A Legal History of Irrational Exuberance

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A LEGAL HISTORY OF IRRATIONAL EXUBERANCE

Daniel W. Levy

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INTRODUCTION

Economic reasons . . . have failed entirely to explain the phenomena of panics. So it may prove wise for us to let our eyes draw near, to witness this phenomenon in action; to breathe the breath of the panic; to follow its unerring progress; to watch its human struggles; to study the thing itself. Where so many abler minds have preceded us, we can scarcely hope to solve the mystery. Still we may learn something new, something heretofore unsuspected and entirely different from what has generally been accepted.¹

But how do we know when irrational exuberance has unduly escalated asset values, which then become subject to unexpected and prolonged contractions . . . and how do we factor that assessment into monetary policy.²

Panics and crises are not conventionally thought of as ideal moments for society’s best decisionmaking. Indeed, the frenzied (albeit short-lived) over-reaction to Federal Reserve Board Chairman Alan Greenspan’s suggestion that the stock market may be a bit too bullish is only the most recent example. While the popular usage of the word “crisis” connotes an emergency state of affairs, perhaps even a chaos which demands hasty reactions, the formal derivation nonetheless signifies the point in the progress of a disease at which the physician must make his or her most important

² Alan Greenspan, Address at the American Enterprise Institute for Public Policy Research (Dec. 5, 1996), cited in Excerpt from Speech by Greenspan, N.Y. Times, Dec. 7, 1996, at 37. For a description of the reaction to Greenspan’s comments, see generally Dollar Tumbles after Comments by Greenspan, Then Rebounds, N.Y. Times, Dec. 7, 1996, at 38. Several years later, Greenspan pointed specifically to history as a poor guide in answering his question about an overvalued stock market and in forecasting the business cycle. He said in congressional testimony:

I think that history tells us that there will be a correction of some significant dimension. . . . What it doesn’t help you on very much is when. And indeed history is strewn with periodic contractions of significant dimensions and I have no doubt that human nature being what it is that it’s going to happen again and again and again.


As I shall do, he focuses his attention on consumer debt. “The real danger exists if there is an awful lot of debt which, in the event of a significant stock market contraction, then all of a sudden becomes unserviceable.” Id.
HISTORY OF IRRATIONAL EXUBERANCE

decisions, often whether the patient can survive without radical and invasive treatment. This essay puts the derivation to the test by looking at the reactions to economic catastrophe and crisis of a class of professional decisionmakers. Judges’ reactions to panic and crisis are contained principally in judicial opinions evaluating the constitutionality and propriety of actions taken by government and citizens during major economic upheaval and instability. And these opinions articulate distinct views of the nature and inevitability of, and the solutions to, economic panics and crises.

This essay is a legal anthropology of these competing visions of panic and economic crisis. Through five sets of cases chosen from the Panics of 1819, the Panic of 1837, the post-bellum era, the Panic of 1893, and the Great Depression, I describe how the Supreme Court articulates a vision of the business cycle in legal, moral, and political terms, and how these visions drive the creation of formal legal doctrine. The pressure of panic, even when looked at by judges after the fact, squeezes ideology from the Court’s every pore, often in the form of a partially articulated political economy grounded in constitutional terms. These competing visions, legal “catharses for the prevailing pains and pressures,” make for rich comparison, and reveal an interesting story about the uneasy path towards federal stewardship over the macroeconomy and federalization of economic levers in the United States.

The first set of cases involves early bankruptcy and currency cases decided in the shadow of the Panic of 1819, “[the] first great economic crisis and depression . . . that could not simply and directly be attributed to specific dislocations and restrictions . . . [Nor was it attributable] to the machinations or blunders of one man or to one upsetting act of government . . . .” During the entire nineteenth century, the federal government was chronically unable to pass a comprehensive bankruptcy scheme that could withstand political scrutiny for more than a few years. As a result

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3 In fact, a secondary, although obsolete definition of the word crisis is “judgement.” 2 OXFORD ENGLISH DICTIONARY 27 (2d ed. 1989).
5 SAMUEL REZNECK, BUSINESS DEPRESSIONS AND FINANCIAL PANICS: ESSAYS IN AMERICAN BUSINESS AND ECONOMIC HISTORY 7 (1968).
6 See infra Part II.
8 The ideological conflicts behind this inability are elegantly explored in Robert
of a vacuum in a key regulatory regime, state legislatures passed traditional debtor relief measures and forced the Supreme Court to struggle with the necessity and morality of discharging the obligations of insolvent citizens. States also attempted to act as lenders of last resort and to provide fresh credit. Whether such laws were permissible begins a narrative about the nature of money and the roles of the state and federal governments may play in the macroeconomy.

The second set of cases comes from the era following the Panic of 1837. They continue the contest between the federal and state governments over regulation of money and banking. Through these cases, I consider judicial attitudes towards speculation and excessive risk-taking, often the putative cause of panics, as well as track the more difficult metaphysical issue of the exact nature and status of money under the Constitution. I also begin to look at the Court's opinions as to the proper role of the government in a Jacksonian economy that was changing from agrarian to industrial: was it to be a safety net, shepherd, steward, fiduciary, trustee, market-maker, or something else?

I choose the third set of cases from after the Civil War and the early 1880s to continue the narrative begun in the 1830s about the nature of money and increasing federal responsibility over its regulation. Cases involving the constitutionality of paper money mark another important trend, the evolution of the justification for federal control over money. What had started as a tool to finance the government's own projects became a tool to promote economic growth or to redistribute wealth. As we shall see, the background of the judicial struggle to articulate a systematically coherent theory of money is and always has been economic crisis. The cases revolving around the power to create legal tender present an example of how extraordinary monetary measures designed to guarantee the federal government's survival and preeminence during wartime may become the norm of post-crisis government.

The fourth set of cases has seemingly little to do with economic regulation or crises. Here I consider from a rhetorical perspective Supreme Court responses to very real threats to social order that


9. See infra Part III.

10. See infra Part IV.

11. See infra Part V.
labor unions, specifically the American Railway Union, presented after the Panic of 1893. Since the Federalist era, one of the looming fears about economic crises has been their ability to generate Hobbesian social conflict, to destroy "all confidence between man and man." 12 Excepting the Civil War, at no time in U.S. history other than the mid-1890s was there more of generalized crisis in social and economic order, and thereby a challenge to established institutions. The responses by judges reveal much about their conceptions of the role of the Court and other federal institutions in the maintenance of a contractual social order.

The fifth and final set of cases 13 arises out of challenges to actions taken by the Roosevelt administration during the Great Depression. They bring us full circle on the question of federal power over and stewardship of the macroeconomy, as well as the government's responsibilities as a private actor. Also, they reintroduce the possibility of a limited state role in providing relief to debtors, a possibility first broached by Justice Marshall early in the country's history. Nonetheless, post-Depression skittishness about the meaning of debt in the modern economy and about the government's having more than a limited role in the economy remains just as much at the surface as in the nineteenth century.

I. TWO MODELS OF PANIC AND CRISIS

Before I turn to those cases, however, I want to describe two models of panic and crisis.

Previous scholarly writing on the subject of judicial reactions to economic distress is sparse. This gap in the legal literature is surprising for a number of reasons. First, popular animus during economic panics, crises, and depressions has been specifically directed at the institution of the courts. The earliest and most telling example is Shays' Rebellion, an armed uprising by Western Massachusetts debtors demanding relief from creditors. Local farmers attacked and prevented local courts from sitting from the summer of 1786 into the summer of 1787. 14 Second, intense criticism and

13 See infra Part VI.
14 See DAvID P. SZATMARY, SHAYS' REBELuON: THE MAKING OF AN AGRARIAN IN-SURRECTION 59-66 (1980). Uprisings in other states also temporarily closed local courts. See id. at 57-59, 124-26. For an interesting contemporaneous account of the popular uprisings in 1786-87, see George Richards Minot, History of the Insurrections in Massachusetts in 1786 and of the Rebellion Consequent Thereon 38-44 (Da Capo
popular attacks on the Supreme Court's legitimacy have coincided with the stressful economic circumstances in the republic's history popularly known as "panics." Third, economic crises have occurred with striking regularity, particularly in the nineteenth century. The impressive streak begins with the Panic of 1819 and continues with the Panics of 1837, 1857, 1869, 1873, 1884, 1893, 1907, and the Great Depression of 1929. Panic and crisis, even if not the norm, are surely not infrequent enough to be aberrational.

The last reason that this gap in legal literature is surprising, and the one that makes an inquiry into economic panic interesting, is the expectation that courts would or should be shielded from political and economic pressures, perhaps because they are separated from the immediate economic and social circumstances of a

Press 1971) (1788). The author quaintly described the physical confrontation of judges and debtors:

[A] body of insurgents to the number of 300 and upwards, posted themselves at the Court House in [Worcester]. [They] were admitted to the door, where a line of bayonets prevented their entrance. The chief justice remonstrated with the rioters, on the madness of their conduct; but the court were obliged to retire to an adjacent house . . . The violence of the mob . . . soon obliged the Court of Common Please to adjourn without day.

Id. at 38. While this essay focuses in large measure on the statements of judges through their opinions, accounts of popular reactions to panic and crisis are as rich, if not richer, than traditional legal materials.


16. One product of this regularity is that the history of the debate over federal bankruptcy legislation, the body of law most implicated by economic distress, maps neatly onto the business cycle. See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 9 (1935); Robert Weisberg, Commercial Morality, the Merchant Character, and the History of the Voidable Preference, 39 STAN. L. REV. 3, 64-65 (1986).

17. See PETER J. COLEMAN, DEBTORS AND CREDitors IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900, at 287 (1974) (concluding that historians "have been so blinded by economic progress that they have underplayed the darker side of the story" of economic panic, and "have ignored the fact that even in ordinary times thousands of borrowers could not pay their debts"); CHARLES P. KINDLEBERGER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISSES 249 app. (1989).
particular crisis by a few years. Also, because it is a systemic aspiration that they apply neutral legal principles, courts, we feel, are among the most logical institutions in our legal order to set the limits of economic prudence and commercial and contractual morality, the very boundaries challenged during stressful economic situations. As we shall see, there are often radically different assessments as to whether there is a need to react to major economic change. Sometimes, judges simply see the economic downturn as just part of a bad business cycle, but not a major shock requiring legislative or executive interference with the free market. Or sometimes they think that the economic downturn was not all that bad for the nation.

18. See, e.g., Ex parte Milligan, 71 U.S. (4 Wall.) 2, 109 (1866):

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. . . . Now that public safety is assured, this question . . . can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.

One commentator has suggested that judicial review of executive action taken during wartime emergencies would optimally occur after a period of delay. See Christopher N. May, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 258 (1989). As a safeguard of the judiciary's legitimacy and a second-best guarantee that it would continue to protect individual rights, the judiciary, he argues, should not be able to prevent necessary emergency action before it happens, but rather should only act after the violation has already happened in order to as a check on future similar violations. See id.

19. Perhaps as a comment on the prudence of judges, in other historical eras, the popular formulation of the quintessentially sober class of investors—the historical equivalent of our term "widows and orphans"—often included legal officers and magistrates. See Kendleberger, supra note 17, at 35 n.*.

20. It is for this reason that I have not referred extensively to the work of Professor John Dawson. His focus is judicial review and modification of contracts in light of changes in economic circumstances. However, Dawson attends to the secondary problem, the question of what to do when there have been unforeseen changes in circumstances. He does not focus on the threshold question: When there is enough of a change in circumstances to do something? That is, do judges conceive of changed circumstances as “crisis,” and how does crisis drive the development of legal doctrine? See, e.g., John P. Dawson, Judicial Review of Frustrated Contracts: Germany, 63 B.U. L. Rev. 1039, 1039-40 (1983) (discussing the readiness of German courts to impose substantive changes on contract provisions to cope with an unexpected change of conditions); John P. Dawson, Judicial Review of Frustrated Contracts: The United States, 64 B.U. L. Rev. 1, 1-2, 35-37 (1984) (exploring whether American courts should be empowered to rewrite contracts to deal with unexpected events, or should merely discharge the parties from fulfilling their contract obligations). Somewhat more promising are John P. Dawson & Frank E. Cooper, The Effect of Inflation on Private Contracts: United States, 1861-1879, 33 Mich. L. Rev. 706, 706-07 (1935) (Pt. 1—The Confederate Inflation Cases) (examining monetary inflation during the Civil War and the legal devices employed to cope with the emergency); John P. Dawson & Frank E. Cooper, The Effect of Inflation on Private Contracts: United
One set of scholars addressing emergency situations focuses on
the imposition of constitutional limits on the executive during war-
time.\textsuperscript{21} For a number of reasons, however, the comparison
between war and economic crises is inapt. On the most basic level,
the Constitution allocates war-related powers both to the legislature,
which has the authority to declare war, to raise armies, and to
provide for a navy, and to the executive, which functions as com-
mmander-in-chief of the armed forces.\textsuperscript{22} Given this structuring of
powers—the congressional duty to say when exactly the nation is
at war, which is only then prosecuted by the president with con-
gressionally provided-for means—war as an emergency situation
generally has an inner-outer dichotomy separated by a fixed bound-
ary. One scholar has written of the prevailing view of war in the
nineteenth century: "The constitutional requirement that Congress
authorize the use of United States armed force against another
nation was designed to ensure that war would truly be an extraor-
dinary measure, and thus demarcate the executive's emergency war
power from the peacetime order."\textsuperscript{23} While the power to declare
war "posit[s] a boundary line separating and protecting the normal
constitutional order from the dark world of crisis government,"\textsuperscript{24}
there exists nowhere a constitutional requirement that economic
distress be "declared" before extraordinary legislative or executive
action may be taken. Thus, war cannot be compared to economic
crisis because judges during the nineteenth century defined crisis
and panic much more fluidly, rather than keeping a starkly binary
gate as to whether such a panic existed.\textsuperscript{25}

A second reason not to compare war and economic crisis is

\textsuperscript{21} See, e.g., MAY, supra note 18 (examining judicial review of the war powers since
the end of World War I); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS & CONSTITU-
TIONAL POWER: THE ORIGINS (1976) (examining constitutional controversies over war pow-
ers).

\textsuperscript{22} U.S. CONST. art I, § 8, cl. 11-13; U.S. CONST. art. II, § 2, cl. 1.

\textsuperscript{23} Jules Lobel, Emergency Power and the Decline of Liberalism, 98 YALE L.J. 1385,

\textsuperscript{24} Id. at 1388.

\textsuperscript{25} Kenneth W. Dam makes a similar point in distinguishing the Legal Tender Cases,
which settled the constitutionality of Congress' decision in the 1860s to issue paper mon-
ney with legal tender status, from cases which deal with executive warmaking authority du-
ring wartime. The former are more grave because they question the inherent power of the
entire government, while the latter implicate only the assumed powers of the executive
that it was not until the twentieth century and the Roosevelt administration's reaction to the Great Depression that the metaphor between economic crisis and war became a useful political tool. Indeed by the mid-twentieth century, emergency response to economic distress would eventually either be subsumed under statutes which, like war, require congressional declaration of a national emergency, or be justified as a necessary extension of war-making power:

Economists, economic historians, and political scientists have, unlike legal historians, undertaken comprehensive analyses of panic and crises. One economist has analyzed the problem of twentieth century crises from a public choice perspective and constructs a model of political reaction to economic shock, a "ratchet theory," to explain the increasing "interference" of government in the market economy. Prior to a crisis, he argues, there is a creeping,

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27. For example, a World War I era statute currently in force, the Trading With the Enemy Act (TWEA) of 1917, 50 U.S.C. app. § 5(b) (1996) (amended in 1977 to limit the executive's authority under the TWEA to actual wartime conditions), and two statutes passed in the 1970s, the National Emergencies Act (NEA), 50 U.S.C. §§ 1601-51 (1996), and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06 (1996), all require congressional declarations of emergencies before extraordinary executive powers can be invoked. See Lobel, supra note 23, at 1412-18, for a critical analysis of the effectiveness of these statutes over the last 25 years.

