularly

condition II, and is thus an informative control case. Similar to *Perry*, the desired outcome was important to the Government, but unlike *Perry*, the threats to directly challenge the Court were lacking. This is largely because the Government had, or at least thought it had, other options. Finally, what threats there were, or what potential threats there could have been, would have been less credible in *Butler* because of case specific differences.

The AAA case is similar to the *Gold Clause cases* on the first condition. The legislation was central to the recovery program. The Government's presence in the courtroom, led by the attorney general, evinced its seriousness. Moreover, as in the *Gold Clause cases*, the signals in the newspapers left little doubt that the Government cared deeply about the policy at stake. For example, as Charles Merz reported in the *New York Times* on December 8, "that the administration desires and intends to carry it on is plainly indicated by the President's recent description of the AAA as a 'permanent plan for American Agriculture'" (Merz, 1935, E3).

Additionally, like its *Perry* brief, the Government's *Butler* brief also contained economic and policy data. It too emphasized the practical importance of the policy in the unique circumstances of the 1930s, but the ordering of the sections suggests it was less extreme in this regard than the *Perry* brief. The *Butler* brief first considered a wealth of case law concerning federal power, and made arguments linked to legal materials, before turning to a lengthy discussion of the Hamiltonian conception of government and detailed policy data. Thus, in the briefs and more generally, *Butler* was weaker, at least in degree on the first condition. While *Butler* was clearly vital, the rumblings about consequences, claims about the pivotal nature of the legislation, and the emphasis on policy were more explicit, dire, and intense in the *Gold Clause cases*. Nevertheless, both strongly meet the first condition which is merely a starting point. It is on the second and third dimensions, where the differences become manifest.

It is easier to identify the exceptional nature of the aggressive signals (condition II) in the *Gold Clause cases* when they are contrasted with the AAA case. In *Butler*, the newspapers again filled with indications that the Government would not accept an adverse ruling quietly. The key difference is that these reports suggested that the Government would not attempt to ignore and undermine the Court; but rather, would pass new legislation to incorporate its forthcoming ruling. In the December 8 *New York Times*, when the AAA case was before the Court, Charles Merz quotes President Roosevelt himself saying that if the Court

invalidates the AAA taxes "we will have to face the problem of financing existing contracts for benefit payments out of some new form of taxes" (Merz 1935, E3). On the same day, Charles Hurd reported in *Times* that President Roosevelt "would welcome legal decisions on the validity of the New Deal legislation in question in order that the atmosphere might be clarified and, if necessary, substitute legislation enacted" (Hurd 1935, 8). A couple of weeks later, on December 29, 1935, when the Court was conferencing, Frank Lynn wrote an article in the *New York Times* headlined "AAA Changes Hinge on Court's ruling" (Lynn 1935, E7). He reported that "what will replace the AAA, if it is invalidated, nobody knows. The form of the substitute must depend upon the scope and wording of the Supreme Court decisions" (Lynn 1935, E7). He then continued by listing a menu of possible legislative changes which could remedy the various maladies the Court may find. He wrote, paraphrasing Secretary of Agriculture Henry Wallace, that there was "no decision which would not be received calmly . . . and for which there is not an acceptable readjustment" (Lynn 1935, E7). These articles evince a different approach than the gold clause belligerence.

Quoting this sentiment many more times would be easy, while citing hints of outright attack would be very difficult. While it would have been upset at an adverse ruling in the AAA case, the Administration indicated that it would respond by attempting to satisfy the Court's demands. This method of pursuing a policy agenda in the face of an adverse decision neither threatens the Court nor induces retreat. In *Perry*, the Government signaled that it was prepared to tell the Court what was constitutional. In *Butler*, it signaled that it was prepared to accommodate the Court's pronouncements. Thus, in the first case the Court had reason to fear a damaging frontal assault while in the latter it did not.