28. See, e.g., Woods v. Miller Co., 333 U.S. 138, 141, 143-44 (1948) (holding rent control statute justified under war-making power of legislative and executive branches because "war power does not necessarily end with the cessation of hostilities," and because "the effects of war . . . may be felt in the economy for years and years . . ."); Ruppert v. Caffey, 251 U.S. 264 (1920) (sustaining post-Armistice prohibition measures as exercises of war power); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919) (finding that war power includes power to remedy domestic evils that arise from war). But see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that a presidential order seizing domestic steel mills was not within power as commander-in-chief).

Justice Jackson's concurrences in Woods and Youngstown are particularly interesting because they caution against the extension powers under the war-making clauses of the Constitution exactly because of the hastiness of their invocation. Additionally, these are cases in which the judiciary explicitly functions as a reluctant and suspicious gatekeeper to the exercise of emergency powers because it is fearful that extraordinary wartime power will become the norm of post-war governance. Jackson wrote: "While we still are technically in a state of war[,] I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended." Woods, 333 U.S. at 147 (emphases added).

29. See HistGSS, supra note 4, at 17-18, 258 (explaining the "Crisis Hypothesis," which "maintains that under certain conditions national emergencies call forth extensions of gov-
general, and regretful increase in government control over economic activity. "[After the onset of] severe business depressions many people come to believe that the market economy can no longer function effectively and that an economy more comprehensively planned or regulated by government would operate more satisfactorily." 30 According to his model, demands by citizens for more governmental action and a sadly unavoidable decrease in deliberation and public consultation lead to government expansion. 31 The passing of the crisis precedes a retrenchment from the height of government interference but not a complete return to pre-crisis conditions. Instead, by then, the temporary expansion, the crisis "experiment," has installed itself into social life and has become normalized. The increase in government authority over the economy is irreversible and, to Higgs, lamentable. 32

Higgs' model is less helpful for the project here partly because of its ideological slant and its somewhat mechanistic public-choice perspective on social change. It also ignores the very knotty federalism and separation-of-powers questions that have always accompanied crisis governance. Instead, Higgs sees the executive, judiciary, and legislative branches, and the federal and state spheres, as the seamlessly coordinated elements of something Higgs calls "Bigger government." 33

A more compelling and helpful analysis of crisis is Charles Kindleberger's work on financial instability. He succinctly and eloquently summarizes his model:

What happens, basically, is that some event changes the economic outlook. New opportunities for profits are seized, and overdone, in ways so closely resembling irrationality as to constitute a mania. Once the excessive character of the upswing is realized, the financial system experiences a sort of "distress," in the course of which the rush to reverse the expansion process may become so precipitous as to resem-

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30. *Id.* at 17.
31. *See id.* at 64 (deliberation during crisis periods seen as "obstructive or doctrinaire or both") (quoting Felix Frankfurter). Higgs sees emergency government interference as particularly dangerous because it hides its true social costs whereas "full reliance on pecuniary fiscal and market mechanisms[] would reveal the costs of the government's policies so clearly as to threaten the viability of . . . the policies." *Id.* at 67.
33. *See, e.g., id.* at 261.
ble panic. In the manic phase, people of wealth or credit switch out of money or borrow to buy real or illiquid financial assets. In panic, the reverse movement takes place, from real or financial assets to money, or repayment of debt, with a crash in the prices of commodities, houses, buildings, land, stocks, bonds—in short, in whatever has been the subject of the mania.\footnote{KINDLEBERGER, supra note 17, at 5-6. The “some event” that triggers overtrading is an exogenous shock that creates opportunities for profit, for example, a recoinage, a sharp reduction in interest rates, an unexpected success in the issuance of a stock or bond, or a revelation of some defalcation. See id. at 17. Kindleberger’s work is based largely on the work of the economist, Hyman P. Minsky. See generally Louis Uchitelle, H.P. Minsky, 77, Economist Who Decoded Lending Trends, N.Y. TIMES, Oct. 26, 1996, at 13. For a more empirical expression of Kindleberger’s model, including the role of credit as a source of instability and of recovery, see HOWARD I. SHERMAN, THE BUSINESS CYCLE: GROWTH AND CRISIS UNDER CAPITALISM 270-94 (1991).}

Kindleberger’s sociopsychologically\footnote{Kindleberger’s claim is that most previous explanations of economic crises have simply ignored the psychological problem of human expectations. See KINDLEBERGER, supra note 17, at 28-32. He asserts, contrary to neoclassical economists, that profit or utility maximization is not the most powerful human incentive. To him, emulation and herding are more compelling explanations of economic activity or, at the very least, explanations of financial crises. Charles P. Kindleberger, Theory vs. History: Reply to Horwitz, 8 CRITICAL REV. 609, 610-11 (1994).} rich model proposes one potential solution to the endemic deflation and liquidation. That solution is a “lender of last resort” who provides liquidity during the panic phase in order to: 1) prevent a massive wave of default by debtors; 2) prevent the crash in the prices of real or financial assets; and 3) shore up confidence in key financial institutions (banks, stock markets, etc.).\footnote{Mainstream economists have begun to chronicle examples of irrational economic behavior. See, e.g., Jonathan Fuerbringer, Why Both Bulls and Bears Can Act So Bird-Brained, N.Y. TIMES, Mar. 30, 1997, at 5:1 (describing irrational alter egos for investors); Floyd Norris, When a 32% Fall Means Nothing, N.Y. TIMES, Apr. 20, 1997, at 3:1 (detailing mistaken sell-off of a mutual fund).} In the United States the lender of last resort often has been an arm of the federal government or a quasi-public agency, for example, the Bank of the United States, the Treasury Department, or the Federal Reserve.\footnote{KINDLEBERGER, supra note 17, at 178-200.} Thus, Kindleberger comes out on the opposite side of the spectrum from Higgs as to the proper role of the government during financial
crises, and makes a compelling case that well-timed actions by a
government lender can play a positive role in ending as panic or
crisis.

Higgs' and Kindleberger's conflicting accounts are both
excursus on the role of the government in the management of the
macroeconomy. More than that, they are similar from a methodo-
logical and substantive standpoint. Methodologically, they exem-
plify two modes of comparative history. Kindleberger's is a "mac-
ro-causal analysis," an attempt to isolate the combination of vari-
ables that cause a coherent and observable phenomenon. Higgs'
is an example of "parallel demonstration of theory," an illustra-
tion of the explanatory power that a particular theory has across different historical or national contexts. My methodological goal in-
stead is a "contrast of contexts," a sort of comparative "crisis-
ology" designed to trace the debates about crisis that run through
the nineteenth and early twentieth centuries and to take some pre-
liminary steps in the construction of a theory about judicial reac-
tion to panic and crisis and the role of panic and crisis in the
constitution of legal order.

A substantive similarity between the two models is that they
both neglect to include as a stage in the typical crisis the legal
shakeout that often follows. It is during this stage that govern-
ments may enact relief from the crisis or reform legislation, and

38. See Theda Skocpol, The Role of Theory in Comparative Politics: A Symposium, 48
 WORLD POL. 1, 37-46 (1995) (discussing historical macroanalysis); see generally Theda
Skocpol, Sociology's Historical Imagination, in VISION AND METHOD IN HISTORICAL
SOCIOLOGY 1 (Theda Skocpol ed., 1984).

39. To his credit, Higgs does not believe that his theory explains nineteenth century
crises. See HIGGS, supra note 4, at 260. For an example of an even more overconfident
theory, see generally DAVID HACKETT FISCHER, THE GREAT WAVE: PRICE REVOLUTIONS
AND THE RHYTHM OF HISTORY (1996) (attempting to explain more than 800 years of his-
tory and business cycles).

40. For a current example of the legal shakeout that followed a speculative crisis, see
Leslie Wayne, The Bull, Under Fire: Merrill Lynch Faces a Barrage of Orange County
 Lawsuits, N.Y. TIMES, Dec. 5, 1995, at D1 (detailing suits by bondholders, noteholders,
local governments, mutual fund investors, and taxpayers); see also Andrew Pollack & Les-
lie Wayne, Ending Suit, Merrill Lynch to Pay California County $400 Million, N.Y.
TIMES, June 3, 1998, at A1 (summarizing settlements with brokers and County's bankrupt-
cy). Even the legal shakeout following mass torts and unsuspected stock market fluctua-
tions is itself a mania, a frenzied overreaction to an opportunity for profit. See, e.g., Joseph
137 (documenting pile-on by plaintiffs' lawyers in face of minimal epidemiological evi-
dence that breast implants caused women's health problems); see also Gina Kolata, In Im-
A8 (describing history of breast implant litigation and role of lawyers).
individuals may lodge their legal claims of injury that flow from these actions. The Supreme Court cases that arise in the wake of the panic and crisis determine in large measure what the crisis will mean for the post-crisis legal and economic order, whether any reform will survive, and how losses and windfalls will be allocated. To that end, this essay focuses on a series of Supreme Court cases decided during, just after, or with specific reference to, major economic and/or social crises. It is these episodes to which I now turn.

II. EARLY STATE DEBTOR RELIEF LEGISLATION AND THE PANIC OF 1819

The conclusion of the War of 1812 ushered in an era of general prosperity and pro-development enthusiasm. The newly chartered Bank of the United States and a host of new state banks lent freely to satisfy a voracious American demand for credit. One newspaper wrote: "[O]ur citizens are clamoring for more banks, more banks . . . [to be put] wherever there is a 'church, blacksmith's shop, and a tavern.'" This lending funded imports of cheap manufactured goods from Europe, export and proto-industrial ventures, and, most importantly, massive land acquisitions. New settlement resulted in the entrance of five new Southern and Western States into the Union between 1815 and 1820. A revolution in transportation—an increasingly dense network of roads, canals, and turnpikes, "internal improvements"—was promoted by private borrowing and local, state, and federal funding.

Unfortunately, however, the speculative mania accompanying the postwar growth was highly unstable and overly dependent on: 1) the maintenance of high prices for land, commodities, and manufactured goods; 2) the maintenance of high interest rates on short term loans; and 3) the freedom of state banks from an obli-
gation to redeem their notes in specie (gold).\textsuperscript{47} New state banks had lent far beyond their specie reserves, which were being depleted as a result of the net outflow of hard currency to Europe.\textsuperscript{48} In 1818 the Bank of the United States, which had been chartered to stem loose money policies and overspeculation, instead decided to treat state notes on par with actual specie.\textsuperscript{49} Even worse, this was done when the Bank’s own notes were trading at a discount of between four and six percent to specie. Thus, by contributing to, rather than checking, the speculative mania, the Bank made overseas creditors increasingly wary of the Bank’s ability to meet its obligations.\textsuperscript{50} Finally, in an effort to save itself, the Bank called in large loans which it had made to state banks, requiring them to pay their obligations in specie. This contraction at the center of the banking system spread quickly as specie-hungry state banks called in their loans to farmers and merchants. Prices of real assets plummeted as debtors voraciously sought specie, and bankruptcies by merchants, farmers, and mechanics in the city and country increased exponentially.\textsuperscript{51}

What followed was an unsurprising cycle of moralizing, finger-pointing, and popular demands for various debtor relief measures. Some thought that the panic was salutary in that it “forced people to go back to the highly moral ways of yesterday.”\textsuperscript{52} Others denied the existence of distress, or simply lamented the “gloom . . . agony, [and lack of any] sales but those of the sheriff or marshal.”\textsuperscript{53} Still others felt that only individual acts of economy and industry could bring relief.\textsuperscript{54}

Reformers demanded relief in the form of laws staying foreclosure actions, laws requiring minimum prices at execution sales, or laws requiring independent appraisals of collateral and met with only partial success.\textsuperscript{55} Their stoical opponents counseled that to “take away the odium [of bankruptcy]” would further “[break

\footnotesize
\textsuperscript{47} See Sellers, supra note 41, at 133.
\textsuperscript{48} See Rothbard, supra note 7, at 9-10.
\textsuperscript{49} See id.; Sellers, supra note 41, at 133.
\textsuperscript{50} See Rothbard, supra note 7, at 8; Sellers, supra note 41, at 133-34.
\textsuperscript{51} See Rothbard, supra note 7, at 11-14; Sellers, supra note 41, at 135-38.
\textsuperscript{52} Rothbard, supra note 7, at 28 (citation omitted).
\textsuperscript{53} Warren, supra note 16, at 25-26 (citation omitted).
\textsuperscript{54} See id.
\textsuperscript{55} See Coleman, supra note 17, at 73, 136, 204, 244. Reformers were able to pass temporary debtor relief in the South and West, areas where the most land speculation had occurred. See Rezneck, supra note 5, at 71.
down] the barriers of honesty" and lead to a further loss of business confidence (and lending) in the economic system, if not an increase in criminal behavior. Some opponents denied that the government could restore confidence by "transfer[ing] discontent and propitiat[ing] one class by disgusting another," claiming that nothing, except the market, could or should control the supply of money in the form of loans.

It was in this tense environment that the Court decided *Sturges v. Crowninshield* in 1819. The dispute involved an 1811 loan of $1,500 from Josiah Sturgis to Richard Crowninshield. Crowninshield was a textile merchant and exporter living in New York and a son of the powerful Massachusetts mercantile family for whom Joseph Story had done much legal work as a practitioner in Salem before his appointment to the Supreme Court. Crowninshield had defaulted on the loan and availed himself of a recently passed New York insolvency law, passed just after the loan was made, which discharged insolvent debtors from their obligations. Sturgis sued claiming that the law was unconstitutional because: 1) only the federal government had the power to pass laws that discharged debts; and 2) the law impaired the obligation of contracts in violation of the Contract Clause.

The Court decided that the New York law as it applied to contracts predating its passage was an unconstitutional impairment of contracts. For the purposes of this Article, we can read the Court's opinion as an essay about a legal system sandwiched between two crises—the monetary crisis that preceded and informed the framing of the Constitution and the crisis at hand, the Panic of

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56. Rezneck, supra note 5, at 61 (citation omitted); see also Rothbard, supra note 7, at 39-40, 125.
57. Rezneck, supra note 5, at 62-63 (citation omitted).
60. U.S. Const. art. I, § 10; see Sturges, 17 U.S. at 129-33.
61. See Sturges, 17 U.S. at 208.
1819. In Sturges, we see Justice Marshall cornered by the magnitude of the latter into recognizing the salutary effects of, if not the immediate need for, bankruptcy laws, but checked by his experience of the former. Thus, the opinion was the product of both contradiction and compromise on the question of how economic crisis could properly be handled.62

Marshall’s initial concession regarding whether New York had any power with respect to debt relief was as unlikely as ever for the great believer in a broadly construed, preemptive federal regulatory power. While the Constitution gives to the federal government the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies,”63 states, in the absence of federal legislation, could not be forbidden from passing their own bankruptcy laws. He explained:

If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States. . . . If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law.64

The inability of Congress to pass a bankruptcy statute65 forced Marshall to move away from a structural interpretation of the relationship between federal and state governments, in which the federal government was the supreme possessor of a host of exclusive powers, toward a functional and contextual one that emphasized the necessity of filling a gap in a key legal regime.66 Unable to arrive

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62. See WHITE, supra note 59, at 634.
64. Sturges, 17 U.S. at 196 (emphasis added).
65. Congress passed a federal bankruptcy law in 1800, but it lasted only three years before repeal. Another one was not passed until the 1840s. See COLEMAN, supra note 17, at 18; Weisberg, supra note 8, at 6 & n.30.
66. Marshall cited Justice Livingston as authority who had declared the same New York law constitutional two years before. The latter was much less equivocal about the absolute necessity of state bankruptcy legislation where Congress had been unable to pass
at a fixed allocation of powers between federal and state spheres, Marshall was also forced to abandon the distinction between permissible state “insolvent laws,” which act upon and free the debtor, and functionally indistinguishable federal “bankrupt laws,” which also discharge the debtor’s obligations.\textsuperscript{67}

Marshall could only have carved out a tiny residuum of constitutional power through which states might “find them[elves] in possession” of the “power of passing bankrupt laws”\textsuperscript{68} by admitting that state debtor relief could play a positive role in solving financial crises and that such a law could possibly be constitutional.\textsuperscript{69} Otherwise, his opinion would have been a summarial reaffirmation of the more than plausible position that federal power over bankruptcy and quasi-bankruptcy relief laws was plenary, regardless of whether Congress had exercised its power to pass bankruptcy legislation. This he did by: 1) reluctantly acknowledging that insolvency was just as likely a “tragic condition as [it was] a signal of possible fraud,”\textsuperscript{70} and 2) suggesting that insolvency laws did not necessarily impair contractual obligations:

[T]he Convention did not intend to prohibit the passage of all [state] insolvent laws. To punish honest insolvency . . . and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our Constitution. . . .\textsuperscript{71}

Here Marshall more directly confronted the two financial crises. 

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Adams v. Story, 1 F. Cas. 141, 144 (C.C.D.N.Y. 1817) (No. 66); see Sturges, 17 U.S. at 196, 201.

\textsuperscript{67}See Sturges, 17 U.S. at 194-95, 197.

\textsuperscript{68}Id. at 199 (emphasis added).

\textsuperscript{69}See WHITE, supra note 59, at 671-72.

\textsuperscript{70}Weisberg, supra note 8, at 7; see also id. at 22-30 (comparing different ideology-driven bankruptcy positions as they manifested themselves in early 1800s).

\textsuperscript{71}Sturges, 17 U.S. at 200 (emphasis added); see also id. at 203 (“The insolvent laws of many, indeed of by far the greater number of the States, do not [impair obligations]. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed.”).
The one surrounding him, the Panic of 1819, had made clear to him that "the loss of one's assets was not necessarily an index of moral depravity [because] economic failure could be traced to the market as well as to one's character." The deepening realization that property-holding was an insecure activity was forced upon Marshall by the second major economic crisis of his lifetime, and was difficult to accept for a Federalist who equated private interest and the pursuit and maintenance of property with public virtue.

An interesting and more radical alternative to Marshall's recognition of the precariousness of property-holding, and the consequent need for bankruptcy legislation, is Justice Livingston's lower court opinion approving the same New York insolvency law. His opinion also reveals an economically modern vision of the regularity of crises.

Livingston's first task was to disassociate immorality and insolvency. Insolvency was for him a product of misfortune, a mere unlucky roll of the dice. Livingston then shifted part of the blame for insolvency by impugning the draconian tactics of creditors. Taking an instrumental view of bankruptcy, he turned the tables further by suggesting that such tactics were to the detriment of creditors: "without property, but without credit, and in many cases with such a heavy load of unextinguished debt," debtors would scarcely make any effort to do more than subsist unless they could secure a discharge. Finally, Livingston truly upset the traditional morally disapproving view of insolvency by intimating that commercial crises would reoccur and that the creditor of today could be the distressed debtor of tomorrow. That is, a credit economy was radically interdependent and unstable, an idea wholly foreign to the Federalist association of moral and political autonomy with economic solidity. Given the fact that today's creditor could be tomorrow's debtor, the best solution to such instability

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72. WHITE, supra note 59, at 631.
73. See Adams v. Story, 1 F. Cas. 141 (C.C.D.N.Y. 1817) (No. 66).
74. See id. at 146, 148.
75. Later, Justice Johnson would echo a similar criticism in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), which upheld the right of states to pass prospective debtor relief. There he likened the destructive pursuit of debtors to barbarous practices on the "coast of Africa," id. at 284 (Johnson, J., concurring), and affirmed the right of state government to impose "limits to the avarice and tyranny of individuals . . . exercised under the semblance of right and justice." Id. at 283-84.
76. Adams, 1 F. Cas. at 146.
77. See WHITE, supra note 59, at 597; Weisberg, supra note 8, at 20-23.
was a "golden rule":

[Insolvency laws] create no inability [to pay], nor interfere between one who is able to pay, and his creditors: but when such inability intervenes, they step in and take care... that a complete surrender of the debtor's estate shall be made for the benefit of all his creditors; and when this is done, they compel the latter to observe towards him that mercy and forbearance which, in similar circumstances, they would wish and expect to have extended to themselves.78

Rather than recognize the inevitability or cynicality of crises, as Livingston had done, Marshall referred to the crisis he considered seminal as a matter of constitutional history as a guide. Looming in the background to Marshall's stingy concession to state power was his experience with another economic crisis, the one that occurred between the Revolution and the Constitutional Convention. He derived from this early economic crisis the guiding principles that limited the management of any later crisis:

What were those laws [which furnished such cause for general alarm]?... [T]hey were such as grew out of the general distress following the war in which our independence was established. To relieve this distress, paper money was issued, worthless lands, and other property of no use to the creditor, were made a tender in payment of debts.... These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed.

... A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention to this subject.... The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt, otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be

78. Adams, 1 F. Cas. at 151 (emphasis added).
done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary, not only to prohibit the use of a particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable.79

Thus, Marshall's memory of a prior crisis insured that state economic regulation, to which he had reluctantly ceded limited territory, would be kept in check;80 the danger at the time of the framing of the Constitution was and always would be state mismanagement and interference with the economy, even if there were federal policy to fill in the gap. The states could never be trusted to be fiscally responsible.

Three principles governed the relationship between the federal government, the state governments, and private economic actors: an anti-inflationary principle, which prevented the states from issuing increasing quantities of money; an anti-fraud principle, which prevented debtors from defrauding their creditors by repaying their debts with inflated property; and an overarching protection of contracts from subsequent changes in legal regulations.81 Economic crises would have to be fought on all fronts: moral, contractual, and systemic.82


80. An additional crinkle in the hostility towards state regulation of debtor-creditor relations was the fact that every state provided for different enforcement procedures and relief schemes. See COLEMAN, supra note 17, at 16. This lent cross-border economic relations added complexity and endangered the uniformity of commercial laws that believers in the use of commercial law to cement together the fragile new republic, like Joseph Story, were working to create. If creditors were generally maligned, absentee or out-of-state creditors were hated much more, particularly those from urban areas. Debtors thus thought that local laws would protect their interests more. This proved unlikely as absentee creditors hired local agent/monitors. See id. at 28.


82. Given his view about the multivariate sources of crisis, Marshall's opinion in Ogden—that states could not pass even prospective bankruptcy legislation—was not contradictory. Marshall reacted violently to the assertion that creditors necessarily contemplate the possibility of bankruptcy because of the very existence of insolvency laws. Economic crisis, either individual or societal, could not and should not be contemplated or prepared for:

   It is not, we think, true that contracts are entered into in contemplation of the
Eventually, following the Panic of 1819, the Marshall Court was again forced to wrestle with renewed post-crisis lending by state banks. The specific legal issue which arose involved the very definition of money, a problem with which both the Taney and Chase Courts would later struggle. In 1821, Missouri passed a statute that created a network of state offices to issue small loans. These state banks, lacking specie reserves, issued loan certificates in exchange for a borrower's promise to repay the money plus interest at a low rate. The state made the loan certificates receivable as payment of state taxes and pledged the faith of the state and an unspecified quantity of funds for their redemption, although it did not officially declare the notes legal tender. One borrower, Hiram Craig, who had sued for $200 owed him, claimed that the loan certificates were state-issued "bills of credit" and therefore prohibited by Article I, Section 10, Clause 1 of the Constitution. The problem for the Court was deciding exactly what such an instrument was; the solution lay in the meaning of crisis as reflected in the Constitution.

In order to define a bill of credit, the four justices who wrote opinions agreed that the clause generally prohibited states from issuing something called "paper money." They further agreed that the purpose of the clause was to prevent a recurrence of the inflationary currency crisis that preceded the Constitutional Convention. In that sense, they saw the Constitution as a document designed with the dangers of the business cycle and a suspiciousness of the state origins of economic crises in mind. Because they

insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. . . . When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

Ogden, 25 U.S. at 343 (Marshall, J., dissenting).


84 See U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . emit Bills of Cred-
it. . . . ").

85 See Craig, 29 U.S. at 432 (Marshall, C.J.); id. at 442 (Johnson, J., dissenting); id. at 448 (Thompson, J., dissenting); id. at 453 (McLean, J., dissenting).

86 To the extent they agreed, the opinions in Craig echoed The Federalist No. 44 (James Madison):

The loss which America has sustained since the peace, from the pestilent ef-fects of paper money on the necessary confidence . . . in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumula-tion of guilt, which can be expiated no otherwise than by a voluntary sacrifice
believed that the "Bills of Credit" clause was designed to prevent the "great and ruinous mischief"\(^8^7\) of the currency crisis that preceded the Constitutional Convention, their individual perceptions as to the nature of that crisis would generate radically different answers as to the question presented in Craig: What are the characteristics—both good and bad—of paper money?

Marshall's opinion that these certificates were indeed unconstitutional bills of credit intended to function as paper money was based on three findings. The first was that the primary evil of paper money was its inevitable inflation with respect to specie, a finding derived from the pre-Constitutional and pre-Revolutionary currency crises.\(^8^8\) Potential inflation meant that those who accepted repayment of debt in paper money would be subject to "immense loss," and made the users of paper money the potential recipients of a windfall. Thus, paper money endangered contractualized relations of trust, the backbones of republican virtue. His second finding was that the small denominations of the loan certificates and their receivability as payment of taxes and debts to the state evidenced the state's intention for them to function as the medium of exchange.\(^8^9\)

Finally, and most interesting, was Marshall's treatment of the fact that the state had not actually declared the certificates to be legal tender. Here he reviewed the history of bills of credit and found, in situations where legal tender bills of credit and non-legal tender bills of credit circulated concurrently, that the two were both treated as legal tender. Thus the economy was subject to unchecked inflation regardless of state denominations of legal tender status.\(^9^0\) Marshall's view, then, was that the creation of money on the altar of justice, of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed that the same reasons which show the necessity of denying the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States; and thus the intercourse among them would be impeded; retrospective alterations in its value might be made; and thus the citizens of other States be injured; and animosities be kindled among the States themselves.

**The Federalist No. 44, at 226-27 (Garry Wills, ed., 1982).**

\(^8^7\) Craig, 29 U.S. at 433.

\(^8^8\) See id. at 432, 434-35.

\(^8^9\) See id. at 432.

\(^9^0\) See id. at 434-37 (reviewing economic history to conclude that legal tender bills of credit and non-legal tender bills both produce inflationary and speculative effects without
was not fully subject to the control of the state. Instead, money might be created by the spontaneous action of citizens, based not upon the information given them, but upon their subjective expectations that the government had completely abandoned the redemption of notes for specie. He suspected that a mere pledge of faith to redeem the loan certificates did not lessen potential abuse by states through excessive note issuance.

Johnson's dissent, less sophisticated in its analysis of credit technologies, made exactly the opposite assumption about which governmental actions could lead to the creation of money. Because the state had not declared the certificates to be legal tender and assuming perfect information as to the exact nature of money, non-legal tender bills of credit could not rationally be confused with legal tender and therefore, could not function as a circulating medium. Consequently, a limited issue of state notes, backed by a state fund for their redemption, could not generate the evils of speculation:

On the face of them they bear an interest, and for that reason vary in value every moment of their existence: this disqualifies them for the uses and purposes of a circulating medium; which the universal consent of mankind declares should be of a uniform and unchanging value, otherwise it must be the subject of exchange, and not the medium.
While Johnson’s opinion is clearly inadequate in denying that economic actors could speculate as to the value of money, Marshall’s was not without substantial instabilities. The decision would be revisited after the Panic of 1837 because, in preventing states from excessively issuing paper currency, it jeopardized the ability of state-chartered private banks to loan money by issuing notes, and thereby promote economic activity.  

III. The Panic of 1837 and State Authority over Money and Banking

Hostility to the Second Bank of United States, which under the competent leadership of Nicholas Biddle had succeeded in stabilizing currency and funding a boom in the late 1820s and early 1830s, was at the core of Jacksonian ideology. The basic Jacksonian position was that all banks were vaguely immoral and untrustworthy. Not only did they promote instability, but also they “favor[ed] limited financial and commercial interests at the expense of farmers, mechanics, and the raw materials sectors of the economy.” The alternative was a simple hard money position: a gold standard.

The consequence of Jackson’s war on the Bank’s monopoly, however, was not to end speculation, but merely to move the $36 millions of dollars of deposits from the national bank to state banks, which came to be known as “pet banks.” These banks engaged in their own lending frenzy during the mid-1830s, particularly lending for land acquisition and the construction of railroads and canals. While Jacksonians had hopes that the states would im-
pose their own limitations on currency, it was clear by late 1835 and early 1836 that the states would do no such thing. Disturbed by the amount of speculation and hoping to stem excessive state speculation, Jackson was finally forced to promulgate the drastic Specie Circular in 1836, which required that all public lands be purchased with specie. This resulted in contractions in lending and the calling in of loan obligations by state banks. Eventually, a wave of bankruptcy and foreclosure followed, along with a general condemnation of the speculative mania of the mid-1830s.

It was in this context that the Supreme Court wrestled with the question of how to allocate control over money between banks supported by proactive state governments and a passive federal bank. The Court decided three cases that would permit state banking and a limited form of state currency to go forward in the absence of any responsible federal institutions, but struck down state debtor relief legislation where the federal government had already passed comprehensive bankruptcy legislation.

The first case was Briscoe v. Bank of the Commonwealth of Kentucky, decided after the Bank of the United States had reorganized as a substantially smaller, less influential state bank, and just before the initial credit contraction caused by the Specie Circular. The case revisited to a large degree the question of state-issued notes that had been decided in Craig v. Missouri, although the result was quite different. There were two essential differences between the Kentucky institution in Briscoe and the Missouri institution in Craig. First, the Kentucky bank was state-owned and state-controlled rather than merely state-sanctioned. Second, the notes were backed by a separate and apparently ample fund to provide for their redemption, rather than a mere pledge of the
State's full faith. Justice McLean's opinion for the Court focuses almost exclusively on the question of whether states should be allowed these powers and the difficult question of the nature of "bills of credit." By holding the issuance of the notes to be a constitutional exercise of state power, and therefore that the notes were not "bills of credit," the case effectively authorized without limitation the issuance of notes by state-chartered private banks, notes that could function as a medium of exchange.