Finally, while the Government made few direct threats in *Butler*, we can still assess their hypothetical credibility. Two case-specific factors, the perceived availability of nonattack options, and diffuse control over noncompliance, would have made threats less credible in *Butler*. As the analysis of condition II demonstrates, the Government acted as though it had other options for shaping agricultural prices. Threatening to attack when less costly routes to the same policy goals are available is less credible than it is when such options are lacking. A threat to ignore the Court would have been more credible in the *Gold Clause cases* where the Court risked backing the Government into a binary choice between attacking

and accepting the undesirable outcome. Secondly, implementing the AAA required the cooperation of manufactures affected by the excise taxes. Thus, the Government could not ignore the Court on its own. If the Court declared the taxes illegitimate and thousands of manufactures decided not to pay them, the Government would have a hard time taking the law into its own hands. It is difficult to compel noncompliance when compliance is in others' best interests. In contrast, in *Perry*, the Government controlled implementation. It could simply refuse to pay gold value on its own bonds from its own accounts. While the cases were quite similar on the environmental dimensions of threat credibility because they took place in similar political and economic atmospheres, they are still distinguishable on case specific attributes. This analysis suggests that *Butler* would have been less amenable to credible threats of attack.

In sum, both cases strongly meet condition I. The policy outcome was critical in both. Secondly, while a direct threat to the Court in *Butler* could have been credible (condition III), it would have been less credible than in *Gold Clause cases*. While the cases differ on condition III, condition II is the pivotal difference. This difference largely hinges on the fact that in *Butler* the Government thought it could pursue its policy goals through revised legislation. Anyone reading the newspapers would have known that while the Government was prepared to take steps to insure its desired practical outcome in both cases, it was prepared to flout the Court in *Perry* but to pass new legislation incorporating the Court's concerns in *Butler*. Thus, the Court was given no reason to retreat in the later while it was essentially given a choice between retreat and an ugly incident in the former.

In *Butler* the Court broadly struck down the use of the Federal taxing power to regulate agricultural markets. Contrary to its previous beliefs, the Administration's contingencies were ill-prepared for the Court's sweeping condemnation. This decision was ostensibly consistent with the Court's legal and/or attitudinal preferences. Because this decision was unlikely strategic, it is relatively unimportant to unpack the outcome in detail given the goals of the paper. The case weakly met the conditions relative to *Perry*, and the Court made an ostensibly unconstrained decision. In contrast, the fact that the *Perry* case strongly met the conditions is insufficient to conclude that it was a strategic retreat. The remainder of the paper focuses exclusively on the *Gold Clause cases* to argue that the Court retreated in *Perry* where the conditions were strongly met.

Legal, Attitudinal and Strategic Models, a "Bizarre" Decision, and Retreat

Testing *Perry* against prominent explanations of judicial behavior bolsters the claim that, relative to most other cases, strategic motivations shaped the outcome. This analysis suggests that legal and attitudinal explanations are not persuasive and makes a positive, albeit inferential, case that *Perry* would have ended differently were it not for strategic motivations. Considering these alternative explanations, and showing that a case produced an outcome different than they would suggest it should, is important when claiming that retreat shaped the result. While trying to classify a case into one of three stylized models does not do justice to the complexities of judicial decision making, such abstractions do provide useful alternative explanations.

When existing doctrine is relatively authoritative, the Court can rule consistent with it uninhibited by institutional concerns (Knight and Epstein 2004). When it is not, a second, "political dimension" (Klarman 2004), becomes important. In *Perry*, doctrine did not dictate an outcome. This flexibility could have led to a decision based on the Justices' political attitudes which were not sympathetic to the Government's side. Instead, the Court responded to the flexible legal landscape with a complex opinion which followed a circuitous route to grant the Government a victory. This opinion not only reached a conclusion antithetical to the Justices' attitudes, it reached it in a very indirect way. It bypassed the straightforward legal materials that could have supported the outcome. The best explanation for this opinion is that it reflects the Court's reluctant acceptance of the strategic imperative to grant the Administration a victory.

Legal Considerations: Uncertainty and Conflicting Precedents

The existing doctrine in all of the *Gold Clause cases* was wrought with ambiguity and conflicting precedents. The strongest evidence of a strategic retreat (in the absence of a smoking gun) would be the Court blatantly ruling in favor of the government against clear legal materials. This level of clarity is rare in important Supreme Court cases. On the one hand, the reality that the Court could choose from conflicting precedents makes it more difficult to persuasively demonstrate strategy over doctrine. On the

other hand, the flexible legal materials make it more likely that political considerations shaped the outcome. Strategic decisions are rarely purely strategic and rarely wholly contradict established doctrine and precedents. Instead, they must rely on them—often creatively—to reach strategic ends just as the *Perry* decision did.