Justice Story, dissenting from the Court's opinion, recognized that the demise of the Bank of the United States had made state banking, in particular the state private banking industry which boomed during the mid-1830's, indispensable to the recovery of the nation. He did so despite assigning blame to irresponsible state institutions for the pre-constitutional currency crisis described by Justice Marshall in Craig. What was dangerous to Story was not so much inflationary growth caused by loose lending practices, but the leveraging of the state; the state had to function as the bedrock of an unstable credit-driven society. Privately created money like the notes in Craig, however, was perfectly acceptable. Henry Clay's argument on behalf of the Bank of Kentucky could not have resonated more powerfully:

The day will be disastrous to the country, when this court shall throw itself on the ocean of uncertainty, and adopt an interpretation of the prohibition of the Constitution which will apply to a constructive bill of credit. The large and prosperous commercial operations of our country are car-

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103. Id. at 323.

104. This was the very fear of the dissenters in Craig:

If these certificates are bills of credit . . . it appears to me difficult to escape the conclusion, that all bank notes, issued either by the states, or under their authority and permission are bills of credit falling within the prohibition. They are certainly, in point of form, as much bills of credit; and if being used as a circulating medium or substitute for money makes these certificates bills of credit, bank notes are more emphatically such.


105. See Sobei, supra note 98, at 38 (documenting the doubling in number of state banks between 1829 and 1837).

106. Briscoe, 36 U.S. at 348-49 (Story, J., dissenting) (struggling to sanction the state chartering of private banks and noting that the issuance of private bank notes intended to circulate as currency was not a danger or concern at the time of the Convention); see also Gerald T. Dunne, Monetary Decisions of the Supreme Court 42 n.28 (1960); Swisher, supra note 99, at 108.
ried on by bills of exchange, notes, and bank-notes, redeemable in specie . . . [t]he credit of all such bills may be brought into question should the Court decide this case against the defendants . . . [D]o not seek . . . to include in its prohibitions such paper as that which is brought into question in this case, and all will be safe.107

When the nation was forced by a crippled federal government to resort to a backup generator, the states, the Court reluctantly looked the other way for the greater good; any other decision would have plunged the nation into a deeper economic hole. The economic crisis and the lack of any solvent lenders who might be able to reinvigorate the economy clearly forced more pragmatic concerns to the top of the Court’s agenda.

Following the demise of the Bank of the United States, the Court declined a second opportunity to circumscribe the operation of state institutions in the face of economic crises where the lack of federal action or institutions had created a regulatory vacuum. This case involved the right of a Georgia bank to consummate transactions in states other than the one in which it was chartered. The decision in Bank of Augusta v. Earle108 allowed the Georgia bank to operate fully in Alabama and rested on comity principles borrowed by Chief Justice Taney from international law. Since Alabama had not specifically made a policy decision that transactions by out-of-state banks were contrary to its own banking rules, the presumption was that cross-border banking was permitted.109 The decision assured that more stable banks, like the appellants in the case, banks from Georgia, Pennsylvania, and Louisiana, would be able to compete with smaller, more local, less well capitalized banks, unless the state specifically granted state-banks a monopoly on local transactions. The Court’s understanding of the recent crisis led it to prioritize responsible lending and sound banking principles over localism and hostility to foreign creditors.

The final decision came in the shadow of the 1837 crisis and resulted in checks on state excesses where a federal uniform statute presented the preferable solution to an economic crisis. The case concerned the debtor relief laws passed by states in the years fol-

109. Taney read the state statute requiring state ownership of 40% of any bank located in Alabama as equivocal on the extent to which foreign banks could operate in Alabama. See id. at 593-94.
lowing the panic. The Whigs had made comprehensive bankruptcy scheme, protective tariffs, and the distribution of public lands integral parts of their electoral platform. In 1841, Congress had finally passed a Whig-sponsored bankruptcy bill. While riddled with administrative problems and loopholes, and not altogether better than exclusive reliance on state insolvency laws, the new regime did achieve a degree of uniformity and effectiveness. In the shadow of the newly passed law, the Supreme Court heard *Bronson v. Kinzie*, a challenge to an Illinois statute that extended to one year a debtor’s right to redeem the equity he had acquired in property and which required a minimum sales price at any foreclosure of two-thirds of the property’s appraised value.

Without inquiring into whether the change in remedy unduly or even remotely affected the contractual right of the creditor, Chief Justice Taney struck down the law on Contract Clause grounds as it applied to contracts made before the legislation was passed. Both Taney and a dissenting justice virtually ignored the debtor’s crisis and the massive economic and social dislocations it caused. About a month later, Congress repealed the federal bankruptcy law, once again leaving a gaping hole in a key

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110. *See Coleman*, supra note 17, at 23.
113. 42 U.S. (1 How.) 311 (1843).
116. But see infra note 240 and accompanying text (stating that Justice McReynolds felt that the Court in *Bronson* struck down the law in spite of the crisis).

While the legal debate about the constitutionality of the debtor relief measure at issue in *Bronson* did not take place in terms of community self-preservation or a state’s inherent police power to safeguard economic order, such arguments were plausible at the time. Justice McLean outlined such a rationale in his dissent in *Bronson* by suggesting that parties to a contract always contemplate a change in the surrounding legal regime. He then justified the hardship of a particular form of debtor relief to an individual creditor by pointing to the benefit of such laws to the general debtor-creditor community. *Bronson*, 42 U.S. at 323-32 (McLean, J., dissenting).

As a much more stark example of a self-preservation rationale for such laws, Senator William Fessenden of Maine spoke of the necessity of preparing for future economic crises: “Take the case, for example, in which a whole community becomes insolvent by some stupendous accident, or by some magnificent, but fallacious scheme. . . . Can it be pretended that a power to apply a remedy to a disorder that is paralyzing and destroying the body politic exists nowhere?” *Warren*, supra note 16, at 75 (citation omitted). In deciding the question of the constitutionality of legal tender in the 1870s and 1880s, and ultimately of state debtor relief in the 1930s, the Court would much more explicitly speak in terms of community self-preservation.

regulatory regime. The 1840s would end without an institution able to stem or to provide relief during an economic crisis. States could not respond quickly to a credit crisis with temporary legislation because any such legislation would by definition affect prior contracts and the federal government could not write a politically stable set of bankruptcy rules.

IV. FROM WARTIME NECESSITY TO PEACETIME REGULARITY: THE POLITICAL ECONOMY OF CIVIL WAR FINANCE

When the Union realized that the Civil War was not going to be the short conflagration it had anticipated, and when tax and tariff revenues fell below expectations, the federal government engaged in a massive borrowing spree. The first round occurred in February 1862; the government issued $150 million of the United States notes to pay suppliers and salaries. They were backed not by specie, but were instead redeemable for twenty year bonds paying six percent interest. The statutory authorization for the issuance declared that the bonds would be "a lawful tender in all payments whatsoever." Eventually, after two additional issues, there were over $450 million of "greenback" dollars in circulation. This form of currency did not trade with parity to the gold dollar.

An inevitable legal question arose out of the entire Civil War finance system: Could those who had made contracts before the declaration of the notes to be legal tender be forced to accept inflated paper money in repayment? The question came before the Supreme Court three times over the next fifteen years. In each case, the answer was found by looking at the meaning and modes of crisis.

The first instance was in 1869 in the case of Hepburn v. Griswold. Chief Justice Salmon P. Chase, who as Lincoln’s first Secretary of the Treasury had been the reluctant architect of

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119. See HURST, supra note 92, at 64.
120. In 1862, when Mrs. Hepburn’s debt to Mr. Griswold came due, $1 worth of greenbacks was worth approximately $1.30 in gold. The ratio of greenback dollars to gold dollars reached 2.85 to 1 in 1864. By 1870, when the Court heard argument in Hepburn v. Griswold, the ratio had declined to 1.20 to 1. See Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 608 (1869); see also MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 65 (1963).
121. 75 U.S. (8 Wall.) 603 (1869).
the Civil War financing plan, struck down the legal tender clause of the authorizing legislation as it applied to debts predating passage of the statute which authorized the borrowing and which declared the notes. First, Chase noted the likelihood that specie would trade at a premium to greenbacks, thus subjecting those who were to receive payment to arbitrary loss. This was the crucial, historical injustice of paper money that Marshall had similarly identified in Craig. The looming danger driving Chase’s constitutional interpretation was inflation-induced economic crisis.

After invoking the mantra of implied powers, Marshall’s language from McCulloch, Chase then worked through possible sources of the ends and means of the legal tender law. He quickly dismissed Congress’ power to “coin money,” because even if coining money meant the regulation of its value, coins meant metal, not paper, in hindsight, an almost quaint physical fetishism. Chase then went on to consider whether issuing legal tender was a constitutionally permissible means to prosecute war, regulate commerce, or borrow money. Reviewing the history of Civil War era notes and directly contradicting the economic presupposition articulated by Marshall in Craig, Chase observed that the notes which were not declared legal tender had circulated on par with those which were so declared, “without unfavorable discrimina-

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122. Chase’s rationalization of this switch was that the sense of national crisis and the danger to the Union had polluted the judgment of policy-makers:

It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views . . . were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. . . . Many who doubted yielded their doubts; many who did not doubt were silent. . . . Not a few who insisted upon its necessity, or acquiesced in that view, have since the return of peace, and under the influence of the calmer time, reconsidered their conclusions.

Hepburn, 75 U.S. at 625-26. As his reasoning in Hepburn bears out, Chase only reluctantly agreed to the declaration of legal tender as a temporary wartime exigency. See also FAIRMAN, supra note 118, at 678-84, 689-90; G. Edward White, Reconstructing the Constitutional Jurisprudence of Salmon P. Chase, 21 N. Ky. L. Rev. 41, 67 (1993).

123. See Hepburn, 75. U.S. at 608-09.

124. He noted that greenbacks traded at a rate as low as 2.85 to the gold dollar. See id. at 608.

125. “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent with the letter and spirit of the Constitution, are constitutional” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

126. See Hepburn, 75 U.S. at 615-16.

127. See supra notes 90-92 and accompanying text.
tion.” That is, once the government abandoned the strict gold standard by issuing paper legal tender, both the legal tender and non-legal tender demand notes depreciated together (i.e., traded on par with one another). Substituting his own macroeconomic reasoning for that of Congress, this meant for Chase that legal tender added exactly nothing to the government’s ability to finance the war, and, therefore, was not rationally adapted to a legitimate end.

Two of the intermediate steps of his reasoning suggest much of Chase’s vision of government’s powers with respect to currency and the economy, as well as a constitutional limit to that power. Chase first explained how legal tender currency came to trade on par with non-legal tender notes even if not initially after its issuance:

All modern history testifies that, in time of war especially, when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the government . . . always obtain at first a ready circulation; and even when not redeemable in coin, on demand, are . . . usually less subject to depreciation than any other description of notes. . . .

Thus, Chase recognized that government was not a mere ordinary actor on par with all others. Even if it could not create money by fiat, it could at least create immediate receivability and negotiability by establishing trustworthy conventions, a power that private and state issuers of notes did not have. In a later case on nearly the same question as that presented by Hepburn, he explained the limit on the power to create receivability in terms of commercial morality and economic practicality:

When the government compels the people to receive its notes [by declaring them to be legal tender], it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent. This

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128 Hepburn, 75 U.S. at 619.
129 See Dam, supra note 25, at 393-94, 404-05.
130 Even if it did add a measure of liquidity and allow for increased spending, the benefit of legal tender was outweighed by “the losses of property, the derangement of business, the fluctuations of currency and values . . . which flow from the use of irredeemable paper money.” Hepburn, 75 U.S. at 621.
131 Id. at 620 (emphasis added).
certainly does not improve the value of its notes. It is an element of depreciation. In addition, it creates a powerful interest in the debtor class and in the purchasers of bonds to depress to the lowest point the credit of the notes. The cheaper these become, the easier the payment of debts, and the more profitable the investments in bonds bearing coin interest.

... The legal tender quality is only valuable for the purposes of dishonesty.\textsuperscript{132}

By associating government with debtors' interests, and federally induced inflation with a fraud perpetrated upon the polity and creditors, Chase was able to mix law, morality, and economics, and thereby constitutionalize monetary policies he deemed sound and disapprove of inflationary ones or ones predicated upon debt, a fundamentally anti-Hamiltonian position.\textsuperscript{133} Clearly, the memory of prior panics, especially the Panic of 1857,\textsuperscript{134} affected Chase deeply. Justice Field, more quintessentially classical in his thinking, would several years later take a different path in subsuming commercial morality into the Constitution.\textsuperscript{135}

The dissenters in Hepburn, Justices Miller, Swayne, and Davis, responded with a competing macroeconomic rationale for paper money; they stressed the financial crisis which made it necessary. The government was unable to borrow from anywhere else, due to a depletion of the amount of specie, and the continued existence of the Union depended on the government's ability of finance the


\textsuperscript{133} On the morality of national debt in seventeenth century England and early nineteenth century America, see Weisberg, \textit{supra} note 8, at 10-11, 17-20. See also Jeffrey A. Needelman, Comment, \textit{Deconstructing the Balanced Budget Amendment: Fiscal Folly, Monetary Madness}, 44 UCLA L. REV. 1289, 1299-1303 (1997).

\textsuperscript{134} Chase was the incumbent Republican candidate for governor of Ohio during the Panic, the worst of American economic crises so far. He was narrowly reelected after being a heavy favorite against an opponent with strong Jacksonian views of banking. See James L. Huston, \textit{The Panic of 1857 and the Coming of the Civil War} 44-54 (19-87). The Panic first hit Wall Street with the collapse of the Ohio Life Insurance and Trust Company, Ohio's largest and more respected bank. See \textit{id.} at 14-15; see also Sobel, \textit{supra} note 98, at 77-114. As an auger to one trader's cover-up of massive losses on index options that brought down Barings Bank, see \textit{Singapore Sentence Leeson to 6 1/2 Years in Prison}, N.Y. TIMES, Dec. 2, 1995, at 35; see also Andrew Pollack, \textit{Sumitomo's Huge Loss: The Trader}, N.Y. TIMES, June 15, 1996, at 34, the collapse of the Ohio Life was precipitated by revelations that a cashier in the bank's New York office had embezzled almost all of the assets to support his losses on the stock market. See Kindleberger, \textit{supra} note 17, at 92; Rezneck, \textit{supra} note 5, at 104.

\textsuperscript{135} For another reading of Chase's opinion, see White, \textit{supra} note 122, at 88-109.
war. However, as opposed to the majority, who grounded their
decision in the much more abstract goal of providing a sound
currency system for the nation (i.e., stabilizing the money supply
and thereby prices), the dissenters stressed the very real war pur-
chases that the government had to make:

All the ordinary means of rendering efficient the sever-
alar powers of Congress above-mentioned had been employed
to their utmost capacity, and with the spirit of the rebellion
unbroken, with large armies in the field unpaid, with a
current expenditure of over a million of dollars per day,
the credit of the government nearly exhausted, and the
resources of taxation inadequate to pay even the interest on
the public debt, Congress was called on to devise some
new means of borrowing money on the credit of the na-
tion... 136

As a consequence, these justices proposed that the federal
government could be more than the guarantor of a sound currency:
the government could assume, through its own borrowing and
spending, a promotional role in, and command over, the economy.
The influx of government spending “stimulated trade, revived the
drooping energies of the country, and restored confidence to the
public mind.”137 What these justices seem to be describing in le-
gal terms is a kind of constitutional Keynesianism, a theory that
stressed not strict controls on the money supply as the key deter-
ninant of economic health, but taxing and spending decisions as
the key economic levers available to government.138 In terms of
the role of debt in the economy, the dissenters imagined public
debt as an economic engine, and disassociated debt from fraud.
Economic crisis was more than simply the result of speculation and
an inability to control the money supply; it included economic
stagnation. Such stagnation—“drooping”—was also a crisis for
which the government could resort to special residuary powers.