The *Gold Clause cases* presented three central constitutional questions. The first question concerned the prerogatives implicit in regulating a monetary system: is legislation that interferes with financial contracts a necessary and proper policy action under the Article I currency power?¹¹ Control over the monetary system is one of the few powers enumerated to the federal legislature. The Court had to decide whether it was broad enough to include actions which altered debt contracts linked to currency values. To strike down abrogation, it would have to find that the Congressional act was not a necessary and proper exercise of its delegated currency power. While the Court recently considered similar issues in the *Blaisdell* (1933) case where it upheld Minnesota's "Mortgage Moratorium" law, the precedent did not directly apply. The contract clause only explicitly limits state governments. Thus, the *Gold Clause cases* concerned the breadth of the currency power rather than the contract clauses' restrictions. Though the Court's willingness to accept contract abrogation in the exercise of "emergency powers," applied, the Minnesota decision did not directly point to an outcome. Though *Blaisdell* ostensibly made contract abrogation easier in a federal case, the Court would have to make a different determination in the *Gold Clause cases*. In fact, *Blaisdell* was barely mentioned in any of the briefs or law review articles and, as it turned out, was not cited in the opinions.

The most relevant case law concerned disputes over gold coin and paper currency. These questions about Congress's reach into financial contracts largely dated to the Civil War recovery. The precedents conflicted and were seemingly irreconcilable. The *Legal Tender Cases* (1871) held that the currency power comprised the authority to declare paper greenbacks on par with gold. It prevented creditors from discriminating against paper and appears to sanction gold clause abrogation. *Trebilock v. Wilson* (1871), decided one week later, cut the other direction. It affirmed *Bronson v. Rodes* (1869) and held that debt contracts *specifically* calling for repayment in gold coin were beyond the government's reach providing the basis for Gold clause bonds.

As Maidment¹² described it, the case law ran in "two, almost opposite directions" (1991, 69). The currency power appeared broad enough to support legislation concerning gold versus paper contracts, and narrow enough to shield explicit gold contracts. Moreover, none of these precedents was exactly on point. They all concerned the physical medium, gold versus paper, to be repaid. In contrast, the *Gold Clause cases* concerned *gold value* contracts. These contracts called for gold, or its currency equivalent, as insurance against inflation. This question was less about Congressional control over forms of physical currency and more about its authority to change the value of agreements linked to physical currency. Thus, the vital question, whether altering gold-indexed contracts was a legitimate use of the currency power, was a new one.

The second central question did concern the extent of citizens' protections against contract infringement. The Court had to assess the propriety of legislation which explicitly targeted certain contracts. This element of gold clause abrogation prompted concerns about due process liberty protections. The Court had long accepted that legitimate exercises of power could *incidentally* alter contracts. The novelty was that the legislation in both the private and public *Gold Clause cases* did not incidentally alter bond contracts. It *unambiguously targeted* them. The *Blaisdell* case recently considered this issue at the state level. Hughes' opinion in the Minnesota case provided room for a state government to explicitly alter contracts, but did so using an "emergency powers" rationale without recognizing a new general power (Maidment 1991, 36). Moreover, the Minnesota case concerned state legislation whereas the *Gold Clause cases* stemmed from federal acts. While *Blaisdell* ostensibly provided the federal government some flexibility, the issue of whether the federal currency power could be used to directly alter contracts was also germane and relatively novel.

The third important constitutional question was only relevant to the *Perry* case concerning U.S. Government bonds. The Court was asked: could Congress alter its own contracts? It turned out that this distinction was pivotal. The most relevant recent decision was *Lynch v. U.S.* (1934). It held that the government could not abrogate its own veterans' insurance contracts, but that it could revoke recipients' rights to sue for benefits. This principle did not bode well for the Government's claims (see, e.g., Hart, Jr. 1935, 1067). Additionally, abrogation arguably implicated the constitutional provisions concerning the borrowing power and the

¹¹See Maidment (1991) for a concise summary of the legal issues

¹²See also, Post and Willard (1933), Barry (1934) and Hanna (1933) for *ex ante* discussions

sanctity of the public debt.¹³ There was at least a plausible argument against the Government's actions based on the claim that they undermined the public debt. The borrowing power and government debt issues were especially complex when combined with the *Lynch* holding. One can safely say that whether altering its own agreements was a valid exercise of federal power was a difficult question requiring a resolution and that plenty of legal factors tended against it.