It was this rationale that drove the outcomes of the second and
third of the cases in this line, cases which overturned Hepburn,
and thereby permitted paper money as we know it today. *Knox v. Lee*\(^{139}\) and *Juilliard v. Greenman*\(^{140}\) resurrected the federal government’s power to declare paper money to be legal tender. *Hepburn* had considered the question as one of Civil War financing. *Knox* and, to a much greater extent *Juilliard*, transformed the question from one of the government’s responsibility “to provide [for] a national currency”\(^{141}\) to the government’s duty to “adjust the currency supply to transactional needs. . . .”\(^{142}\) In short, the baseline role of government in and over the economy was more than simply as an enforcer of the market’s universal principles, but that of trustee over the economic health of the nation.

To some extent, this process had already begun before the legal tender question came before the Court. As Secretary of the Treasury, Chase, a “hard money” advocate who thought that state “wildcat” banks were undisciplined lenders, had worked to create a system of national banks which could issue national bank notes backed by United States bonds.\(^{143}\) The national bank system created in 1863-64 also helped the government finance the war by creating a liquid market for U.S. bonds. Finally, in 1865, the dual policy goals of controlling, if not eliminating, less reliable state bank notes and providing for uniform national currency coincided with legislation imposing a ten percent tax on state bank notes.\(^{144}\) This ruthlessly effective tax-and-destroy policy succeeded: State banks were forced to cease operations, and either become part of the national bank sub-treasury system or merely issue small loans.\(^{145}\)

One Maine bank, however, challenged the statute as a direct tax not “laid . . . in Proportion to the Census.”\(^ {146}\) In *Veazie Bank v. Fenno*,\(^ {147}\) Chase rejected the challenge and recognized, albeit in an incipient form, a greater federal role in the economy. He began, of course, by referring to the crisis created by the War: “The necessity of adequate provision for the financial exigencies

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139. 79 U.S. (12 Wall.) 457 (1870).
140. 110 U.S. 421 (1884).
141. HURST, supra note 92, at 73 (quoting Juilliard, 110 U.S. at 448).
142. Id.
143. See FRIEDMAN & SCHWARTZ, supra note 120, at 20-22; HURST, supra note 92, at 178-80; see also White, supra note 122, at 63-67.
144. See HURST, supra note 92, at 180-81.
145. See Dam, supra note 25, at 377.
146. U.S. CONST. art. 1, § 9, cl. 4.
147. 75 U.S. (8 Wall.) 533 (1869).
created by the late rebellion, suggested to the administrative and legislative departments of the government important changes in the system of currency. . . ."148 Chase explained the rationale behind the resulting system, asserting that barriers in the federal government’s way constitutionally could, and indeed should, be removed. That those barriers were state-chartered banks presupposed a very specific relationship between the federal and state governments insofar as each participated in the economy:

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.149

What were initial terms in Chase’s mind of the relationship between the federal government and the state governments over the national economy? First, the federal power within the macroeconomy and the market would be subsumed within the federal system and contractual morality. That is to say Chase’s positions in *Veazie*, *Hepburn*, and *Knox* are reconcilable. On the formal doctrinal level, they fit seamlessly: Exclusively federally provided notes (*Veazie*) could adequately service the needs of the economy, but only “[w]hen these bills shall be made convertible into coin . . . ”150 (*Hepburn*, *Knox*). Structurally, Chase’s trumping regime was also coherent. In *Veazie*, Chase clearly considered the federal government to be supreme to the states in matters of regulatory and monetary policy.151 In *Knox* and *Hepburn*, he felt

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148 Id. at 536.
149 Id. at 549 (emphasis added).
150 Id.
151 This can most clearly be seen by comparing Marshall’s defense of the Bank of the United States in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1816). Marshall defended the bank as an instrumentality of the federal government, as if it were any regulatory agency, and thus rested the opinion on implied powers and the supremacy of the federal over the state governments. See id. That is, it was the narrow power to incorporate
that market mechanisms which prevented the federal government’s legal tender monetary policy from being effective, i.e., justifiable as “necessary and proper,” mandated that paper money be declared unconstitutional. Finally, just as Briscoe\textsuperscript{152} tolerated state banking activity in the absence of and until the passage of currency laws that gave the federal government a monopoly over the creation of money, as the dissenters in Veazie made clear, state power to charter banking institutions, even if it existed prior to the Constitution, could be preempted by federal policy.\textsuperscript{153} While he was reluctant in Hepburn to allow paper money into the economy, if any economic actor could successfully issue such money, it could only be the federal government.

Before turning directly to Knox and Julliard, two intervening events are notable. The first came in between Hepburn and Knox, the second between Knox and Julliard. In 1869, Congress increased the number of Supreme Court justices from eight to nine; with the retirement of one justice, President Grant appointed two new justices to the Court.\textsuperscript{154} Second, after Knox specifically overruled Hepburn and sustained the wartime declaration of legal tender status for United States notes as it applied to contracts both before and after the declaration of legal tender, Congress planned to resume the payment of specie and to return to the gold standard. Outstanding greenbacks would be redeemed for specie. However, after the Panic of 1873 and the congressional elections of 1874, in which the Republicans lost control of the House of Representatives, the Resumption Act was repealed, forbidding the retirement of any greenbacks.\textsuperscript{155}

In this context, the Court decided Knox, which tested the constitutionality of the original 1862 declaration of legal tender that already had been held unconstitutional in Hepburn with respect to

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\textsuperscript{152} Briscoe v. Bank of the Commonwealth of Kentucky, 36 U.S. (11 Pet.) 257 (1837); see supra notes 102-07 and accompanying text.

\textsuperscript{153} See Veazie, 75 U.S. at 551-54.

\textsuperscript{154} The seedy history of how he chose them and what transpired within the Court in the period between Hepburn and the Legal Tender Cases can be found in Fairman, supra note 118, at 716-46.

\textsuperscript{155} See Friedman & Schwartz, supra note 120, at 47-49; Hurst, supra note 92, at 88-89; Dam, supra note 25, at 380-81. On the interesting history of the Panic of 1873, caused by massive overspeculation in railroad stocks, see Rezneck, supra note 5, at 129-147; Sobel., supra note 98, at 154-96.
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debts contracted before the legislation. The Court now considered the statute’s prospective application, that is, a debt incurred in 1863. Without being necessarily required to overrule Hepburn (for example, it could have been simply said that the power to declare legal tender was only exercisable prospectively), the Court did overrule Hepburn, thus paving the way for a virtual federal monopoly over macroeconomic issues. Rejecting Chase’s somewhat stingy and hesitant view of federal power, the two cases broadened substantially the terms of government’s involvement in the economy, particularly with respect to the effect economic legislation might have on individual rights.

Justice Strong, newly appointed to the Court, situated the case into what he thought was the appropriate context: The stakes were the government’s ability to preserve itself in an emergency. After reviewing the critical and dire financial straits in which the North found itself when the original legislation was passed, Strong asked what “enabled the successful prosecution of the war, and the preservation of national life? What was it, if not the legal tender enactments?” Strong’s economic reasoning was that the declaration of legal tender status “gave [the notes] a new use, and it needs no argument to show that the value of things is in proportion to the uses to which they may be applied.” While Justice Field vigorously denied this, using the very same argument that Chase had used in Hepburn, the constitutionality of legal tender for Strong went beyond, indeed was completely independent of, its economic effectiveness: The Constitution was designed to establish one nation, with one currency over which Congress had exclusive control. To Field’s suggestion that this worked an injustice on the individual who was repaid a debt with inflated currency, Strong was emphatic in subsuming individual rights into an economy under the exclusive stewardship of Congress. Working individual injustice in a handful of cases was an unfortunate, but unavoidable-
able byproduct of the market. In a sense, it was a tax on one’s use of the market: “Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, . . . and the obligation of the parties is, therefore, assumed with reference to that power.”

Besides the economic argument that the declaration of legal tender status did not add value to the notes issued, Field’s central response in dissent was a radical denial of the economic “stewardship” concept. His alternative concept had a number of elements. First was a physical fetishism with precious metals, items which have a transhistorical and international acceptance that paper money could never have. As a formal legal matter, he did this by reading the prohibition on states’ making anything but gold or silver legal tender in conjunction with the grant of the power of coinage to Congress.

Second, only upon the solidity and pure physicality of metal could the nation be constructed; paper money necessarily fluctuated in value and, because it could be relied upon to a dangerous and abusive extent, was a pollutive, immoral element. He described this anti-inflationary moral principle as a peremptory constitutional requirement:

It is difficult to perceive how the trust and duty here designated, of “creating and maintaining a uniform and metallic standard of value throughout the Union,” is discharged, when another standard of lower value and fluctuating character is authorized by law, which necessarily operates to drive the first from circulation.

. . . By debasing the coins, when once the standard is fixed, is meant giving to the coins, by their form and impress, a certificate of their having a relation to that standard different from that which, in truth, they possess; in other words, giving to the coins a false certificate of their value. Arbitrary and profligate governments have often

161. Id. at 549. He did not go so far as to suggest that contracts for a specific quantity of gold could be repaid with inflated paper money. The Court had already held that the legal tender legislation did not affect a contract for repayment in gold. Bronson v. Rodes, 74 U.S. (7 Wall.) 229 (1868). Bronson would eventually be overruled in Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935). See infra notes 248-67 and accompanying text.

162. See Knox, 79 U.S. at 651-52.
resorted to this miserable scheme of robbery, which Mill designates as a shallow and impudent artifice, the "least covert of all modes of knavery, which consists of calling a shilling a pound, that a debt of one hundred pounds may be canceled by the payment of one hundred shillings."  

Third, while Field’s economic argument that the declaration of legal tender probably did not make the notes more valuable, he took the rejection of “fiat money” farther. Even the declaration of legal tender had a deceptive and dissimulating quality to it. He retraced an argument first made in Chase’s majority opinion in Hepburn. There, Chase suggested that, even though the Contract Clause did not apply to Congress, “the spirit of this prohibition should pervade the entire body of legislation...” Thus, Field believed that Congress could not force individual parties to a contract to accept a lesser value, i.e., inflated paper money, merely by declaring paper to be of the same value as gold:

No just man could be imposed upon by this use of words in a double sense, where the same names were applied to denote different quantities of the same thing, nor would his condemnation of the wrong committed in such case be withheld, because attempt was made to conceal it by this jugglery of words.

163. Id. at 658, 675.
165. Knox, 79 U.S. at 668. While he would not force a payee to accept inflated currency, Field would take a more lenient attitude towards judicial adjustments of the payor’s contractual obligations under changed circumstances like a major economic upheaval. For example, in Willard v. Tayloe, 75 U.S. (8 Wall.) 557 (1869), decided just before paper money as a legal tender was declared unconstitutional in Knox, the Court considered the situation of two individuals who had contracted for a ten year lease on a house with an option to buy. When the option-holder attempted to exercise his option and purchase the house in 1864 with paper money, the option-writer refused to accept the inflated greenbacks. See id. at 559-61. Field’s solution was to award the option-holder as a remedy specific performance (allowing him the profit for the increase in value of the property), but to force him to pay for the house in specie (denying him the windfall of paying in inflated money) on the theory that “[w]hile he seeks equity he must do equity.” Id. at 574. See Steven G. Harman, Note, Alleviating Hardship Arising from Inflation and Court Congestion: Toward the Use of the Conditional Specific Performance Decree, 56 S. CAL. L. REV. 795, 799-800, 815 n.137 (1983). This, of course, assumed that legitimate and illegitimate inflation could be separated.

On the question of whether Field’s interpretation could be deemed a judicial impairment of contract, see Barton H. Thompson, Jr., The History of the Judicial Impairment “Doctrine” and Its Lessons for the Contract Clause, 44 STAN. L. REV. 1373 (1992). He argues principally that “the Contract Clause finds its sustenance in fears that state debtor
Lastly, he hypothesized the sale of government bonds which specified repayment in gold. If the Court were right, he said, then the government could simply declare the debt payable in currency. Such an interpretation would allow the government to repudiate its obligations:

What is this but declaring that repudiation by the government of the United States of its solemn obligation would be constitutional? . . . Repudiation in any form, or to any extent, would be dishonor, and for the commission of this public crime no warrant, in my judgment, can ever be found in that instrument.\textsuperscript{166}

In short, Field conceived of the federal government's relationship to the macroeconomy by looking at government as an individual actor within a macroeconomy and imagining an economy ruled by fundamental monetary and constitutional principles derived from a traditional contractual morality.\textsuperscript{167}

What Field seems to be describing (and constitutionalizing) in \textit{Knox} is a kind of early monetarism, whereby government policy as to the quantity of money controls economic health, including the

\textsuperscript{166} Capturing a number of elements present in the \textit{Legal Tender Cases} (crisis government, political control over the economy, judicial checks on that authority, and ambivalence about the morality of debt) is the late eighteenth century episode involving the post-Reconstruction repudiation of state debt incurred by carpetbagger state governments. One scholar has described how the judiciary used the Eleventh Amendment as a safety valve to avoid a crisis. For this fascinating history, see John V. Orth, \textit{The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power}, 1983 U. ILL. L. REV. 423, 431-55.

\textsuperscript{167} The repudiation imagined by Field, including a concerted government policy of currency devaluation, would occur with striking similarity 60 years later in the \textit{Gold Clause Cases}. See infra Part VI. Charles Kindleberger has pointed out numerous other historical instances in which the question of government repudiation arose. See Charles P. Kindleberger, \textit{The Great Disorder: A Review of the Book of that Title by Gerald D. Feldman}, 32 J. ECON. LITERATURE 1216, 1220 (1994).
occurrence or non-occurrence of crises. On the type of crisis for which the federal government and ultimately the courts had to be vigilant, Field echoed Marshall in his reference to a specific pre-Constitutional monetary crisis: Crisis always results from the inability of the government to control the money supply and from rampant speculation, inflation, and the heaping up of debts caused by a loss of simple commercial morality. Only basing all money on a real gold standard would prevent people from creating new forms of money, prevent banks from loaning well beyond their specie reserves, and ground money in reality. The flip side of this view was that Field felt that economic stagnation was definitely not a type of crisis that called for government action. Without any promotional role with respect to the economy as a whole, government was relegated by Field to the status of a normal economic actor with an extra duty of currency maintenance.

The final legal tender case, Juilliard v. Greenman, came nearly fifteen years after Knox, and concerned the power of the government to re-issue greenbacks. That is, once the lame duck Republican Congress in 1874 made the decision to redeem greenbacks for specie, could the Democratically controlled one undo this decision? Would the power to issue legal tender be extended beyond the wartime situation upon which the majority in Knox relied so heavily?

From the standpoint of coherent political economy, Justice Gray's holding makes a certain amount of sense: If the federal government was to have the exclusive duty to guarantee the systematic coherence of the economy, both its monetary and fiscal health, that role could not rationally be limited to wartime, as if one needs to steer a ship only during a tempest. However, the constitutional justification that Gray gave for his economic belief was fuzzy at best. His opinion for the majority grounded its answer formally on the power to borrow and coin money, but principally on the holding that the provision of a national currency was an aspect of sovereignty. Thus, noting that government notes

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165. See SHERMAN, supra note 34, at 273-74.

166. For an explanation of a late monetarist "true" gold standard, a completely free market determination of the value of gold, see Milton Friedman, Real and Pseudo Gold Standards, 4 J. L. & ECON. 66 (1961).

167. 110 U.S. 421 (1884).

168. See supra note 155 and accompanying text.

169. See Juilliard, 110 U.S. at 449-50.
were initially declared to be legal tender during a massive crisis, Gray interpreted the Constitution to provide the legislative branch with a tremendous amount of discretion as to the existence of crisis and as to the appropriate response, effectively "eviscerat[ing] the dichotomy between constitutional normalcy and extra-constitu-
tional emergency."\textsuperscript{173}

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inade-
quacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as a matter of fact, wise and expedient to resort to this means, is a political question, to be deter-
mined by congress when the question of exigency arises, and not a judicial question to be afterwards passed upon by the courts.\textsuperscript{174}

Gray's opinion is in large measure an abdication of the judi-
ciary's responsibility to scrutinize both the ends and means of government. Since Gray's conclusion was that providing a currency for the nation was an aspect of sovereignty, a constitutional end under any circumstances, Gray foreclosed the possibility that the means selected, e.g., paper money, \textit{might} be unconstitutional, or that other results of the legal tender legislation, e.g., the destruction of the state banking system in \textit{Veazie},\textsuperscript{175} might be illegitimate. Furthermore, by failing to police the boundary between normal exercises of enumerated and implied powers and extraordinary crisis government, Gray succeeded in "routinizing\textsuperscript{176} crises and allowing "the 'medicine of the Constitution' [to] become its daily bread."\textsuperscript{177}

\textsuperscript{173} Lobel, \textit{supra} note 23, at 1388 (terming the alternative to liberal "spheres" of normal-
cy and crisis the "absolutist" view of emergency power).
\textsuperscript{174} \textit{Juhl}, 110 U.S. at 450.
\textsuperscript{175} See \textit{supra} notes 147-49 and accompanying text.
\textsuperscript{176} Lobel, \textit{supra} note 23, at 1412.
\textsuperscript{177} \textit{Juhl}, 110 U.S. at 458 (Field, J., dissenting). Field's more stoic approach in his dissent was to categorically deny the existence of extraordinary powers. Field thought that such restraint was the only way to avoid a ratchet effect and an irreversible flow of pow-
ner to the political branches:

[It was for Congress to determine when the necessity for its [exercise of the power to impart the quality of legal tender to its promissory notes] existed; that
Gray’s grant of substantial discretion to Congress to determine when crisis exists is remarkable for its sheer rarity. Most judges take note in some way of the crises in which the executive or legislative actions at issue occurred. Formally, they apply a conventional constitutional analysis by looking at the legitimacy of the ends and the appropriateness of the means employed, sometimes giving latitude to the legislature based on their particular perception of the necessity of a piece of legislation (e.g., Briscoe, Earle) or taking note of the context in which the legislature acted (e.g., Hepburn). The next set of cases continues our look at judicial strategy in the face of crisis from a slightly different standpoint and finds not ambivalence, silence, or a partially articulated political economy, but a judiciary willing to speak in the starkest of terms.

V. CRISIS OF LEGITIMACY AND SOCIAL ORDER

Up to this point, we have explored the relationship between constitutional reasoning and economic crisis by looking at how different Supreme Court justices have articulated distinct roles for government in structuring and maintaining economic order, often reflecting a particular vision of the causes of economic crises. For example, one vision is of crisis as the result of an inability to control the money supply. Thus, paper money, inevitably inflation inducing, was, for Field and Chase, an unconstitutional means to provide a currency system for the nation. As another vision, some justices have described a federal-state dynamic by which the Supreme Court policies of the federal system allows state regulatory regimes and monetary institutions to step forward where the Court senses a vacuum of federal action in an area.

This section explores similar themes in the context of a social crisis, the Pullman Strike of 1894, to understand how the Supreme Court responded to rampant social, as opposed to primarily eco-
nomics, crises. The response is particularly interesting because of the Court's perception that the state government, the traditional repository of police power, had not confronted the mob violence that the Court thought was the real threat to order. As the Court permits state institutions to do in the absence of federal bankruptcy legislation or federal institutions in the face of economic stagnation, the Court is likely to step into a crisis situation where it perceives a vacuum of competent moral authority.

While economic panics in the United States have generally engendered some degree of social unrest, the Panic of 1893 outrides all others in terms of the revolutionary uproar that resulted. Various groups in the political arena made new demands for change as a result of the panic: laborers clamored for increased wages and better working conditions; citizens demanded government action to break up powerful trusts; farmers and other pro-agrarian interest groups made claims for greater access to credit; and Populists promoted inflationary "free silver" policies and a progressive income tax.

One of the most disruptive incidents of the era was the Pullman Strike of 1894. When the Pullman Palace Car Company unilaterally lowered worker salaries twenty-five percent, without lowering rents in the company town of Pullman, Illinois, where most lived, the workers appealed for support to a new union of skilled and unskilled railway workers organized by Eugene V. Debs, the American Railway Union (ARU). By the time of the strike in mid-1894, the Union had approximately 150,000 members. Out of sympathy for the Pullman workers, whose demands were dismissed, the ARU agreed to organize a boycott of all Pullman cars, refusing to switch or handle any of them, and thereby causing a virtual standstill in train traffic to and from Chicago.

Normally, because many of the railroads had been forced into bankruptcy as a result of the Panics of 1884 and 1893, their receivers would bring suit in federal court under the Sherman Antitrust Act to enjoin the boycott. On July 2, while these individ-

180. On the stock market causes of the panic, see SOBEL, supra note 98, at 230-72; see generally W. JETT LAUCK, THE CAUSES OF THE PANIC OF 1893 (1907).
181. See PAUL, supra note 15, at 1; REZNECK, supra note 5, at 177-98, 190.
182. See PAUL, supra note 15, at 133-34.
183. The authoritative, even if slightly histrionic, account of these events is ALMONT LINDSEY, THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL 90-91, 109 (1964).
184. See id. at 155-56.
On July 4, President Cleveland resorted to even more drastic measures: He sent about 2000 federal troops to Chicago as protection against expected uprisings, violence, and the destruction of federal property, ignoring the governor's assertion that the problem was under local control by the Illinois state militia. On July 6, 4200 state militiamen joined the Chicago city police and federal officials. The arrival of state-controlled troops escalated tensions and more than sporadic violence did occur (twenty people were wounded, four killed, and thousands of railroad cars were burnt). By July 13, with support from the strikers and other unions waning and the influx of new workers from the East, trains were again moving and the President withdrew federal troops the following week. On July 17, Debs was arrested for violating the original injunction, tried, and convicted of contempt.

It was this legal conflict that would allow the circuit court and the Supreme Court podiums from which to sanction the use of labor injunctions and to underscore the unchallengeable alignment of all federal forces (the President, Attorney General, the U.S. marshals, the army, a federal grand jury, an intermediate appellate court, and a unanimous Supreme Court) against disruptive union activity and, more generally, challenges to established institutions and social conditions. The Debs opinion by Justice David Brewer and a lower court opinion in a related case by William Howard Taft, a former president and future Supreme Court chief justice, are two examples of how the judiciary deals with these challenges.

The formal legal question in Debs was whether an injunction

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185. The text of the broadly worded injunction is reprinted in United States v. Debs, 64 F. 724, 726-27 (C.C.N.D. Ill. 1894); see also Lindsey, supra note 187, at 160-65.
186. See Lindsey, supra note 183, at 186. A conflict ensued between the Governor of Illinois and President Cleveland over the President's authority to send in federal troops over the Governor's objection. See Paul, supra note 15, at 142-43.
187. See Lindsey, supra note 183, at 199.
190. See Thomas v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 62 F. 803 (C.C.S.D. Ohio 1894) (Taft, J.). The injunction here was issued against a colleague of Debs, F.W. Phelan, who was helping to coordinate the strike in Ohio.
was a proper form of relief against the Pullman strike. Thus, because the case was not formally a constitutional one, but rather one of equitable powers,ør Brewer had great latitude and could focus on the institutional power and practical effectiveness of the courts during a time of crisis. Owen Fiss has identified Brewer’s main interpretive problem as grounding the “maintenance of order” in the enumerated powers given the executive.ør Taking seriously Brewer’s legal reasoning on its own terms, Fiss eloquently analyzes the three sources that Brewer tapped (the Commerce Clause, public nuisance doctrine, and historical experience of the Civil War) to locate such power.ór Rather than summarizing that analysis, I instead want to focus on order and crisis from the perspective of the rich rhetorical strategies employed by Brewer and Taft.

Justice Brewer used two organizing images throughout his opinion. The first was the dichotomy of the large, powerful government with an array of institutional weapons, allied against the small, weak, and isolated Debs. The government’s interest in interstate commerce was “vast”; its means of exercising “the great powers assigned to it” were independent of any other authority; the arm of the executive was “strong”; the “entire strength of the nation” was allied against the defendants; Congress’ interstate commerce authority extended over “every foot of soil” and was one of “direct supervision, control, and management”; the power to punish contemnors was “summary.”ó The “whole interests of the nation” could never “be at the absolute mercy of a portion of the inhabitants of [a] single State”; the government had the responsibility to “promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare.”ó Brewer constantly referred to Debs not as an evil conspirator

191. See Fiss, supra note 188, at 67.
192. Id. at 65. In a speech before the New York State Bar Association, Brewer had identified security and the maintenance of order as the “chief end of government.” See David J. Brewer, The Nation’s Safeguard, Speech before the New York State Bar Association (Jan. 17, 1893), in PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, SIXTEENTH ANNUAL MEETING 37, 39 (1893).
193. See Fiss, supra note 188, at 65-74. See also L.H. LaRue, Constitutional Law and Constitutional History, 36 BUFF. L. REV. 373, 381-91 (1987) for another penetrating reading that I need not redo here. The same sort of analyses could be done of the lower court opinion in Debs, although it is not as theoretically well-constructed as Brewer’s. See United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894).
194. Debs, 158 U.S. at 578-79, 582, 593, 596.
195. Id. at 582.
196. Id. at 584.
whose secret plans had been exposed, but as an "interference" with or "obstruction of" the inexorable and massive forces of commerce and rail traffic and Congress' plenary authority to protect that commerce.197

The other organizing image that Brewer used was of the sheer forcefulness of the legal process. Disruptions of social order, either attempts to revalue established hierarchies or block the functioning of traditional legal powers, had to be met with absolutely unequivocal and devastating reaction. Courts confronted with such a situation should expand to their maximum institutional force:

The picture drawn in [the indictment] of the vast interests involved ... [of] the general confusion into which the interstate commerce of the country was thrown [and] the attempted exercise by individuals of powers belonging only to government ... presented a condition of affairs which called for the fullest exercise of all the powers of the courts. If ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this [indictment] ... 198

Oddly enough, however, it was best for the judicial, not the executive, branch to accomplish this. The ability to resort to punitive authority should not foreclose additional resort to the courts. In part, this was because economic coercion on the part of strikers was not a traditional form of violence, but a civil form of violence;199 in part, this was because the Constitution had committed the "determination of questions of right and wrong between individuals, masses, and States"200 to the courts, as if they might effectively defuse class conflict and class consciousness.201

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197. Id. at 577, 581-82, 593.
198. Id. at 592.
199. See Brewer, supra note 192, at 40 ("When a thousand laborers gather around a railroad track ... [i]t is coercion, force; it is the effort of the many, by the mere weight of numbers, to compel the one to do their bidding. It is a proceeding outside of the law, in defiance of the law. . . .").
200. Debs, 158 U.S. at 598.
201. See id. at 586:

While it is not the province of the government to interfere in any mere matter of private controversy between individuals ... whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation ... then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts.
Another reason Brewer felt that the dispute in *Debs* was uniquely amenable to judicial resolution was because mobs on the edge of violence might yield to judges. The judiciary, while not of the same dynamism of the executive, had an authority more mesmerizing than force: the authority of rationality, an authority that depended not on saying no, but on teaching citizens how to say yes. In this vein, Brewer again minimized Debs, placing him squarely in the category of "poor and puny anonymities"\(^\text{202}\) when held next to the overwhelming power of the federal judiciary, capable of nothing more than mere rabble-rousing and agitation:

> It may be true, as suggested, that in the excitement of passion a mob will pay little heed to processes issued from the courts, and it may be . . . that it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late civil war . . . . But . . . [i]s it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil processes of the courts?

. . .

Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their

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\(^{202}\) Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting). Justice Holmes would have occasion to deal with Debs in *Debs v. United States*, 249 U.S. 211 (1919), in which he affirmed Debs' conviction, applying the "clear and present danger" test. While Holmes minimized Debs, he did it in a completely different fashion, that is, with his typical supercilious dismissiveness. He wrote later:

> I am beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing and recruiting service so far as the law was concerned. . . . There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case—*Schenck v. U.S.*

Compare Brewer's minimization strategy and the formal legal result it generated with the interpretive lens that Taft held up to Phelan (a Pullman strike leader in Cincinnati) and Debs in Thomas v. Cincinnati, New Orleans & Texas Pacific Railway Co. Through Taft's lens, they appeared much larger and much more dangerous because he likened them a worthy adversary to the Pullman Company:

The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are the arteries on the human body, and yet Debs and Phelan and their associates proposed, by inciting the employees of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible ..., to pay more wages to his employees.

Taft's strategy was to attack the strike as an illegal combination in violation of a court order which had placed the railroad into receivership. First, the strike's object was defective because strikes could only exist between aggrieved employees and their employer. Sympathy strikes, however, are boycotts, distinct because their aim is to compel employer B to withdraw from a mutually profitable relation with employer A who is the real target of the strike. This was more than a visceral reaction to "sympathizers" or class consciousness among workers. The formal distinction was that a strike could result in a higher wage for an employee or, if one of the parties chose, in an end to the contractual arrangement. A sympathy strike, however, existed outside of an exchange relationship and could be the product of nothing more than pure

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203. Debs, 158 U.S. at 597-98. Brewer was responding here to Debs' argument that the maintenance of social order should be committed to the executive, and thus, that Debs was subject to the executive's power to prosecute Debs criminally, but not to the judiciary's power to enjoin the strike.

204. 62 F. 803 (C.C.S.D. Ohio 1894).

205. Id. at 821.

206. See id. at 818-21.
Taft’s other organizing metaphor concerned the source of the judiciary’s moral authority. Rather than Brewer’s vision of the judiciary as a power which can command obedience and thereby stem a crisis, for Taft, the real source of judicial authority is its ability to see, penetrate, and undress. Correspondingly, the true danger of strikes is their secrecy, opacity, and darkness. The opinion is replete with references to Phelan and Debs’ hiding, obfuscation, and dissimulation. Showing palpable hostility to Phelan, Taft would not be dissuaded by the “evasiveness and verbal quibbling to which the witness was continually willing to resort under examination,” nor would he be so gullible as to swallow what Phelan “would have the court believe.” Taft expressed that Phelan’s “marvelous” assertions and “trifling with the truth” could not “conceal[] the facts” from the pure truthfinding power of the Court.