In sum, the Court had to resolve three vital questions which were novel and/or wrought with conflicting precedents. This legal landscape provided "ample materials for a decision either way" (Hart, Jr. 1935, 1068). The lack of consensus amongst those that endeavored to proffer predictions supports this assessment. Some felt the Government would win, others felt it would lose. Some expected the Court to sustain gold clauses in private contracts but not the Government's while others believed the opposite.¹⁴ In sum, the legal landscape was not controlling in the *Gold Clause cases*. This means that the Justice's attitudinal preferences could shape the outcome, but the next section demonstrates that this explanation is wanting as well.

Attitudinal Considerations: Unsympathetic Justices

Novel questions with ambiguous precedents about important policy matters are consistent with the attitudinal model's conditions (Segal and Spaeth 2002). While one might expect to see the justices voting their policy preferences against the government, attitudinal explanations do not seem to fit the *Perry* case.

¹³Hart did not find the "credit" or "validity of debt" arguments terribly persuasive, but did acknowledge them as valid questions. "There was at least some justification for arguing that a refusal to honor a gold clause in a public obligation was a questioning of the public debt" (1935, 1068).

¹⁴"Everything points to the presumption and almost certainty that the decision would uphold the gold clause" (Garis 1933, 223). On the other hand, Ralph Robey reported in *the Washington Post* on 1/14: "there are few, if any, who believe that the Court will render a decision wholly adverse to the Government," and that, "some believe it may decide that the repudiation of the gold clause was unconstitutional only in the case of Government obligations" (Robey 1935, 18). Robey directly contradicts the *New York Times'* report of 2/19 that Wall Street "had conjectured that the gold clause might be sustained in private contracts and abrogated in government obligations" (Staff 1935, 16). Furthermore, Robey wrote that "others hold that a more likely decision would be that the repudiation of the gold clause was constitutional but that the confiscation of gold at a price below that being paid by the Government in the open market was without legal warrant" (Robey 1935, 18), a prediction which was essentially the inverse of the actual outcome in *Perry*.

The Justices were not compelled by legal factors and had strong attitudinal and moral predispositions *against* the Government's position, yet they held for it.

The *Nebbia* and *Blaisdell* decisions suggest that the Court had some attitudinal inclinations for allowing intervention in contracts during economic emergency. Nevertheless, its general affinity for contracts was well known. More importantly, there is direct evidence that the Justices abhorred the Government's actions concerning its own contracts. While judicial preferences beyond liberal/conservative are often difficult to detect, in this case, there is direct evidence of the Justices' sympathies. The famous conservative "Four Horsemen," McReynolds, Butler, Van Devanter, and Sutherland, who were the most supportive of contract rights, were joined in their outrage over the Government's actions. Brandeis, famous for allowing economic realities to affect the law called the action "terrifying in its implications" (Brandeis 1933, 523). Similarly, Justice Stone "sorely troubled by the Government's action vowed never again to buy securities from a government so faithless to its obligations" (Mason 1956, 390). Finally, Hughes was "deeply perturbed by the spectacle of the government repudiating its word" (Pusey 1951, 736). It is clear that many of the Justices' sympathies did not lie with the Government. This suggests that the decision to uphold the actions, especially in *Perry*, was probably an unenthusiastic one at best. Had the justices simply voted their policy preferences, it is likely that a solid majority would have forced the government to meet its gold clause obligations.

This would not be the only case in which the Justices upheld economic regulations they did not like. Brandeis, for example, did so frequently. Importantly, as the subsequent analysis will demonstrate, in the *Gold Clause cases*, Justice Stone provided an option for those inclined to defer to the government against their own policy preferences. Four others chose to bypass this straightforward route, condemn the Government's actions, and declare them unconstitutional before awarding it a technical victory. This path suggests that the *Gold Clause cases* were not an instance of judicial deference over attitudinal preferences but one of strategy over attitudes.

Bizarre Decisions, Strategic Motivations

Knowing only that the existing legal doctrine was ambiguous at best, and that the Justices were attitudinally

inclined against the Government, one might predict it would lose. The fact that the Government won in spite of these forces suggests that some other strong factor, judicial retreat, proved decisive. In addition to the actual outcome in *Perry*, the way it was reached furthers this conclusion. Consistent with the aforementioned attitudes and suggesting its true feelings, the Court harshly condemned the Government's actions before granting it a technical victory. It could have simply and concisely found the actions necessary and proper and extended the *Legal Tender* precedent, but it chose not to. This approach suggests strategy over soundness. Many struggled to comprehend exactly what the Court had done. Immediately after the cases were decided, Harry Hart wrote in the *Harvard Law Review*, "what was confusing to the reporter at the first reading is even more so to the commentator at the hundredth. Few more baffling pronouncements, it is fair to say, have ever issued from the United States Supreme Court" (Hart, Jr. 1935, 1057). The baffling opinion is best understood as a strategic retreat.

Contemporaneous coverage indicates that the Government struggled in Court and rules out the possibility that it tipped a borderline case through skillful lawyering. In fact, these accounts hint at strategic retreat. Thurston wrote on January 11 that the Government did not "have a smooth going yesterday," it made an "extremely poor showing in presenting its side of the case," and was "constantly driven on the defensive." For example, Justice Stone, a presumptive supporter, mocked the Government's position by asking: "Congress couldn't declare what my farm was worth and then take it without just compensation, could it?" (Thurston 1935, 1). Thurston's analysis is telling. It suggests that an Administration victory would be the result of the Court feeling compelled to grant one. He wrote, the Government counsel "palpably suffered in comparison with their adversaries" and highlighted speculation that they were bombarded with questions due to a "desire on the part of the Court to elicit some substantial reasons for deciding the cases as the Government believes it should decide them" (Thurston 1935, 1). The Court's treatment of the Government at oral arguments furthers the expectation that the Government would lose as the Justices' questions are often indicative of their votes (Shullman 2004).

The strange, and strained, *Perry* majority opinion lends credence to these suspicions. It appears especially suspect in comparison to the straightforward decision in the private bonds cases (*Norman v. Baltimore and Ohio Railroad*, 294 U.S. 240). There,

the Court reviewed the precedents related to greenbacks and concluded that the enumerated currency power included the steps taken in 1933. "In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority" (294 U.S. 316). With this hands-on regulation of currency deemed acceptable, Hughes was able to assert that "contracts, however express, cannot fetter the constitutional authority of the Congress" (294 U.S. 307). The Court found abrogation a permissible exercise of the currency power even if it explicitly targeted preexisting contracts.

Justice Stone offered the Court a similarly straightforward and coherent route in *Perry*. He reluctantly accepted the Government's repudiation of its own credit paralleling the private bonds opinion. While he found the Government's actions distasteful, he believed that the policy was a legitimate use of the currency power. "... the Government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune..." (294 U.S. 359) In contrast, Butler, McReynolds, Sutherland, and Van Devanter found the act unconstitutional in principle and believed *Perry* was entitled to relief. McReynolds' dissent must rank amongst the most spectacular ever. He departed from his text and delivered an "extemporaneous speech bristling with scorn and indignation" that "startled spectators," by sermonizing with "sarcasm and irony behind sentence after sentence." He declared "it is impossible to overestimate the result of what has been done here... the Constitution as many of us have understood it has gone."¹⁵

Stone's concurrence was consistently deferential, the dissent was consistently sincere, and both were consistently clear in their conclusions. None of which can be said for Hughes' majority opinion which suggests strategic retreat through its approach and creativity. The Court, apoplectic at the Government's abrogation of its own bonds, stood against it on the merits and in its rhetoric but then found for it in the remedy. The opinion comprises two potentially contradictory sections reminiscent of Marshall's opinion in *Marbury*. Writing for Brandeis, Cardozo, and Roberts (and for the Court thanks to Stone's vote to deny redress), Hughes found the act itself unconstitutional, and scolded the Administration, before ultimately concluding that *Perry* was not entitled to

¹⁵There is no official transcript. I rely on *The New York Times* and *Wall Street Journal* accounts (2/19/1935) and (2/23/1935), respectively.

relief. The key distinction for the Court, and the source of complexity, was the Government's abrogation of its own contracts.