Taft went on to analyze the content of Phelan’s speeches and telegrams to Debs to see if in fact he had advocated the tying up of all railroad traffic or the use of violence and intimidation in carrying out the boycott. Again, what characterizes the analysis of the evidence is Taft’s belief in the perspicacity of the Court. The solution was to see through, if not penetrate, the labor organization in order to isolate its real ends: the disruption of commerce and the interference with property. “Telltale words would creep into the evidence”; Phelan’s “complete command [of the strikers was] so apparent that it [could not] escape anyone”; Phelan’s denials showed exactly the opposite of what he intended them to mean; Phelan could not “seek shelter” from the Court’s vision; “double meaning” could not be “conceal[ed] and pervert[ed].”

Taft continued the use of a dichotomous relationship between Phelan’s secrecy and the Court’s ability to penetrate that secrecy in describing Phelan’s equivocal language, words which had been “slyly slipped in where [it] could be given a double meaning if questioned”.

207. See id. at 818.
208. Id. at 807.
209. Id. at 808.
210. Id. at 809.
211. Id. at 811.
212. Id.
213. See id. at 814.
214. Id. at 814-15.
215. Id. at 815.
The expressions were for the purpose of bringing into operation that secret terrorism which is so effective for discouraging new men from filling the strikers' places, and which is so hard to prove in a court of justice unless it results in open assault. That Phelan openly discouraged conflict with the law is to his credit as a strike organizer, for he wished public sympathy; but that he wished the aid of that secret terrorism, which is quite as unlawful, seems to me to be established.\textsuperscript{216}

That is, sympathy strikes are dangerous because they erase the clear battle lines drawn by contracts. Contractual relationships, and strikes over their terms, are transparent, whereas sympathy strikes are secret,\textsuperscript{217} capable of spreading without perception, and outside the "normal operation of competition in trade."\textsuperscript{218}

One legal historian has traced the role of the legal order in American labor's failure to articulate a class-based political movement similar to Europe's union movements, in particular the construction of a labor consciousness grounded in rights.\textsuperscript{219} Another has evaluated the impact of judicial assumptions about worker violence in generating the legal doctrines of economic coercion.\textsuperscript{220} These analyses reflect and our quick tour through the language of Debs and Thomas once again shows that rhetorical power in articulating a particular vision of crisis affects the generation of specific legal results, as well as the generation of an institutional consciousness adapted to that threat. In Debs, the crisis

\textsuperscript{216} Id. (emphasis added).
\textsuperscript{217} Secrecy and opacity were even to be avoided by the government. It was more than appropriate for the railroad to call for the use of the federal marshals to protect its interests. However, Taft had to struggle to justify the use of and to establish the credibility of a private detective employed by the railroad to penetrate the union, though he was clearly embarrassed by it. See id. at 814, 815.
\textsuperscript{218} Id. at 820.
\textsuperscript{220} See Dianne Avery, Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921, 37 BUFF. L. REV. 1, 35 (1989) (stating that coercive power of injunction is justified by a judge as a proportionate response to a threat of violence). In addition to changes on the organizational level that Forbath outlines, confrontations with the law have a transformative power on an individual level. See David Ray Rapke, Eugene Debs as Legal Heretic: The Law-Related Conversion, Catechism, and Evangelism of an American Socialist, 63 U. CHI. L. REV. 339 (1994). I cannot help but note that campaigning from prison, Debs received almost a million votes in the presidential campaign of 1920. See id. at 371-72.
was the incipient "rebellion or revolution"\textsuperscript{221} against the entire state. Therefore, a much larger Supreme Court, aligned with the executive branch, was justified in stamping out this flame with the overwhelming force of a sweeping injunction, a "chancellor's foot." In \textit{Thomas}, on the other hand, the danger was the "paralysis" and "injury"\textsuperscript{222} that a massive conspiracy, spreading like an infectious virus, posed to an individual company. The court was therefore required to detect and punish the wrongdoer.\textsuperscript{223} In the final set of cases, I combine the rhetorical analysis employed here with the focus on political economy and morality used in Parts III through IV to take a step toward a more general vision of crisis.

VI. THE FIRST (AND LAST?) GREAT MODERN CRISIS

The most recent economic crisis in U.S. history brings us full circle on two of the major questions explored in this essay: debtor relief during times of crisis and the ability of federal institutions to take command of the macroeconomy. That they are the most recent cases does not suggest that \textit{Home Building & Loan Association v. Blaisdell}\textsuperscript{224} settles conclusively the question of emergency relief for debtors in times of economic upheaval,\textsuperscript{225} or that the \textit{Gold Clause Cases}\textsuperscript{226} resolve the question of the federal government's ability to alter private contractual relations in exercising its power over the economy. In fact, both are manifestations of a basic, ever-present interpretive problem over the adaptability of the Constitu-

\addtocounter{footnote}{1}
\footnotetext{221}{\textit{In re Debs}, 158 U.S. 564, 597 (1895).}

\addtocounter{footnote}{1}
\footnotetext{222}{\textit{Thomas}, 62 F. at 807.}

\addtocounter{footnote}{1}
\footnotetext{223}{For example, Taft believed that he was conducting "a kind of police court." \textit{Avery}, \textit{supra} note 220, at 21 (quoting Taft's letters).

\addtocounter{footnote}{1}
\footnotetext{224}{290 U.S. 398 (1934) (upholding a Minnesota statute providing homeowners with relief from foreclosure in times of economic emergency).

\addtocounter{footnote}{1}
\footnotetext{225}{Indeed, most commentators have repudiated the doctrine of emergency economic powers. \textit{See}, e.g., \textit{Belknap}, \textit{supra} note 26, at 101 (discussing the potentially dangerous and inappropriate “one man rule” of President Roosevelt in exercising emergency economic powers); Charles A. Bieneman, Note, \textit{Legal Interpretation and a Constitutional Case: Home Building & Loan Association v. Blaisdell}, 90 Mich. L. Rev. 2534, 2535 n.12 (19-92) (arguing that \textit{Blaisdell} was wrongly decided under any theory of constitutional interpretation).

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tion to new circumstances, as well a "perennial ambivalence" over the role of credit and debt in our society. In a crisis situation, with circumstances pressing down upon on the Court, these root differences are laid bear.

At issue in Blaisdell was a Minnesota law that provided for various forms of debtor relief, among them, a judicially crafted extension of the period following a foreclosure during which a debtor could redeem his or her equity and alteration of the repayment schedule of a debt. The law was challenged as a violation of the Contract Clause. Echoing Marshall in Sturges, Chief Justice Hughes agreed that the Constitution was a document already adopted for a period of emergency. Notably, however, the economic crisis preceding the Constitutional Convention was not caused by the overextension of credit, as Marshall thought in Sturges and Craig. Rather, it was exactly the reverse. What had occurred was "utter destruction of credit," and what was lacking was confidence in the economic future, something "essential to prosperous trade" and necessary to induce people to borrow and lend. Government was thus encouraged to literally and figuratively inflate the economy until it could get back on its feet. The Constitution was not simply adopted during and for crisis; it was adapted to the individual circumstances of crises. Hughes refused to allow the crisis circumstances that inspired the Contract Clause to constrain the interpretation of that clause during a later crisis.

Why not? Hughes' opinion suggests that in a highly evolved economic order, the evils of early panics could simply not be the same evils of which to be wary during the present crisis. We had progressed beyond those fundamental flaws. All that was necessary was a regulatory tune-up, since a crisis was a minor, temporary jiggle, an adaptive process. In the meantime, courts could function as a safety valve until cooler heads prevailed, for example, by limiting foreclosures and by altering the contractual terms of repayment. Courts should, of course, continue to safeguard constitutional

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227. Weisberg, supra note 8, at 3.
228. See Blaisdell, 290 U.S. at 427-30.
231. Blaisdell, 290 U.S. at 427 (emphasis added).
232. See id. at 428 ("Full recognition of the occasion and general purpose of the [Contract Clause] does not suffice to fix its precise scope. Nor does an examination of the details of prior legislation in the States yield criteria which can be considered controlling.")
rights, but with an understanding that the executive and legislative branches needed some breathing room to reinvigorate the drooping market economy.

Hughes' view of the uniqueness, if not randomness, of economic crises, and of the proper role of the various branches of government during the lag, supplied him with a general interpretive orientation towards crisis. He invoked an unremarkable proposition in a rather cryptic form: "While emergency does not create power, emergency may furnish the occasion for the exercise of power." What occupied the vast majority of his energy in *Blaisdell* was locating a source of the power the state was attempting to exercise. He did this by giving economic content to the state's police power. "[T]he vital interests of [the] people" included more than the protection of public health and morals, the power to enjoin nuisances, or the power to regulate public roads. The police power included also the power to safeguard the "economic interests of the State" and its citizens, the power to make the vicious market safe for nighttime contracts. Essentially, Hughes was denying that, as far as the police power was concerned, there was any constitutionally meaningful difference between a "fire, flood, or earthquake" and an economic crisis. In the face of crisis, the state government had the power, if not the affirmative obligation, to alleviate the hardships caused by economic dislocation. Hughes gave his political-economic reason why there was a need for an activist state during moments of crisis:

Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved [in protecting individual opportunity], and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

Thus, Hughes concluded, the state, reserving the power to resort to

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233. *Id.* at 426.
234. *Id.* at 436-37.
235. *Id.* at 437.
236. *Id.* at 439.
237. *Id.* at 442.
emergency powers should a bolt of economic lightening strike, could provide limited, temporary, and conditional relief to debtors during such a crisis.238 After all, every contract is made with this as a backdrop, with the laws of nature "as conditions inherent and paramount. . .".239

Justice Sutherland's countervailing view of the business cycle expressed in his dissent was informed by an extremely detailed excursion into the history of economic panics and the societal reactions to them. He began by noting gleefully and proudly that statutes passed during every economic crisis were overturned by the Court, specifically in spite of the crisis context in which the Minnesota law at issue was passed, and despite the fact that the crises were often worse than the one which motivated the Minnesota statute at hand.240 Thus, crisis was a time for judges to recognize temporary dysfunction, but to stoically ignore the crisis as a periodic, purgative downturn, and certainly not a structural crisis that threatened collapse.

His basic position was that crises were regular, if not healthy troughs in the nation's economic life, painful lessons in commercial morality. Unfortunately, however, nothing could be, and therefore nothing should be done to avoid them: Crisis advances an "ideology of economic austerity,"241 a time to return to first principles, a shakeout of the overindulgent chaff. Indeed, debtor relief was un-

238. Hughes supported active state measures to promote the economy only during crisis moments. Hughes noted that the relief provided by Minnesota was temporary, conditional, and limited in scope, as well as administered by the state judiciary. See id. at 444-47; see also W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934) (explaining that the State's power to interfere in the face of a "pressing public disaster" must be "limited by reasonable conditions appropriate to the emergency"). Second, in Hughes' view, the reasonableness of crisis measures within the emergency context, as well as the very existence of a crisis, would still be subject to judicial review. See Blaisdell, 290 U.S. at 442.

239. Blaisdell, 290 U.S. at 436.

240. See, e.g., id. at 449 (Sutherland, J., dissenting) ("The true rule was forcefully declared . . . in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist today."); id. at 466 (Sutherland, J., dissenting):

The opinion of the court says nothing about an emergency; but it is clear that the statute was passed for the purpose of meeting the panic and depression which began in 1837 and continued for some years thereafter. And in the light of what is now to be said, it is evident that the question of that emergency as a basis for the legislation was so definitely involved that it must have been considered by the Court.

(footnote omitted).

necessary and unwise because: 1) it would encourage debtors to rely on legislative relief and not on their personal industry and economy, as well as engender disrespect for legal institutions; 2) debtors found themselves in poverty because of their profligacy, the spending of fictitious wealth (i.e., "debt") for foreign luxuries; and 3) sound financial policy dictated against the use of all debt.

He summarized his position:

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

When it came to deciding the legal question before him, his view of the business cycle, as one which took for granted the regularity of crisis, drove his constitutional interpretation. That the Constitution, and especially the Contract Clause, was a document born of a debt crisis was simple proof that extraordinary conditions do not change the scope of proper state power:

The defense of the Minnesota law [on the grounds of an emergency doctrine] should not now succeed because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with

\[\text{\textsuperscript{242}} See Blaisdell, 290 U.S. at 455 & n.2, 456 (Sutherland, J., dissenting). \]

\[\text{\textsuperscript{243}} See, e.g., id. at 454 (Sutherland, J., dissenting) ("Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. . . . In these circumstances they incurred indebtedness in the purchase of imported goods and otherwise, far beyond their capacity to pay."). Compare Sutherland's language with Marshall's review of the pre-Constitutional crisis: Whereas Sutherland blamed the crisis on decadent debtors, Marshall blamed state banks who had enticed those debtors with liberal credit. See supra notes 79-80, 89 and accompanying text. \]

\[\text{\textsuperscript{244}} Blaisdell, 290 U.S. at 471-72 (Sutherland, J., dissenting). \]
those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it.\textsuperscript{245}

Armed with this conception of the crisis, Sutherland had no trouble showing that the extension of time allowed to the debtor by the Minnesota law was an impairment of the contractual obligation, not a modification of the remedy.\textsuperscript{246}

While the reach of \textit{Blaisdell}, perhaps by the very nature of its holding, could not have been extended beyond its limited circumstances\textsuperscript{247} situating contractual arrangements within an economic order maintained by the government survives as a technique for interpreting the Contract Clause and the Takings Clause. In three companion cases which have come to be known as the \textit{Gold Clause Cases},\textsuperscript{248} the Court also sanctioned the assignment to the federal government of the task of overseeing, maintaining, and tending to the economic machinery of the nation. They provide our final example of the increasing centralization of power in the hands of the federal government when the economy is careening out of control. They also show how a particular vision of crises drives legal interpretation.