One may have stopped part way through the majority opinion and assumed the Government had lost (*Perry v. U.S.* 1935 294 U.S. 330). It began with a moral lecture which nastily condemned the Government's actions. For example: "the Government seems to deduce the proposition that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient." It continues by declaring the "credit of the United States an illusory pledge" (294 U.S. 350) and that "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 . . . To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation" (294 U.S. 351). Following this harsh and potentially unnecessary sermon, the Court declared the actions "beyond the Congressional power."

After striking down the action, Hughes made a surprising U-turn. He declared: "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" (294 U.S. 354). After aggressively condemning the Government, the Court availed itself of the "Malolo Doctrine" which was introduced in briefs and oral arguments. This contingency argument was that there could be no relief without an active domestic gold market. Holding that taking gold out of circulation was legitimate, the Court declared that "it is inadmissible to assume that he (Perry) was entitled to obtain gold coin for recourse to foreign markets" (294 U.S. 357). Conveniently shifting to a more literal "gold-commodity" interpretation, the Court stated that without an accessible gold market, Perry could not demonstrate that he had suffered a loss. As he would have to immediately return that gold to the Federal Reserve, Perry had not "shown, or attempted to show, that in relation to buying power he has sustained any loss whatever" (294 U.S. 354). Abrogating Perry's gold clause was appallingly unconstitutional according to the Court, but he still did not have a claim to enforcement of it.

The logic of the majority's opinion is strained. It initially interpreted the bonds as contracts for "gold value," security against inflation, and rejected a simple "gold as a commodity" interpretation. Once the Court

wrote that the clause "obviously was intended to afford protection against loss" (294 U.S. 348), the fact that Perry could not avail himself of a market for actual gold is an unsatisfying solution. If the Court decided that he had literally contracted for a pile of gold he may have been out of luck. Such a pile of gold would have been illegal and irrecoverable. Since the Court explicitly decided otherwise elsewhere in the opinions, the switch back to a literal gold contract interpretation when it was convenient is untenable. As McReynolds pointed out in dissent, while Perry could not personally sell gold in a free domestic market, gold was an international commodity and there were ways of ascertaining its paper value.

Once the Court declared abrogation unconstitutional, the contracts were seemingly valid. The ruling seemed to mean that Perry now held a contract entitling him to the gold value of his loan, but he was not entitled to collect a cent. The Court declared that the gold clause contract meant what Perry said it did, yet was still only worth what the Government claimed. As Seth Waxman, Solicitor General under President Clinton, recently said of this logic while arguing that it made sense given the political climate and economic realities at the time:

It was the greatest of all technicalities, but it could save the legislation in those desperate times . . . And with respect to the *Gold Clause cases*, it was the result, not the principle, that mattered . . . If the gold clauses were upheld, a creditor who made a \$100 loan would receive \$169; if there were invalidated, the creditor would receive only \$100. How could such a great difference in payment be no harm? (2000, 2399)

The Court did make a brief purchasing power claim, which, as Waxman argues, had some validity. Hughes' papers do indicate a sincere concern for purchasing power. He kept clippings of articles expressing a variety of viewpoints about the real implications of gold clause policy (Hughes Papers container 67–68). It is thus possible that Hughes genuinely believed that Perry had not suffered a loss. There was a strong argument to be made that the contracts' gold value would have been artificially inflated by the Government's policy rather than their paper value improperly devalued by it. Nevertheless, if the case truly boiled down to the real value of gold and paper dollars, the opinion should have done more than simply brush aside Perry's claim. Were it the best explanation of the opinion, it is hard to imagine that purchasing power would only comprise a few sentences of an opinion in which the Court primarily lectured the administration indicating its true beliefs.

Another plausible counter explanation, that the decisions reflect the Court's effort to make the best of a tough situation and help enact a reasonable economic policy, is similarly wanting. If the Court sought to help the Government help the economy, it surely could have found a better way than its *Perry* opinion. The Government only won because gold did not circulate freely. The Court's ruling put the Government in a box and limited its options for future policy making. Additionally, if it was motivated to help during the depression, it could have written an opinion providing more support for the Government, and inspiring more confidence in its economic policies and currency, than the narrow and nasty one it produced.