The immediate precursor of the cases was Franklin Roosevelt's first major act as President: taking the U.S. off the gold standard. After a recurring series of bank failures and dangerous declines in the ratios of gold reserves to outstanding currency, and of deposits to loans,\textsuperscript{249} President Roosevelt declared a bank holiday and prohibited banks from paying out any gold or engaging in any international gold transactions. Eventually, banks were required to deliver their gold holdings to the Treasury, which would be redeemed at the previously determined legal price of $20.67 per ounce.\textsuperscript{250}

\textsuperscript{245} \textit{Id.} at 472 (Sutherland, J. dissenting).
\textsuperscript{246} \textit{See id.} at 477-83 (Sutherland, J., dissenting).
\textsuperscript{247} For example, in \textit{A.L.A. Schechter Poultry Corp. v. United States}, 295 U.S. 495 (1935), the Court refused to allow the federal government to resort to \textit{Blaisdell}'s "emergency economic powers" doctrine as a justification for various health and labor codes.
\textsuperscript{249} \textit{See} FRIEDMAN & SCHWARTZ, supra note 120, at 524-35 (describing the banking difficulties throughout the Midwest in 1933); Kenneth W. Dam, \textit{From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law}, 50 U. Chi. L. REV. 504, 509-12 (1983) (providing historical overview of steps taken by President Roosevelt to abandon the gold standard).
\textsuperscript{250} \textit{See} FRIEDMAN & SCHWARTZ, supra note 120, at 462-63; Dam, supra note 249, at
The President’s plan was to allow the dollar to depreciate as compared to gold and foreign currencies, thereby making U.S. exports, particularly agricultural commodities, more expensive overseas. Roosevelt was generally successful in achieving the goal of inflating world and domestic prices.\(^2\)

The remaining problem in devaluing the dollar with respect to gold was the fact that many financial obligations, both private and public bonds, contained contractual provisions, so-called “gold clauses,” that required either payment to a lender in actual gold (something that was now prohibited by statute) or in an amount of currency based on the prevailing price of gold.\(^3\) These clauses had been inserted in contracts since after the Civil War as hedging devices to protect creditors from having to accept inflated currency in satisfaction of a debt. Enforcing these clauses would have radically multiplied the amount of money debtors owed, something the President openly refused to do.\(^4\) By joint resolution, then, Congress declared “every provision . . . which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured . . . to be against public policy . . .”\(^5\) Weeks later, Congress authorized the President to reestablish a gold value to the dollar, i.e., revalue the gold that the U.S. now owned, which he did. The dollar-gold equivalency was reestablished at approximately $35 per ounce, a huge devaluation of the dollar.\(^6\) However, individuals were still forbidden from purchasing gold bullion without a license, even on the open market.\(^7\)

\(^{510-11.}\)

\(^2\) See FRIEDMAN & SCHWARTZ, supra note 120, at 464-47; Dam, supra note 249, at 511.

\(^3\) See FRIEDMAN & SCHWARTZ, supra note 120, at 464-68; Dam, supra note 249, at 512.

\(^4\) See James M. Buchanan & T. Nicolaus Tideman, Gold, Money, and the Law: The Limits of Governmental Monetary Authority, in GOLD, MONEY, AND THE LAW 25-26 (Henry G. Manne & Roger Leroy Miller eds., 1975) (discussing windfall that creditors would have enjoyed had they been able to enforce the gold clauses in contracts); see also Dam, supra note 249, at 521 (referring to President Roosevelt’s remark that the Joint Resolution would prevent the “unjust enrichment” of creditors).


\(^6\) The revaluation of federally owned gold represented a $3 billion “paper profit” for the Treasury. Most of this accounting gain was assigned to a “stabilization fund” for the maintenance of a stable world market dollar-gold price. FRIEDMAN & SCHWARTZ, supra note 120, at 470-71.

\(^7\) This was the basis for Friedman’s distinction between a real and a pseudo gold
The formal questions that creditors forced the Court to answer were three-fold: 1) Did the government have the power to abrogate gold clauses included within private contracts, the purpose of which was to reallocate the risk of currency fluctuations?; 2) Was there any distinction to be drawn between a contract where both parties were private actors and a contract where one party was the government itself?; and 3) If indeed something was taken in the constitutional sense, what was it? That is, what price would be paid to private holders of gold certificates who redeemed them, the old price of $20.67 or the new price of $35.00?257

By considering the answers to the formal legal questions, the Court first justified the economics of the abrogation of gold clauses in constitutional terms by resorting to a distinct political economy which Chief Justice Hughes used to dismiss any distributional content to the government’s actions. But the Court still struggled to delegitimize the gains that creditors would receive from enforcement of the gold clauses by defining them in economic and moral terms as “windfalls.” Finally, based on this definition of windfall, the Court reluctantly allocated the gains and losses that resulted from the increased price of gold.258

The Court’s basic holding in Norman v. Baltimore & Ohio Railroad was that the entire currency program was constitutional. Abrogation of the gold clauses was constitutional because, in exercising its plenary power over “revenue, finance and currency,”259 Congress had the authority to attach limitations to the private ownership of, and contracts for the exchange of, gold where they “interfere[d] with the exercise of its constitutional authority.”260 Hughes took a large step forward here by selectively noting the evils that motivated Congress to enact these measures: President

standard; that is, the dollar was valued with respect to, but could not be used to effect transactions in, gold. See Friedman, supra note 169, at 73.

257. Creditors wanted to be paid in the post-devaluation price of gold. The gold clause worked as follows: Imagine Company A owes B $20.67 and one ounce of gold was valued at $20.67. If the gold clause were enforced and the price of gold rose to $35 per ounce, B would receive the dollar value of one ounce of gold, $35.00, thereby protecting B from such changes.

258. See Buchanan & Tideman, supra note 253, at 34; see also Dam, supra note 249, at 522 (discussing how creditors had already benefitted from a considerable increase in purchasing power of interest payments and, implicitly, the outstanding principal of the others’ debts).

259. Norman, 294 U.S. at 303 (citing a broad range of regulatory powers held by Congress, and relying principally on Juilliard).

260. Id. at 306.
Roosevelt was forced to act because there had been "'heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding' and 'extensive speculative activity abroad in foreign exchange' which had resulted 'in severe drains on the Nation’s stocks of gold'. . ."  

Given this broad authority to structure economic order, Hughes situated private contracts in a subordinate position. Contracts, including gold clauses, were always "made in reference to the possible exercise of the rightful authority of the Government. . ." Thus, if a contract frustrated a legitimate congressional policy, an overarching change in a legal rule governing the monetary system was a foreseeable alteration of private obligations and thus, could not constitute a taking, even if its effect on private obligations was fundamental.  

Hughes was much more equivocal on how the enforcement of the gold clauses actually interfered in the exercise of a constitutionally justifiable congressional policy such that the declaration could be constitutional. (Remember that the gold clauses were abrogated in order to prevent unrealized and, in Roosevelt’s eyes, undeserved profits from accruing to creditors.) He took note of the estimate of $75 billion of open gold clause obligations, but lamely avoided the question of explaining why a "windfall" to creditors and an "injustice" to debtors would affect Congress’ ability to manage the economy. He was hardpressed to separate as a conceptual matter the general power to structure the market from the distributional effect of devaluation.  

It is common knowledge that the bonds issued by these obligors have generally contained gold clauses, and presumably they account for a large part of the outstanding obli-

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261. Id. at 295 (quoting President Roosevelt).
262. Id. at 305.
263. See id. at 309 (noting that contractual “agreement must necessarily be regarded as having been made subject to the possibility that, at some future time,” Congress might render that agreement unenforceable). The Court went further:  

[T]he principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. . . . To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals. . . .

Id. at 309-10.
264. See HURST, supra note 92, at 125 n.213 (analyzing the Court’s rationale for sustaining President Roosevelt’s ban on gold clauses in private contracts).
gations of that sort. It is also common knowledge that a similar situation exists with respect to numerous industrial corporations that have issued their “gold bonds” and must now receive payments for their products in the existing currency. It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency.\footnote{265}

Justice Hughes’ analysis was applied without much further elaboration to government bonds with gold clauses in \textit{Nortz v. United States},\footnote{266} but answering the question as to whether it made a difference when the debtor was the government proved difficult. Practically it made no difference: The creditors of the railroad in \textit{Norman v. Baltimore & Ohio R.R. Co.}\footnote{267} and of the government in \textit{Nortz} and \textit{Perry v. United States}\footnote{268} all received their cash based on the pre-devaluation value of gold, $20.67. The Court’s reasoning, however, differed slightly, but interestingly, from the reasoning in \textit{Norman}.

In \textit{Nortz}, the creditor held gold certificates, essentially notes representing a quantity of gold that the holder could claim on demand. The Court formally conceded that abrogation of gold clauses effected a taking had occurred, but asserted nonetheless that no damages were sustained.\footnote{269} That is, had Nortz redeemed his certificate for one ounce of gold, he would had to have immediately turned that amount over to the Treasury (because of the prohibition on privately held gold) and would have received only the official price, $20.67. Answering the claim that gold had a higher “intrinsic” value on the world market, the Court responded that the “plaintiff had no right to resort to such markets.”\footnote{270} That is to say, given Congress’ constitutional power to control the domestic market for gold, “[p]arties [could not] remove their transactions

\begin{footnotes}
\item[265] \textit{Norman}, 294 U.S. at 315-16.
\item[266] 294 U.S. 317 (1935).
\item[267] 294 U.S. 240 (1935).
\item[268] 294 U.S. 330 (1935).
\item[269] See \textit{Nortz}, 294 U.S. at 330.
\item[270] Id. at 330.
\end{footnotes}
from the reach of dominant constitutional power by making contracts about them.”271 In addition to making the government the mediating element between individuals and the market, both domestic and international, the Court in Nortz suggested that to pay the plaintiff based on the international value of gold would award him with an illegitimate windfall by putting him in a “better position than that in which he would have been placed had the gold coin ... been paid to him.”272 Thus, the baseline for an economically just resolution by the Court was the regulated environment created by the government, not a hypothetical free market.

Perry was the final case and involved something which, given Hughes’ acceptance of the government as dictator of the essential rules of the free market, differed surprisingly from the stakes of Norman and Nortz: the “power ... to invalidate the terms of the obligations which the Government has ... issued in the exercise of the power to borrow money on the credit of the United States.”273 Hughes’ simple theory was that the government checks its sovereignty at the door when it enters into a private contract, and takes on the same moral obligations to pay its `debts as an individual. However, the repudiation of public debt would damage the government’s ability to borrow, “an unqualified power, a power vital to the Government,—upon which in an extremity its very life may depend.”274


273. Perry, 294 U.S. at 350 (1935). Perry had purchased a $10,000 Liberty Bond towards the end of World War I. See id. at 346-47.

274. Id. at 353. Thus, while Hughes had advanced beyond Chase’s hostility towards government funding of debt, one senses from Hughes’ opinion that he viewed government’s power to borrow as both fragile and indispensable. On the question of damages, Hughes fell back on Nortz, stating that the plaintiff had failed to show any loss because he could not have taken the gold and resold it on the domestic market payment at higher gold valuation, and so his sought damages would result in unjust enrichment. See Perry, 294 U.S. at 354-58.

Having identified some of the key elements in Justice Sutherland’s jurisprudence, little needs to be said of the dissenting opinion of his intellectual companion on the Perry Court, Justice McReynolds. See Norman, 294 U.S. at 361 (McReynolds, J., dissenting). To him, the gold clauses were simply risk-reducing devices useful for preallocating the risk of currency fluctuation to the debtor: A crisis was foreseen and planned for. Hughes’ opinion does not attack the clauses on any substantive grounds (for example, that they were either not bargained for, or that they did not mean to cover the government devaluation that occurred in 1933). See Buchanan & Tideman, supra note 253, at 63-67 (discussing gold clauses as a simple form of indexation); Dam, supra note 249, at 522-25
VII. Conclusion

Some of the tensions reflected in the cases I have just described appear to a large extent to have been resolved. For example, in the late twentieth century economy, there is little doubt that the role of states in providing relief to debtors or in the creation of new monetary units is non-existent. Nor is there any doubt that the Federal Reserve fairly strictly controls our monetary policy, or doubt about what forms of currency are acceptable in our economy.

Nonetheless, despite a set of highly evolved economic institutions, worries about financial crises which loomed heavily in the past still pervade discourse about our current economic milieu, and quite reasonably so. For example, in the face of attempts by regulators to rationalize the behavior of individual and institutional investors by assuring them that the business cycle has not disappeared, irrational, indeed perhaps manic levels of optimism continue to lift major stock indices.\(^{275}\) In addition to concerns about investor psychology, continuing debates among regulators about whether there are sufficient market mechanisms to stem a financial crisis reflect substantial unease about whether things have really changed since the last financial crisis.\(^{276}\) Finally, new forms of currency and property continue to inflict substantial losses on the unsuspecting, the uninitiated. And regulators disagree about how these new forms of currency and property should be treated, debates which are not unlike those of the 1830s and the 1870s about the nature and control of money in the American economy.\(^{277}\)

(noting the frequency of gold clause usage at the time). What McReynolds did discern, however, was that the monetary policy as a whole produced a massive windfall for the government by “driv[ing] into the Treasury all gold within the country. . . .” *Norman*, 294 U.S. at 369 (McReynolds, J., dissenting). Also, he realized that the more specific policy of depriving the purchasers of U.S. bonds of a windfall had a flip side, a government windfall. This observation cannot be dismissed simply because it came along with hysterical and paranoid fantasies of Congress’ newly “inaugurated . . . plan primarily designed to destroy private obligations. . . .” *Id.* (McReynolds, J., dissenting).

\(^{275}\) Two distinct diagnoses of this excessive optimism are *America Bubbles Over*, ECONOMIST, Apr. 20, 1998 (describing symptoms of speculative excess: “overvalued share prices, merger mania, rising property prices, and a rapid growth in the money supply”) and David Barboza, *The Balloon that Refuses to be Popped*, N.Y. TIMES, July 1, 1998, at D1.


Thus, in the face of the future economic crisis, we can expect that the American schizophrenia about debt reflected in our history—skittishness and creeping disgust of debtors alternating with begrudging acceptance of debt as a safety valve and a generative economic force—will manifest itself in the same ways it has in the past. As we have seen, in the minds of some judges, the solution to economic panics has been to establish strict legal and constitutional controls over the manufacture of money. If that control was not available, that is, if a certain amount of money generation or, its flipside, relief from the obligation to repay money, was considered absolutely indispensable, then these judges at the very least located control over such financial assets within the law-making body which would be most shielded, even if not completely so, from the excesses of democracy, for example, federal, as opposed to state institutions. For example, only at great interpretive pains were states and the instrumentalities that they chartered allowed a minimal, temporary role in the monetary life of the nation.

To other judges more sanguine about the role of debt, uncertainty and the hoarding of money as a hedge against financial chaos were the root causes of crisis. In the face of such crises, governmental institutions, be they state or federal, which could shore up economic and consumer confidence were necessary, as were extraordinary constitutional powers. And the exercise of such powers, not unlike the exercise of normal police powers, should not be declared unconstitutional.

To still other judges, crises were an acceptable process of reinforcing unheeded warnings about living beyond one’s means. Such judges were most likely to allocate control over the economy to something much more powerful than the Constitution: the market. Accordingly, they subsumed crisis into the system of contract. For them, crisis was nothing more than another of possibly observable economic phenomena; no special processes were required to forestall or end them, and the Constitution authorized no dipping

Away, FORTUNE, Mar. 1994, at 40; Carol J. Loomis, Untangling the Derivatives Mess, FORTUNE, Mar. 1995, at 51, 52-53; Melody Peterson, Board Gives Final Approval to New Rule on Derivatives, N.Y. TIMES, June 2, 1998, at D2 (detailing new rules on corporate accounting for derivatives); Timothy O’Brien, A Federal Turf War Over Derivatives Control, N.Y. TIMES May 8, 1998, at D3. The creation by market actors of new forms of wealth is, for Kindleberger, unsurprising. See KINDLEBERGER, supra note 17, at 11 (“When government produces one quantity of the public good, money, the public will proceed to make more. . . . The evolution of money from coins to include bank notes, bills of exchange, bank deposits, finance paper, and on and on illustrates the point.”).
into a well of extraordinary powers.

During the next great financial crisis—basing his assumption on human nature and history, the one Alan Greenspan deems inevitable—we can only expect a series of legal claims to arise, claims that will be adjudicated with reference to modern versions of the paradigms which judges have been using since the days of the early Republic to rationalize economic crises.