Finally, some of the earliest and most prominent analyses of the decisions provide additional support for the proposition that they were strategic and practical ones. These commentators, fully immersed in the episode's ethos, lauded the result while acknowledging, and perhaps even celebrating, the distance the Court stretched to achieve it. Three days after the decisions, Walter Lippmann began a piece in the February 20 *Los Angeles Times*:

It is not too much to say that any other decision by the Supreme Court would have created an almost impossible situation... In the event of, therefore, of an adverse decision on some or all of the cases, Congress would have been compelled to take measures to circumvent the Court's decision. This would seriously have impaired the Court's authority... The alternatives would have been an economic convulsion or a deliberate nullification of the Court's decision by a Congress that would be branded as a violator of the sanctity of contracts. (Lippman 1935 A4)

Long before there was a literature on strategic court behavior, Lippmann declared, referring to the political and economic consequences, "it was this consideration, rather than any minute hair-splitting about legal definition, which was bound in the end to govern the opinions of the Court" (Lippman 1935, A4).

Similarly, Harvard professor Thomas Reed Powell and Judge Learned Hand agreed with the result but found Hughes' approach bizarre. Powell mocked, "how it could be held that Congress may not renege on a national promise to pay in gold of specific density, and then apply to the bondholder the tort measure of damages instead of the contract one, well nigh passes comprehension. Only Mr. Justice Stone of the majority found the appropriate way to reach the well nigh necessary result" (Powell 1956, 86). Hand was similarly befuddled by the majority's route to a desirable outcome. "Unless I misconceived it, (the *Perry* opinion) it means that though Congress may not

repudiate the promise, it may make reception of performance unlawful... To trick up a lot of international stuff as though it were law frankly makes me puke as dear old Holmes used to say" (Mason 1956, 392). If Hughes, Brandeis, Cardozo, and Roberts sincerely believed what they wrote, it is difficult to imagine that they could not articulate it more clearly so that at least their supporters could convince themselves it was a legally solid decision.

As Powell points out, Justice Stone's concurrence could have provided a much clearer and more convincing decision in the Government's favor. Had Brandeis and the others simply been deferential in spite of their personal abhorrence of the actions, they could have joined Stone and avoided unnecessary issues and complications. Given the alternate route Stone illustrates, it is difficult to ascertain why the majority opinion was written as it was without ascribing the first half to genuine beliefs and the second to expediency. Why go to all of 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. Together, the two halves met the imperative of assembling a coalition of five justices who hated the Government's actions, to grant it a victory and avoid a costly attack.

Conclusion

In the 1935 *Gold Clause* cases, the Administration extracted a crucial policy victory by appealing to the strategic instincts that the Court originally evinced in *Marbury*. Using *U.S. v. Butler* as a control while thoroughly analyzing the *Gold Clause cases* highlights the conditions under which the Court may retreat. It also highlights when and how the President may influence the Court. The Court will only consider retreat when the government has an abnormally large stake in the outcome, when it directly threatens to undermine the Court, and when environmental and case-specific factors make these threats credible. When the government must choose between attacking the Court and losing its policy, these conditions are more easily met. When the government can pursue its agenda without undermining the Court, they are harder to meet.

Additionally, the analysis suggests a partial explanation for why the Government won some New Deal cases and lost others. Under the right conditions,

and motivated by overwhelming necessity, the Government was able to make a case-specific threat and extract a victory. Though the Court may not have known the details, the President's speech and plan of action reveal how critical it was to reach the "right" decisions. Instead of making a dangerous stand in 1935, the Court retreated while asserting moral authority over the law. It was able to return only weeks later to begin evaluating and contesting the remainder of the New Deal. *Butler* was one of the cases in which the Court used this authority. As it did not meet the conditions like the *Gold Clause cases* did, the Court was free to rule against the Government. This paper is insufficient to attribute the pattern of New Deal decisions to conditional strategic behavior, but it does provisionally point in that direction.

At a minimum, the *Gold Clause cases* should be recalled among the most salient and tense episodes in the Court's history. More importantly, we should remember them as landmark decisions in which the Court retreated. It simultaneously helped to save the New Deal and preserved the legitimacy it would use to confront it. The timely strategic maneuver deftly avoided what would surely have been a memorable confrontation with the Administration. It prevented the early New Deal test from becoming a pyrrhic victory for the Court. The Court recognized that the Government could not afford to lose and, more importantly, that it could not afford to win. The Chief Justice simultaneously yielded to the Government while retaining and reasserting the Court's authority. It would famously use this authority in the ensuing months.

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